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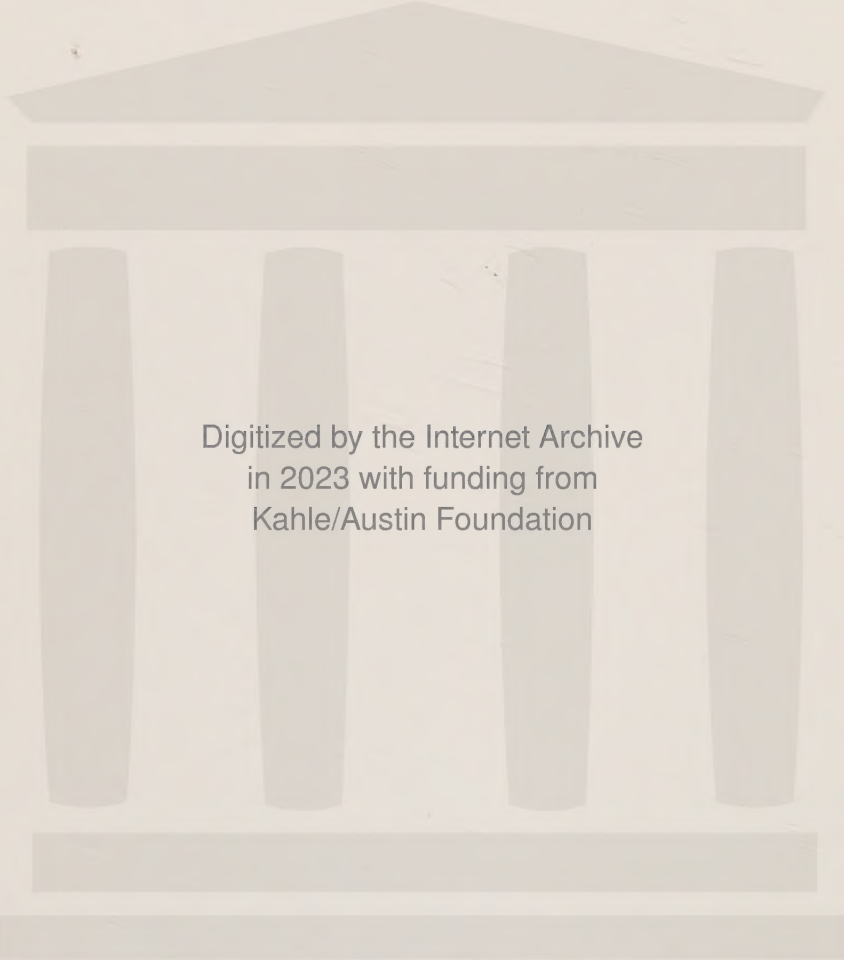
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¹ Became Presiding Justice Aug. 14, 1948.

² Appointed, took office Aug. 14, 1948.

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32 Cal.2d 53

PALERMO v. STOCKTON THEATRES, Inc.

Sac. 5758.

Supreme Court of California, in Bank.

June 15, 1948.

Rehearing Denied July 8, 1948.

1. Statutes ⚡51, 142, 158

Where a statute adopts by specific reference the provisions of another statute, regulation or ordinance of the same or of another jurisdiction, such provisions are incorporated in the form in which they exist at time of reference and not as subsequently modified, and repeal of provisions referred to does not affect the adopting statute in absence of a clearly expressed intention to the contrary.

2. Treaties ⚡7

Treaties have the force and effect of federal statutes.

3. Statutes ⚡51, 142, 158

Where a statute adopts by specific reference the provisions of a treaty, such provisions are incorporated in form in which they exist at time of reference and not as subsequently modified, and repeal of treaty does not affect the statute in absence of clearly expressed intention to the contrary.

4. Statutes ⚡51, 142, 158

Where a statute adopts by general reference a system or body of laws or general law relating to the subject in hand, the statute takes the law or laws referred to not only in their contemporary form but also as they may be changed from time to time, and their repeal eliminates them altogether.

5. Aliens ⚡13

Statutes ⚡51, 158

Provision in Alien Land Law that aliens not eligible to citizenship may occupy

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and use realty in the state in manner, to extent, and for purposes prescribed by treaty existing between the United States and the alien's nation refers to a specific treaty, and therefore abrogation in 1940 of treaty between the United States and Japan did not affect the Alien Land Law, and lease of realty to corporation the capital stock of which was almost wholly owned by nationals of Japan was valid. Treaty with Japan April 5, 1911, 37 Stat. 1504; Gen.Laws, Act 261, §§ 1-3.

6. Constitutional law ⚡48

Where a statute is reasonably susceptible of two constructions, that construction which will save the statute's constitutionality is to be preferred to a construction of doubtful validity.

7. Aliens ⚡13

Constitutional law ⚡60

Statutes ⚡51, 158

Alien Land Law refers to treaties with nations concerned only as such treaties existed at the time of the passage of the law, declares the law of the state and not the provisions of the treaty agreements between the United States and other nations, and is unaffected by abrogation or amendment of a treaty, and therefore the law does not unconstitutionally delegate to the treaty-making authority of the United States power to terminate or change it. Gen.Laws, Act 261, §§ 1-3.

8. Statutes ⚡172, 173

The Alien Land Law is not temporary or emergency legislation the operative effect of which by reason of changed conditions must be deemed to have terminated of its own limitations, or which should be declared obsolete because to enforce it would be inequitable. Gen.Laws, Act 261, §§ 1-3.

9. Treaties ⇨5

The commercial treaty between the United States and Japan providing that the treaties shall enter into operation on the 17th of July, 1911, and remain in force 12 years or until expiration of six months from date on which either of contracting parties shall give notice of intention to terminate, considered as municipal law, must be deemed to have been permanent or perpetual. Treaty with Japan April 5, 1911, 37 Stat. 1508.

10. Statutes ⇨173

An interpretation of the Alien Land Law as being unaffected by abrogation in 1940 of the treaty between the United States and Japan does not deprive owner of realty leased to corporation the capital stock of which was almost wholly owned by nationals of Japan of any constitutional right and court therefore had no right to declare the Alien Land Law obsolete because of change in conditions under which the law was enacted. Treaty with Japan April 5, 1911, 37 Stat. 1504; Gen. Laws, Act 261, §§ 1-3.

11. Statutes ⇨173

In absence of a constitutional objection, courts generally have no right to declare statute obsolete by reason of a supervening change in the conditions under which it was enacted.

12. Aliens ⇨10

The Alien Land Law is a definite exercise of the police power expressed by the people and the Legislature of the state. Gen. Laws, Act 261, §§ 1-3.

13. Aliens ⇨10

The Alien Land Law is liberally interpreted. Gen. Laws, Act 261, §§ 1-3.

14. States ⇨4

The action of a state, particularly in respect of matters within its police power, is ordinarily independent of that of the federal government.

15. Aliens ⇨10**Landlord and tenant** ⇨29(1)

Lease of realty to corporation, the capital stock of which was almost wholly owned by nationals of Japan, was not invalid under the Alien Land Law because of

void provision giving corporation option to purchase the realty since the void provision was clearly a severable part of the lease and did not affect the remaining and valid portions thereof. Gen. Laws, Act 261, §§ 1-3.

16. Treaties ⇨2

The construction of the Alien Land Law as referring to specific treaty does not render it unconstitutional as an infringement of the treaty-making power of the United States government. Gen. Laws, Act 261, §§ 1-3; U.S.C.A. Const. art. 1, § 10.

17. Constitutional law ⇨46(1)

Where a decision that lease did not infringe the Alien Land Law necessarily disposed of the case, the Supreme Court would not gratuitously reconsider previous decisions holding that the basic provisions in Alien Land Act are constitutional. Gen. Laws, Act 261, §§ 1-3.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Emil Palermo against Stockton Theatres, Inc., for a declaratory judgment that a lease of commercial property executed by plaintiff's predecessor in interest as lessor to defendant as lessee violates the California Alien Land Act. From a judgment for plaintiff, the defendant appeals.

Judgment reversed.

Prior opinion 172 P.2d 103.

See also, Cal. Sup., 195 P.2d 10.

Freed & Freed, Eli Freed, Emmett F. Gebauer, William F. Cleary, and Guy C. Calden, all of San Francisco, for appellant.

Honey & Mayall and Forrest E. Macomber, all of Stockton, and A. B. Bianchi and Garrett H. Elmore, both of San Francisco, for respondent.

SCHAUER, Justice.

In a suit for declaratory relief plaintiff seeks to have adjudged violative of the California Alien Land Act (Deering's Gen. Laws, Act 261), and consequently void and of no effect, a lease of commercial real property in California executed by plain-

tiff's predecessor in interest, as lessor, to defendant corporation, as lessee. The defendant lessee corporation also is the successor in interest of the lessees' rights, if any there be, under a previously executed lease of the same property to certain Japanese nationals. The capital stock of defendant lessee is and at all times concerned has been "principally and almost wholly" owned by nationals of Japan; i. e., by aliens not eligible to citizenship in this country.

Under the provisions of the Alien Land Act (sec. 3), as amended in 1923 (Stats. 1923, p. 1021), the right to lease, or otherwise use or enjoy, real property in this state is granted to such a corporation "to the extent and for the purposes prescribed by any treaty now existing between the * * * United States" and Japan. The trial court rendered judgment in plaintiff-lessee's favor, declaring that the lease "is, and at all times was, void," and defendant-lessee appealed. Following decision of the District Court of Appeal, Third Appellate District, reversing the judgment, this court granted a hearing for the purpose of giving further study to the problems presented and to consider in particular the question of a possible infringement by the state statute upon the treaty powers of the federal government. After such study we have concluded that the opinion of the District Court of Appeal, prepared by Mr. Justice Peek, correctly treats and disposes of all issues essentially involved, and it is therefore, with further discussion concerning the asserted conflict between state statute and federal treaty power, and comment as to a suggested constitutional pronouncement, adopted as the opinion of this court. Such opinion (with appropriate deletions and additions of introductory, conjunctive, and other pro forma matter as indicated) is as follows:

"[] The record [] discloses [] the following [undisputed] facts:

"On January 3, 1930, respondent's [plaintiff lessor's] predecessor leased to appellant's [defendant lessee's] predecessors, who were nationals of Japan, certain premises situated in the city of Stockton, California, for theater purposes for a term of 10 years, commencing January 1, 1931,

under the provisions of the Alien Land Act of this state (Stats. 1921, p. lxxxiii, as amended, 1 Deering's Gen. Laws, Act 261), and in accordance with the provisions of the commercial treaty which had been concluded between the United States and Japan on April 5, 1911, 37 Stat. at L. 1504. On December 22, 1934, respondent's predecessor gave the lessees an option for a term of 10 years longer than the term of the original lease. Said option recited that it was given for a valuable consideration, and that it was attached to and became a part of the condition of said lease. On January 16, 1935, the lessees, with the consent of the lessor, transferred all their right, title and interest in said lease and option to the appellant, a corporation, the capital stock of which was almost wholly owned by nationals of Japan. On January 26, 1940, the treaty between the United States and Japan was abrogated. On February 14, 1940, appellant served respondent's predecessor with a written notice of its election to exercise said option for an additional term of 10 years, commencing January 1, 1941, and on September 13, 1940, pursuant to said option the parties entered into a written agreement of lease for the additional term of 10 years. On October 27, 1941, respondent's predecessor died, and respondent became the legal owner of the premises in question.

"The record further discloses that on October 19, 1944, respondent, who had been employed by appellant in the operation of the theater from 1936 to the time the present action was filed, served on appellant a demand that the latter vacate the premises forthwith, on the ground that the occupancy thereof by appellant was illegal under the provisions of the Alien Land Act of California. On November 20, 1944, the present action was brought by respondent to have the rights of the parties adjudicated.

"The trial court found generally in favor of respondent, and particularly that the lease of September 13, 1940, was 'partially a new Lease and partially an extension of the pre-existing Lease,' that no notice of appellant's election to exercise the option was served on respondent's predecessor until February 14, 1940, which was sub-

sequent to the termination of the treaty between the United States and Japan, and that, while there was no proof of a conspiracy to violate the law, the said lease was void and of no force or effect whatsoever. In a written memorandum of decision the trial court predicated its holding on the ground that the treaty removed the lease from the operation of the California statute and that in the absence of a treaty, a Japanese alien cannot enter into a lease of commercial property in the State of California.

"While other issues were raised in the proceedings in the trial court and are argued in the briefs on appeal, the basic question on which the correctness of the judgment herein turns is the effect of the abrogation of the treaty between the United States and Japan on the permissive provisions of the Alien Land Act with respect to the right of a corporation in which a majority of the issued capital stock is owned by noneligible aliens of Japanese nationality to acquire or enjoy an interest in real property in this state which could have been acquired or enjoyed under the terms of said treaty.

"The pertinent provisions of the act in question, sections 1, 2 and 3 of the Alien Land Law (1 Deering's Gen.Laws, Act 261), as adopted by the electorate of this state in 1920, and thereafter [pursuant to permission contained in section 13 of the initiative act] amended by the act of the Legislature approved June 20, 1923 (Stats. 1923, p. 1021), and as they read at the time herein involved, provided as follows:

"1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole

or in part the beneficial use thereof, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

"3. Any company, association or corporation organized under the laws of this or any other state or union, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.'

"Likewise the pertinent provisions of article I of the Treaty of April 5, 1911, between the United States and Japan provided in part:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.'

[1] "It is a well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified, and that the repeal of the provisions referred to does not affect the adopting statute, in the absence of a clearly expressed intention to the contrary. (*Rancho Santa Anita v. City of Arcadia* [1942], 20 Cal.2d 319, 322 [125 P.2d 475]; *Brock v. Superior Court* [1937], 9 Cal.2d 291, 297-298 [71 P.2d 209, 114 A.L.R. 127]; *In re Burke* [1923], 190 Cal. 326, 327-328 [212 P. 193]; *Don v. Pfister* [1916], 172 Cal. 25, 28, 31 [155 P. 60]; *Ramish v. Hartwell* [1899], 126 Cal. 443, 447 [58 P. 920]; *Ventura County v. Clay* [1896], 112 Cal. 65, 72 [44 P. 488]; *People v. Clunie* [1886], 70 Cal. 504, 506 [11 P. 775]; *People v. Whipple* [1874], 47 Cal. 592, 593-594; *Spring Valley Water Works v. San Francisco* [1863], 22 Cal. 434, 439; 59 C.J. § 548, p. 937.)

[2,3] "This principle applies to the adoption of a statute of another jurisdiction (*Brock v. Superior Court*, supra, 9 Cal.2d at page 297, 71 P.2d 209; *In re Burke*, supra, 190 Cal. at page 328, 212 P. 193); and inasmuch as treaties have the force and effect of federal statutes (52 Am.Jur. §§ 4, 17, pp. 807, 815), it [] [seems reasonable to hold] that it applies to a treaty to the same extent that it would to an act of Congress.

[4] "It also [] [must] be noted that there is a cognate rule, recognized as applicable to many cases, to the effect that where the reference is general instead of specific, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time, and (it may be assumed although no such case has come to our attention) as they may be subjected to elimination altogether by repeal. (*Kirk v. Rhoads* [1893], 46 Cal. 398, 403; *Bolton v. Terra Bella Irr. Dist.* [1930], 106 Cal.App. 313, 322

[289 P. 678]; *Thoits v. Byxbee* [1917], 34 Cal.App. 226, 231 [167 P. 166]; 50 Am.Jur. 58-59; 59 C.J. § 624, pp. 1060-1061. And see *Vallejo & N. R. Co. v. Reed Orchard Co.* [1918], 177 Cal. 249, 254 [170 P. 426].)

[5,6] "The question whether the reference to the treaty contained in the California Land Act should be deemed specific or general within the meaning of the foregoing rules might, as an abstract proposition, admit of different opinions. The language is 'any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject.' However, in view of the fact that there is grave doubt whether our Legislature could constitutionally delegate to the treaty-making authority of the United States the right and power thus directly to control our local legislation with respect to future acts (*Rancho Santa Anita v. City of Arcadia*, supra, 20 Cal.2d at page 319, 125 P.2d 475, 322; *Brock v. Superior Court*, supra, 9 Cal.2d at page 297, 71 P.2d 209; *In re Burke*, supra, 190 Cal. at pages 328-329, 212 P. 193), we are constrained to hold that the reference is specific and not general, since such a construction is at least a reasonable one (See [*In*] *re Heath* [1891], 144 U.S. 92, 93-95 [12 S.Ct. 615, 36 L.Ed. 358]) and therefore to be preferred to one of doubtful validity (11 Am. Jur. § 97, pp. 729-730; *Matthews v. Matthews* [1925], 240 N.Y. 28 [147 N.E. 237, 239, 38 A.L.R. 1079]).

"According to the text of the former of these two last cited authorities, 'The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score.'

"In the case last cited, the New York Court of Appeals said: 'A like duty requires us to avoid a construction which

raises grave and doubtful constitutional questions if the statute can reasonably be construed so as to avoid such questions.'

"The conclusion which this construction leads to, viz., that the Alien Land Act incorporated the then-existing provisions of the treaty and retained them after the treaty was abrogated, suggests a somewhat similar situation which apparently existed in some of the states when the Volstead Act [U.S. Stats. at large, vol. 41, p. 305, 27 U.S.C.A. § 1 et seq.], the provisions of which many local prohibition laws either adopted or copied, was repealed. (See, Annotation, 88 A.L.R. 1365-1369.) It seems that the general view was that the repeal did not automatically effect a termination of the local law. In our own state the question was not presented, for the Wright Act [Stats.1921, p. 79] was repealed [Stats.1933, p. lxxxviii] prior to the repeal of the federal act; yet the decisions of our courts leave little doubt that had this not been done the state law would have remained unaffected by the repeal of the national law. (*People v. Pagni* [1924], 69 Cal.App. 94, 98, 99 [230 P. 1001]; *People v. Wood* [1928], 88 Cal. App. 621, 625 [264 P. 298]; *In re Volpi* [1921], 53 Cal.App. 229 [199 P. 1090]. And see *In re Burke*, supra, 190 Cal. at pages 328, 329, 212 P. 193.)

"Another interesting example of a reference statute is the so-called Assimilative Crimes Act which embodies section 468 of United States Code, 18 U.S.C.A. § 468, and which, as enacted in 1898 (30 Stat. 717), provided in effect that a crime committed in a place over which the United States had exclusive jurisdiction was punishable in the same way and to the same extent as it was punishable under the law of the state, territory or district within the territorial limits of which it was committed, and that 'every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District.'

"In construing said section of the act, the United States Supreme Court has held that the reference therein was to the law of the state, territory, or district only

as such law existed at the time of the passage of the act (*United States v. Press Publishing Co.* [1910], 219 U.S. 1, 9-10 [31 S.Ct. 212, 55 L.Ed. 65]), that said section was designed and served to enforce federal law and not the law of a state, territory, or district (*People of Puerto Rico v. Shell Co.* [1937], 302 U.S. 253, 266 [58 S.Ct. 167, 82 L.Ed. 235]), and that, inasmuch as the federal law would not be responsive to changes in the law of the state, territory, or district, whether they should occur by way of repeal or amendment, said section could not properly be deemed to constitute an unlawful attempt to delegate to local lawmakers the power to work a change in the federal law (*Franklin v. United States* [1909], 216 U.S. 559, 568-569 [30 S.Ct. 434, 54 L.Ed. 615]).

[7] "Likewise, it may be said that the California Alien Land Act refers to treaties with the nations concerned only as such treaties existed at the time of the passage of the act (or of the amendments containing the same reference), that said act declares the law of the state and not the provisions of the treaty agreements between the United States and said nations, and that, being unaffected [insofar as it may remain valid as a law of the state] by the abrogation or amendment of a treaty, said act does not unconstitutionally delegate to the treaty-making authority of the United States the power to terminate or change the law of our state.

"It should be noted that the section mentioned was substantially amended in 1943 [Stats.1943, chs. 1003, 1059]. However, it was not such an amendment as would affect our discussion of the question here presented.

"Of course if there were an express provision in the Alien Land Act which unmistakably made the duration of the local provisions coterminous with those of the treaty, such a provision would have to be given effect according to its tenor and validity. An example of that kind of a provision is found in section 71 of title 8 of the United States Code, 8 U.S.C.A. § 71, dealing with the subject of alien ownership of land. The language in that section is:

"The prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing Treaties to citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer."

"The fact that similar language was not used by our Legislature may be thought to constitute some evidence of the fact that such a result was not intended.

[8] "Neither is this a case of temporary or emergency legislation the operative effect of which, by reason of changed conditions, must be deemed to have terminated of its own limitations or which should be declared obsolete because to enforce it would be inequitable. (See for example *Nashville C. & S. L. R. Co. v. Walters* [1934], 294 U.S. 405, 415 [55 S.Ct. 486, 79 L.Ed. 949]; *C. K. Chastleton Corp. v. Sinclair* [1923], 264 U.S. 543, 547-548 [44 S.Ct. 405, 68 L.Ed. 841].) The treaty of April 5, 1911, was not of a temporary character, particularly at the time it was re-adopted in sections 2 and 3 of the Alien Land Act by the amendment of 1923. The duration provisions of the treaty were contained in article XVII, which read as follows:

"The present Treaty shall enter into operation on the 17th of July, 1911, and shall remain in force twelve years or until the expiration of six months from the date on which either of the Contracting Parties shall have given notice to the other of its intention to terminate the Treaty.

"In case neither of the Contracting Parties shall have given notice to the other six months before the expiration of the said period of twelve years of its intention to terminate the Treaty, it shall continue operative until the expiration of six months from the date on which either Party shall have given such notice."

[9] "It is apparent that the treaty considered as municipal law must be deemed to have been permanent or perpetual. (25 R.C.L. §§ 10 and 11, p. 765. See, also, 50 Am.Jur. §§ 513-515, pp. 524, 525.)

[10,11] "Nor is there anything in the situation here which would deprive the respondent of any constitutional right if the law as it originally read were deemed to have been continued in effect subsequent to January 26, 1940 [, the date of the treaty abrogation]. And in the absence of a constitutional objection it is generally held that the courts have no right to declare a statute obsolete by reason of a supervening change in the conditions under which it was enacted. (*Benson v. Hunter* [1921], 23 Ariz. 132 [202 P. 233, 234]; *McKeown v. State* [1939], 197 Ark. 454 [124 S.W.2d 19, 22-23]; *Corn Exchange Sav. Bk. v. Smith*, [1931], 59 S.D. 182 [239 N.W. 186, 189 [78 A.L.R. 800]; *Gulf Refining Co. v. City of Dallas* (Tex.Civ.App. [1928]), 10 S.W.2d 151, 159. See, also, *Painless Parker v. Board of Dental Exam.* [1932], 216 Cal. 285, 299 [14 P.2d 67].)

[12-14] "Finally, the fact that, when amending the Alien Land Act in 1943 and again in 1945, the Legislature was silent on the question of the effect of the abrogation of the treaty on corresponding provisions of the statute, seems to indicate in the opinion of that body that no change was effected. This is particularly true in view of the fact that this act is a definite exercise of the police power expressed by the people and the Legislature of this state [] [*Mott v. Cline* (1927), 200 Cal. 434, 446-447, 253 P. 718]. However reluctantly such power may have been exercised in favor of non-eligible aliens, once it was exercised its intended scope and effect within the defined limits were given liberal interpretation by our courts. (See *State of California v. Tagami* [(1925), 195 Cal. 522] at pages 529-532, 234 P. 102.) This accords also with the [] view expressed in the decisions that particularly in respect of matters within the police power the action of the state is ordinarily independent of that of the federal government. (*People v. Pagni*, supra, at page 99 [of 69 Cal.App.] 230 P. 1001; *People v. Wood*, supra, at page 625 [of 88 Cal.App.] 264 P. 298.)

"Since we have concluded that the abrogation of the treaty had no effect on the provisions of the Alien Land Act, it is obvious that the lease of September 13, 1940, was valid irrespective of such abrogation.

It is unnecessary, therefore, to consider what effect on vested or contingent rights the repeal or annulment of those provisions would have had, nor the extent to which a private individual as distinguished from the state would have had the right to take advantage of such repeal or annulment, or questions concerning estoppel on the part of this respondent to attack the validity of the lease.

[15] "We may notice, however, one other reason assigned by respondent for holding the lease invalid, viz., the fact that said lease contains an option provision permitting the lessee to purchase the property demised. [] [Even if we assume that] this provision is void insofar as it purports to confer any such right on a noneligible alien, it is clearly a severable part of the lease and its validity could not affect the remaining and valid portions thereof. (*Mott v. Cline* [supra], 200 Cal. 434, 450 [253 P. 718]; [see also *Spaulding v. Yovino-Young* (1947), 30 Cal.2d 138, 141, 180 P.2d 691].)"

[16] Plaintiff-lessor has particularly urged before this court that to construe the statute's reference to the treaty as being specific rather than general renders the act unconstitutional because with such a construction the act infringes upon and embarrasses the treaty-making power of the United States government, for the reason that Japan would not enter into a new treaty which gives it "lesser rights than those now given by the frozen state laws." Subsequent to our granting a hearing in this case, the Supreme Court of the United States, in *Clark v. Allen* (1947), 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953, rejected a similar contention with reference to section 259 of the California Probate Code. It was there held that although under the provisions of the state law the right of nonresident alien to take property in California by will or succession depends upon a reciprocal right of United States residents and citizens to take property in such alien's country, and although the existence of such a reciprocal right depends in part at least upon treaties between the government of the United States and that of the particular foreign country involved, the California statute is "not un-

constitutional as an extension of state power into a field of foreign affairs exclusively reserved to the federal government, and that California had not entered into the forbidden domain of negotiating with a foreign country or of making a compact with it contrary to article I, section 10, of the federal Constitution." (*Estate of Knutzen* (1948), 31 Cal.2d 573, 191 P.2d 747, 750; see also *Estate of Bevilacqua* (1948), 31 Cal.2d 580, 191 P.2d 752.) We hold the same to be true of the California Alien Land Act as construed hereinabove: hence we need not consider other asserted weaknesses in plaintiff's argument on this phase of the case.

[17] It has been suggested that this case could be used as a vehicle for re-examining the earlier rulings of the United States Supreme Court and of this court holding constitutional the basic provisions of the Alien Land Act (see e. g. *Webb v. O'Brien* (1923), 263 U.S. 313, 322, 44 S.Ct. 112, 68 L.Ed. 318, 321; *Porterfield v. Webb* (1923), 263 U.S. 225, 233, 44 S.Ct. 21, 68 L.Ed. 278, 281; *Mott v. Cline* (1927), 200 Cal. 434, 445, 253 P. 718; *In re Y. Akado* (1922), 188 Cal. 739, 743, 207 P. 245; *Frick v. Webb* (1923), 263 U.S. 326, 333, 44 S.Ct. 115, 68 L.Ed. 323, 325-326; *Cockrill v. California* (1924), 268 U.S. 258, 45 S.Ct. 490, 69 L.Ed. 944, 946-947; see also *People v. Oyama* (1946), 29 Cal.2d 164, 173 P.2d 794 and cases there cited; *Oyama v. California* (1948), 332 U.S. 633, 68 S.Ct. 269; *Terrace v. Thompson* (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255, 272; *United States v. Fox* (1876), 94 U.S. 315, 24 L.Ed. 192), that we should reverse our previous holdings and dispose of this case by ruling that "the statute here involved is clearly unconstitutional, and should, therefore, be stricken down." We are of the view that this issue, unnecessary to the decision, should not be decided here or made the subject of a dictum. It has heretofore been considered against the policy of this court (and of courts of last resort generally) to reach out and unnecessarily pronounce upon the constitutionality of any duly enacted statute. At least as early as *State of Johnson* (1903), 139 Cal. 532, 534, 73 P. 424, 425, 90 Am.St.Rep. 161, this court said, "A court will not decide a constitu-

tional question unless such construction is absolutely necessary" (see also *Marin Municipal Water Dist. v. Dolge* (1916), 172 Cal. 724, 726, 158 P. 187) and as recently as *Hurd v. Hodge* (May 3, 1948), 68 S.Ct. 847, 850, the United States Supreme Court in determining one of the racial restriction cases said: "Upon full consideration, however, we have found it unnecessary to resolve the constitutional issue which petitioners advance; for we have concluded that judicial enforcement of restrictive covenants by the courts of the District of Columbia is improper for other reasons hereinafter stated." The footnote referred to reads: "It is a well-established principle that this Court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case. Recent expressions of that policy are to be found in *Alma Motor Co. v. Timkin-Detroit Axle Co.*, 1946, 329 U.S. 129, 67 S.Ct. 231 [91 L. Ed. 128]; *Rescue Army v. Municipal Court*, 1947, 331 U.S. 549, 67 S.Ct. 1409 [91 L. Ed. 1666]."

This case fits squarely into the policy above stated; we deem it improper to now strike that policy down. It seems to us that good judicial practice, as well as legal precedent, requires that we dispose of the case on the now thoroughly established grounds which are set forth hereinabove rather than to gratuitously make opportunity for either reaching or declaring views on the suggested constitutional question.

For the reasons above stated, the judgment is reversed.

SHENK, EDMONDS, and SPENCE, JJ., concur.

GIBSON, Chief Justice (concurring).

I concur in the judgment of reversal and am in accord with the conclusion reached in the majority opinion that the Alien Land Act incorporated the provisions of the treaty between the United States and Japan as it existed on April 5, 1911, and that the abrogation of the treaty in 1940 had no effect on the operation of the act, which, therefore, still permits a lease of real property by a corporation such as the one involved here. I also agree that as a general rule we should not decide constitutional

questions if the case can be disposed of on other grounds, but under the circumstances presented here and because of the position which I took in *Torao Takahashi v. Fish and Game Commission*, 30 Cal.2d 719, 737, 185 P.2d 805, I deem it proper to state that I am in full agreement with the additional ground for reversal set forth in the concurring opinion of Mr. Justice Carter and Mr. Justice Traynor.

CARTER and TRAYNOR, Justices (concurring).

We concur in the judgment.

As we view the present case it presents substantially the same issues of constitutionality as were involved in *Takahashi v. Fish and Game Commission*, 30 Cal.2d 719, 185 P.2d 805, reversed in 68 S.Ct. 1138. In our opinion the unconstitutionality of the provisions of the California Alien Land Act involved in this case is clearly demonstrated by the dissenting opinion of Mr. Justice Carter in that case. If these constitutional questions had not previously been considered by this court it might be possible to construe these provisions in such a way as to avoid constitutional implications. In view of previous decisions of this court, however, such constitutional implications cannot be avoided. We wish to make it clear, therefore, that we still adhere to the views expressed in the dissenting opinion in the *Takahashi* case.

There can be no doubt that a state cannot deny "to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." *Truax v. Raich*, 239 U.S. 33, 39, 36 S.Ct. 7, 10, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283. Thus persons may not be barred because of their race or nationality from employment in the ordinary industry or business of another. It is common knowledge that it is necessary to the conduct of an ordinary industry or business enterprise to own or lease the property in which the industry or business is conducted. If the state could prohibit aliens ineligible to citizenship from owning or leasing real property it would thereby effectively prevent such persons from conducting ordinary industrial or business enterprises. Such a discrimination, if valid, would confine the alien's

right to engage in an ordinary means of earning a livelihood to serving as an employee or servant of a citizen or of a foreign national permitted to own or lease real property or of corporations owned by a majority of such citizens or nationals. The effect of such legislation is to impose upon the alien ineligible to citizenship an economic status inferior to all others earning a living in the state. Such a discrimination cannot be sustained under the Fourteenth Amendment to the Constitution of the United States. Even in *Terrace v. Thompson*, 263 U.S. 197, 221, 44 S.Ct. 15, 20, 68 L.Ed. 255, the United States Supreme Court recognized that a state could not discriminate against aliens ineligible to citizenship if that "discrimination was imposed upon the conduct of ordinary private enterprise covering the entire field of industry with the exception of enterprises that were relatively very small."

In our view the statute here involved is clearly unconstitutional, and should, therefore, be stricken down.



32 Cal.2d 889

PALERMO v. STOCKTON THEATRES, Inc.
Sac. 5815.

Supreme Court of California, in Bank.
June 15, 1948.

Rehearing Denied July 8, 1948.

Aliens ⇨13

Landlord and tenant ⇨29(1)

Statutes ⇨173

A lease of realty to corporation, the capital stock of which was almost wholly owned by nationals of Japan, was valid though executed after abrogation of treaty with Japan. Treaty with Japan April 5, 1911, 37 Stat. 1504; Gen.Laws, Act 261.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Unlawful detainer action by Emil Palermo against the Stockton Theatres, Inc.

From a judgment in favor of the plaintiffs, the defendant appeals.

Judgment reversed.

Prior opinion 172 P.2d 109.

Freed & Freed and William F. Cleary, all of San Francisco, for appellant.

Honey & Mayall and Forest E. Macomber, all of Stockton (A. B. Branchi and Garrett H. Elinore, both of San Francisco, of counsel), for respondent.

SCHANER, Justice.

Defendant in this unlawful detainer action (Code of Civil Procedure, § 1161(1)) appeals from a judgment ordering that it restore to plaintiff lessor possession of the premises involved in *Palermo v. Stockton Theatres*, Cal.Sup., 195 P.2d 1, in which our opinion has been this day filed. The parties in the two cases are the same.

Defendant lessee is in possession under the lease described in that case, and plaintiff here urges invalidity of such lease on the same grounds as are there advanced in support of his claim for declaratory relief. Our opinion in that case is determinative of this cause. For the reasons therein stated the judgment here appealed from is reversed.

We concur.

SHENK, EDMONDS, and SPENCE, JJ., concur.

GIBSON, C. J., and CARTER, and TRAYNOR, JJ., concur in the judgment.



32 Cal.2d 145

O'BANION et al. v. BORBA et al.
S. F. 17362.

Supreme Court of California, in Bank.
June 28, 1948.

I. Easements ⇨37

Whether use of easement is adverse and under a claim of right, or permissive and without owner's consent, and whether

nature of user is sufficient to put owner on notice, are questions of fact.

2. Appeal and error ⇨1009(2)

If there was any substantial evidence to support judgment quieting title to easements, judgment was required to be affirmed.

3. Appeal and error ⇨931(1)

All conflicts must be resolved on appeal in favor of the prevailing party in the trial court, and the evidence must be viewed in a light most favorable to him.

4. Easements ⇨36(3)

In action to quiet title to easements, evidence established that plaintiff's use of easements was open and notorious and under a claim of right, and that the use was such that notice of a claim of right adverse to owner of servient tenement might be imputed to him.

5. Easements ⇨37

The question (whether the use of a right of way has been adverse and under a claim of legal right to do so, or a mere matter of neighborly accommodation, is a fact question for the trier of the facts from all the circumstances.

6. Easements ⇨5

Merely because the public also uses an easement does not preclude the acquisition by an individual of a right based on his own user, but his right must be based on his individual use rather than his use as a member of the public.

7. Easements ⇨36(3)

In action to quiet title to easements, evidence was sufficient to support finding that use by plaintiffs was not permissive and was adverse rather than a user common with the public.

8. Trial ⇨143

Trier of facts must resolve conflicts in evidence, whether such conflict is between witnesses on one side or on opposite sides.

9. Appeal and error ⇨1002

The Supreme Court on appeal will not disturb finding supported by any substantial evidence, even though there is a conflict in evidence produced by prevailing party.

10. Easements ⇨36(3)

In action to quiet title to easements by prescription, evidence sustained trial court's implied finding that defendants, when they purchased realty had actual or constructive knowledge of the existence of the easements.

11. Appeal and error ⇨169

Question raised by appellants for first time by letter sent to Supreme Court after their petition for hearing was filed in the Supreme Court was not before the Supreme Court.

12. Easements ⇨41

Where easements were private rights of way acquired by adverse use by plaintiffs over defendants' lands, the rights thus acquired were limited to uses which were made of the easements during the prescriptive period, and no different or greater use could be made of the easements without defendants' consent.

13. Easements ⇨61(12)

Judgment for plaintiffs in action to quiet title to easements acquired by adverse use was required to be interpreted in the light of the use for which the easements were acquired by plaintiffs, and right of defendants to make reasonable use of their land subject to easements thus acquired.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action to quiet title by Emory O'Banion and others against A. A. Borba and others. From a judgment for the plaintiffs, the defendants appeal.

Judgment affirmed.

Prior opinion 178 P.2d 54.

C. Ray Robinson, Samuel v. Cornell and Margaret A. Flynn, all of Merced, for appellants.

Linneman & Burgess and L. M. Linne-man, all of Das Palos, for respondents.

CARTER, Justice.

Defendants appeal from a judgment declaring plaintiffs to be the owners of easements for roads and a ditch across land owned by defendants.

The trial court found that plaintiffs are the owners of a described right of way or road (hereinafter called first easement) across defendants' land designated parcel A, and of a described right of way for a ditch, and road along it (hereinafter called second easement) across defendants' land designated as parcel B.

Plaintiffs acquired parcels of land in 1933 and 1938. Defendants acquired their parcels A and B in 1945 from Miller and Lux, Incorporated, the deed excepting and reserving all then existing rights of way for roads, ditches and irrigation works. The first easement extends from Russell Avenue, a public road, about two miles from plaintiffs' property, across defendants' parcel A. The second easement extends from an irrigation canal across defendants' parcel B, to plaintiffs' property. The land over which the easements extend has been unfenced until defendants erected fences in 1945. It is an arid area used only for pasturage and hunting during a part of the year.

[1-3] Defendants assert that to acquire a prescriptive easement there must be an open and notorious claim of right, non-permissive user and a use other than that in common with the public. Their attack is basically aimed at the sufficiency of the evidence to establish an open claim of right and adverse user. In this connection it is pertinent to observe that whether the use of the easement is adverse and under a claim of right, or permissive and with the owner's consent, and the nature of the user is sufficient to put the owner on notice, are questions of fact. 1 Cal.Jur. 635. Also, if there is any substantial evidence to support the judgment, it must be affirmed. All conflicts must be resolved in favor of the prevailing party and the evidence viewed in a light most favorable to him.

It appears from the evidence that the first easement was a road existing and well defined when the property was acquired by plaintiffs in 1933. The evidence shows that it had been in existence since 1924. In 1938 the second easement consisting of a ditch and a road along it, were constructed. Since that time plaintiffs have openly maintained, used and kept both

easements in condition for their use. While neither of the easements was bordered by a fence nor was extensive grading done on the roads, every year they have been openly scraped and repaired. There is a conflict in the evidence, but there is testimony that there were no other roads in the vicinity of the first easement. Plaintiff Henderson testified that he used both easements and used the road as the only means of access to his property. The road was used by plaintiffs for vehicles and for driving stock, hauling farm equipment and the like commonly associated with the use of such a road in connection with their land. Dye, a tenant of plaintiffs' property for three years, testified he used the second easement continuously. Henderson was asked: "Have you used them [both easements] openly and notoriously during all that time? A. We have," except when the use was interfered with by defendants in 1945. Plaintiff O'Banion was asked and answered: "Have you used them [both easements] openly, continuously, and notoriously since your purchase of the land in 1938? A. I have." There is testimony that the road was used and the right to do so was claimed, although the claim was not orally communicated to anyone and no permission to use either easement was either asked or obtained from anyone. Defendant, A. A. Borba, testified that he saw both easements on the property when he purchased his parcels A and B.

[4] From the foregoing circumstances an inference reasonably arises which constitutes substantial evidence that, contrary to defendants' contention, plaintiffs' use of the easements was open and notorious and under a claim of right; that the use was such that notice of a claim of right adverse to the owner of the servient tenement may be imputed to him. Certainly from those circumstances we cannot say as a matter of law that the trial court's conclusion finds no basis in the evidence.

[5] There has been considerable confusion in the cases involving the acquisition of easements by prescription, concerning the presence or absence of a presumption that the use is under a claim of right adverse to the owner of the servient tenement, and of which he has constructive

notice, upon the showing of an open, continuous, notorious and peaceable use for the prescriptive period. Some cases hold that from that showing a presumption arises that the use is under a claim of right adverse to the owner. *Fleming v. Howard*, 150 Cal. 28, 87 P. 908; *Franz v. Mendonca*, 131 Cal. 205, 63 P. 361; *Kripp v. Curtis*, 71 Cal. 62, 11 P. 879; *Stevens v. Mostachetti*, 73 Cal.App.2d 910, 167 P.2d 809; *Smith v. Skrbek*, 71 Cal.App.2d 351, 162 P.2d 674; *Chapman v. Sky L'Onda etc. Water Co.*, 69 Cal.App.2d 667, 159 P.2d 988; *Shonafelt v. Busath*, 66 Cal.App.2d 5, 151 P.2d 873; *Rose v. Peters*, 59 Cal. App.2d 833, 139 P.2d 983; *Wallace v. Whitmore*, 47 Cal.App.2d 369, 117 P.2d 926; *Redemeyer v. Carroll*, 21 Cal.App.2d 217, 68 P.2d 739; *Lemos v. Farmin*, 128 Cal.App. 195, 17 P.2d 148; *Pacific Gas & Electric Co. v. Crockett Land & Cattle Co.*, 70 Cal.App. 283, 233 P. 370; *Costello v. Sharp*, 65 Cal.App. 152, 223 P. 567; *Ricioli v. Lynch*, 65 Cal.App. 53, 223 P. 88; *Wells v. Dias*, 57 Cal.App. 670, 207 P. 913; *Yuba Consolidated Goldfields v. Hilton*, 16 Cal.App. 228, 116 P. 712, 715; *Silva v. Hawn*, 10 Cal.App. 544, 102 P. 952; *Gurnsey v. Antelope Creek etc. Water Co.*, 6 Cal.App. 387, 92 P. 326. It has been intimated that the presumption does not arise when the easement is over unenclosed and unimproved land. See, 28 C.J.S., Easements, § 68 p. 736; 4 Tiffany, Real Property, 3d Ed., sec. 1196A. Other cases hold that there must be specific direct evidence of an adverse claim of right, and in its absence, a presumption of permissive use is indulged. *Clarke v. Clarke*, 133 Cal. 667, 66 P. 10; *Los Angeles Brick etc. Co v. City of Los Angeles*, 60 Cal.App. 2d 478, 141 P.2d 46; *Rochex & Rochex, Inc., v. Southern Pac. Co.*, 128 Cal.App. 474, 17 P.2d 794; *Heenan v. Bevans*, 51 Cal.App. 277, 196 P. 802. The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner. There seems to be no ap-

parent reason for discussing the matter from the standpoint of presumptions. For the trial court the question is whether the circumstances proven do or do not justify an inference showing the required elements. In the appellate court the issue is merely whether there is sufficient evidence to support the judgment of the trial court. This view has been implicitly followed. See, *Hutton v. Ormando*, 3 Cal.2d 305, 43 P.2d 1100; *Conaway v. Toogood*, 172 Cal. 706, 158 P. 200; *Abbott v. Pond*, 142 Cal. 393, 76 P. 60; *Humphreys v. Blasingame*, 104 Cal. 40, 37 P. 804; *Thomas v. England*, 71 Cal. 456, 12 P. 491; *McMorris v. Pagano*, 63 Cal.App.2d 446, 146 P.2d 944; *de la Cuesta v. Bazzi*, 47 Cal.App.2d 661, 118 P.2d 909; *Bernstein v. Dodik*, 129 Cal.App. 454, 18 P.2d 983; *Grimmesey v. Kirtlan*, 93 Cal.App. 658, 270 P. 243; *Brandon v. Umpqua Lumber etc. Co.*, 26 Cal.App. 96, 146 P. 46; *Burris v. Rodrigues*, 22 Cal.App. 645, 135 P. 1105; *Alper v. Tormey*, 7 Cal. App. 8, 93 P. 402. In *Conway v. Toogood*, supra, the rule is succinctly stated: "The question as to whether or not the use of a right of way has been adverse and under a claim of legal right so to do, or a mere matter of neighborly accommodation, is a question of fact to be determined by the jury, or the court sitting without a jury, from all the facts and circumstances of the case." 172 Cal. at page 709, 158 P. at page 202. While many of the cases mention presumptions, the problem actually discussed therein is the sufficiency of the evidence in the light of all the circumstances disclosed. Furthermore, we see no reason why the same rule should not apply to uncultivated and unenclosed land. It may require more circumstances to establish the right, but the test is ultimately the same.

In the instant case, as before stated, there was ample from which the trial court could conclude that plaintiffs' use was continuous, uninterrupted, peaceable, adverse and under a claim of right, with notice of which defendants and their predecessors could be charged. See, *Biggs Ditch Co. v. Jongste*, 24 Cal.2d 298, 149 P.2d 1; *Fleming v. Howard*, 150 Cal. 28, 87 P. 908; *Franz v. Mendonca*, 131 Cal. 205, 63 P. 361; *Wallace v. Whitmore*, supra; *Redemeyer v.*

Carroll, *supra*; Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., *supra*; Costello v. Sharp, *supra*; Riciola v. Lynch, *supra*; Wells v. Dias, *supra*; Yuba Consolidated Goldfields v. Hilton, *supra*; see, 34 Cal.L.Rev. 445.

Defendants rely upon the following cases: Peck v. Howard, 73 Cal.App.2d 308, 167 P.2d 753; Jones v. Tierney-Sinclair, 71 Cal.App.2d 366, 162 P.2d 669; Smith v. Skrbek, *supra*; Lyons v. Schwartz, 40 Cal.App.2d 60, 104 P.2d 383; Schudel v. Hertz, 125 Cal.App. 564, 13 P.2d 1008; and Eddy v. Demichelis, 100 Cal.App. 517, 280 P. 389. In each of those cases, a judgment based upon findings of the trial court was affirmed, as being supported by sufficient evidence. The evidence simply portrayed the circumstances under which it was claimed the easements were acquired. Likewise, in the instant case it may well be that the trial court could have come to a contrary conclusion, but it was not required to do so as a matter of law under the evidence here presented.

In connection with the claimed permissive use by plaintiffs of the easements here involved, defendants assert that the evidence shows that the use was permissive and therefore could not ripen into a prescriptive right of way, and that a use in common with the public cannot be the basis for such right.

[6,7] Referring first to the latter contention the law is clear that merely because the public also uses the easement does not preclude the acquisition by an individual of a right based upon his own user. His right must be based on his individual use—rest on its own foundation rather than use as a member of the public. See, Hare v. Craig, 206 Cal. 753, 276 P. 336; Bernstein v. Dodik, *supra*; Costello v. Sharp, *supra*; 17 Am.Jur, Easements, sec. 64; 111 A.L.R. 221; Tiffany, Real Property, 3d Ed., sec. 1199. Here, although there was testimony that the use of the roads by plaintiffs was the same as the use by the public, plaintiff Henderson testified: "Q. When was the first time if at all that you ever claimed any greater right in either of these roadways than that possessed by the general public. * * *

A. Well, by that question you mean that did I assume that I had any more right than anybody else to go there? Q. Yes. A. I certainly figured we had a right to go there because it had been used for years, and we had a use for it and necessity for going over it, so I figured we had a right to continue using it." And there is evidence that the roads and ditch were maintained and repaired by plaintiffs. The ditch was constructed by them. The first easement was the only means of access to their property and they used it for the customary agricultural purposes in connection with their property. That is sufficient from which the trial court could find that the use was not permissive and was adverse rather than a user common with the public. The question was one of fact which has been decided adversely to defendants.

On the claim that the use of the easements was permissive, defendants refer to conversations with plaintiff O'Banion when the defendants erected the fences in 1945 to the effect that he went to defendants to see if the roads could be opened, and discussed the payment of \$85 to defendants to obtain an opening, and to alleged admissions by plaintiff O'Banion in his deposition to the effect that he obtained the permission of Miller and Lux, defendants' predecessors, to use the easements.

Nothing more than a conflict in the evidence is involved. As to both instances to which reference has been made it must be remembered that there is testimony that no permission for the user was sought of anyone at any time. The user was open, notorious and adverse. It was uninterrupted until 1945. Regarding the conversations when the fences were put in, O'Banion said he told Borba he wanted to get the roads opened up which is not necessarily inconsistent with a claim of right and a non-permissive user. Naturally he would go to see Borba when the roads were obstructed. Borba replied that he would have to see his attorney. O'Banion testified in regard to the conversation: "Q. * * * On this day that you went to see Mr. Borba at his home at El Nido you said you came there to see if you could make some, or what ar-

rangements could be made to open up those roads, is that correct? A. I came to see *why* he closed them." And later "A. There was not anything mentioned about a couple of keys apiece. I told him at that time that *I did not care to have any trouble with the neighbors and I would rather get along than to have trouble with them* and that if he would put a gate up there and put a lock on it he could keep a key and I could have one and we could each go in there jointly; and he gave me no answer of any kind. He just merely said he would have to consult his attorney." Concerning the discussion about sharing the cost of the fences, O'Banion stated: "Finally he arrived at a figure for the price of the wire, which was approximately \$85, and I told him that *if he felt that that was necessary for us to get along* out there that I would be willing to pay the \$85 for half the fence *if he did not obstruct the road*. Well, as soon as I came back to him about obstructing the road, all he would say was he had to consult his attorney." He did not state that he would pay part of the expense. From all that transpired the court could well conclude that there was no admission of a permissive use, but rather O'Banion was asserting his right in a peaceable manner.

[8,9] O'Banion was asked if he had testified in his deposition to the effect that he got permission of Miller and Lux in 1938. He stated that he had. On the other hand we have repeated testimony by O'Banion and others that no permission was obtained from anyone. Assuming the testimony from the deposition was offered as admissions of plaintiff O'Banion and thus independent evidence rather than impeachment (which is doubtful) we have nothing more than a conflict in his testimony which has been resolved by the trier of fact against defendants. " * * * it is within the province of the trier of fact to resolve conflicts in evidence whether the conflict is between witnesses on one side or on opposite sides. Hence, this court will not disturb the finding where there is any substantial evidence supporting it, even though there is a conflict in the evidence produced by the pre-

vailing party." Rice v. California Lutheran Hospital, 27 Cal.2d 296, 301, 163 P.2d 860, 863.

[10] Defendants urge that they were bona fide purchasers for value and not bound by easements acquired by prescription—not of record. They admit, however, and it is borne out by the record, that they had actual knowledge of the existence of the roads and ditch at the time they purchased the land traversed thereby. At page 25 of plaintiffs' opening brief counsel state: "*Except for their very existence and the fact that appellant saw them before he purchased his property*, there is not a thing in the record to charge him with any notice of any easement of right of way over the private roads, either claimed or perfected." [Emphasis added.] Furthermore, there is evidence that there were no other roads on the property (there is a conflict on the subject), the user was open and notorious, repairs had been made, and when defendants purchased their property, reservation of easements were made in the deed to them, indicating that there might be such in existence. All of these factors, coupled with defendant Borba's testimony, point to his actual or constructive knowledge of the existence of the easements in accordance with the implied finding of the trial court.

[11] Defendants raise for the first time by letter sent to this Court, after they petitioned for a hearing here, the contention that the injunctive portion of the judgment debarring them from obstructing the easements in anyway whatsoever is too broad and that they should be permitted to erect gates across them. Various rules have been applied in regard to the right of the servient owner to maintain gates (and require the owner of the easement to shut them) across an easement acquired by prescription. It has been stated by some authorities that the right is measured by the user and thus if no gates ever existed during the prescriptive period none may be maintained thereafter. Others hold that in any event the servient owner is entitled to use the easement in any way that does not interfere with the use by the dominant owner and hence

he may maintain gates if they do not unreasonably interfere with the easement owner's use of his easement. Some make a distinction between where the easement is in urban areas and over agricultural land. See, cases collected and discussion, 28 C.J.S., Easements, § 98: *Kinkade v. Lyons*, 235 Ky. 226, 30 S.W.2d 963, 73 A.L.R. 778; *Thompson on Real Property*, Perm. Ed., sec. 586; *Tiffany, Real Property*, 3d Ed., sec. 812; 17 Ky.L.J. 132; 5 Temp.L.Q. 297; *Jones on Easements*, sec. 400; *Gale on Easements*, 9th Ed., p. 495. It is conceded that during the prescriptive period here involved defendants' land was unenclosed and there are only vague references to it having been used for pasturage. It was at that time apparently unused, uncultivated land. There is no evidence of the use defendants are making or intend to make of their land, nor other circumstances showing the need for gates. Nor did defendants offer evidence to show that the maintenance of gates would not unreasonably interfere with plaintiffs' use of the easements. It is apparent from the record that so far as defendants are concerned, the case was tried upon the theory that plaintiffs had not acquired the easements claimed by them across defendants' property, and no consideration was given to the right of defendants to maintain gates or cattle guards across the easements in the event plaintiffs established their right thereto. As heretofore stated, this question was not raised until after defendants' petition for hearing was filed in this Court. The question as to the right of defendants to maintain gates or cattle guards across said easements is therefore not before us. In their closing brief filed November 20, 1947, plaintiffs concede that defendants have the right to construct and maintain cattle guards across said easements. Such cattle guards would, of course, constitute some obstruction to the use of said easements by plaintiffs, as one of the uses claimed by plaintiffs was the driving of cattle over said roads. In view of the nature of the easements here involved, it would seem that the maintenance of gates across the roads

in question, which gates could be opened and closed by plaintiffs at will, would not constitute obstructions prohibited by the judgment. This question may arise in the event defendants should enclose their land with a fence and construct suitable gates on the roads for the use of those who have the right to traverse them.

[12] It should be remembered that the easements here involved are private rights of way acquired by adverse use, and the rights thus acquired are limited to the uses which were made of the easements during the prescriptive period. 17 Am. Jur., p. 996, sec. 98; pp. 997-1000, secs. 100-101; p. 1001, sec. 103. Therefore, no different or greater use can be made of the easements without defendants' consent.

[13] It would seem to follow, therefore, that the judgment must be interpreted in the light of the use for which the easements were acquired by plaintiffs, and the right of defendants to make a reasonable use of their land subject to the easements thus acquired. See, 17 Am. Jur., p. 1012, sec. 122; *Kinkade v. Lyons*, 235 Ky. 226, 30 S.W.2d 963, 73 A.L.R. 778, 788; *Pasadena v. California-Michigan etc. Co.*, 1941, 17 Cal.2d 576, 579, 110 P.2d 983, 133 A.L.R. 1186; *Merry v. Priest*, 1931, 276 Mass. 592, 177 N.E. 673, 674; *Chesson v. Jordan*, 1944, 224 N.C. 289, 29 S.E.2d 906, 909; *Board of Trustees v. Gotten*, 1919, 119 Miss. 246, 80 So. 522, 523; *Dyer v. Walker*, 1898, 99 Wis. 404, 75 N.W. 79; *Flener v. Lawrence*, 1920, 187 Ky. 384, 220 S.W. 1041, 1044. Whether under such interpretation of the judgment defendants may construct and maintain gates across said easements, which will not interfere with plaintiffs' use thereof, is a matter for the future determination of the court if and when the question is presented.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

32 Cal.2d 193

**ALAMEDA COUNTY v. KUCHEL, State
Controller.
No. S. F. 17708.**

Supreme Court of California, in Bank.
July 2, 1948.

Rehearing Denied July 29, 1948.

1. Statutes ⇐277

An intent to that effect appearing by legislative provision at session of Legislature effecting repeal of statute is sufficient to save rights thereunder without an express saving clause.

2. Highways ⇐99¼

Section 41 of Highway Act of 1947, providing that during period from July 1, 1947, to January 1, 1948, money paid into Motor Vehicle Fund under pre-existing tax rates should be apportioned and distributed as provided by law prior to enactment of 1947 act, operates as a saving clause, and authorized distribution after January 1, 1948, of money thus received and apportioned as provided in Vehicle Code section 779, notwithstanding repeal by 1947 act of section 779, effective January 1, 1948. Vehicle Code, § 375; §§ 370, 372, 781, as amended by St.1947, 1st Ex. Sess., pp. 3807, 3809, §§ 27, 31, 37; § 779, as amended by St.1945, p. 1967, § 4; St.1947, 1st Ex. Sess., p. 3810, §§ 38-41.

3. Statutes ⇐181(1)

Statutes should be given a reasonable interpretation in accordance with apparent legislative intent, which controls if it can be reasonably ascertained from the language used. Civ.Code, § 3542.

EDMONDS and TRAYNOR, JJ., dissenting.

Petition by County of Alameda, a body corporate and politic, and a legal subdivision of the State of California, for a writ of mandate to compel Thomas H. Kuchel, as Comptroller of the State of California, to draw his warrant in favor of petitioner for money allegedly due petitioner from Motor Vehicle Fund.

Peremptory writ issued.

195 P.2d—2

J. F. Coakley, Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., and Archie A. Smith, Deputy Dist. Atty., all of Oakland, for petitioner.

Fred N. Howser, Atty. Gen., and Robert E. Reed, Deputy Atty. Gen., for respondent.

SHENK, Justice.

Petitioner County of Alameda seeks the writ of mandate to compel the Controller of the State of California to draw his warrant in favor of petitioner for an amount claimed to be due it under the provisions of section 779 of the Vehicle Code as it existed prior to its repeal in 1947 by section 18 of the Collier-Burns Highway Act. Stats.1947, 1st Extra Sess., pp. 3788, 3806.

The moneys thus claimed were paid into the Motor Vehicle Fund of the state treasury, for the period of July 1, 1947, to January 1, 1948. The amount sought is a sum "equal to that proportion of thirty-one and three-fourths percent of the moneys received and reported as registration and weight fees and penalties thereon and fees for special plates * * * which the number of fee-paid vehicles registered in the county of Alameda * * * bears to the total number of fee-paid vehicles registered in the state of California."

The Collier-Burns Highway Act, herein referred to as the Act, provides for a comprehensive system of public streets and highways in this state, and for the acquisition and distribution of funds for its maintenance. As hereinafter noted, the Act contemplates several changes in the existing law relating to the collection and distribution of moneys paid into the Motor Vehicle Fund in connection with the registration and operation of motor vehicles on the streets and highways. Prior to the repeal of section 779 of the Vehicle Code, which contained the method of distribution of these funds, that statute provided: "Thirty-one and three-fourths per cent (31-3/4%) of the moneys received and reported as registration and weight fees and penalties thereon and fees for special plates in the Motor Vehicle Fund is hereby appropriated and shall be paid to the counties of this State and the State Controller shall in the months of February

and August of each year draw his warrants upon said Motor Vehicle Fund in favor of the county treasurer of each county for the amount to which each said county is entitled hereunder. Said payments shall be made to the counties in proportion to the number of fee-paid vehicles registered in such counties as determined by the places of residence of the owners to whom the registration cards are issued." Stats. 1945, p. 1967.

The Act also makes provision for an increase in the amount of vehicle registration and weight fees, which are payable to the Motor Vehicle Department and carried in the Motor Vehicle Fund. (See sections 31 and 37 of the Act, amending sections 370 and 372 of the Vehicle Code.)

An increase is also made in distribution and use taxes on motor fuel. (See sections 29 and 30 of the Act, amending sections 7351 and 8651 of the Revenue and Taxation Code.)

Several new provisions are added to the Streets and Highways Code (secs. 2000 et seq.) which inaugurates the new "Highway Users Tax Fund" appropriated for the acquisition, improvement, repair, etc., of streets and highways (sections 2100, 2101). The sum of \$5,400,000 from this new fund is to be apportioned annually to the counties—the sum to be increased or decreased each year in the ratio that the total number of registered motor vehicles for the preceding calendar year bears to the total number of motor vehicles registered in 1946 (section 2104). The apportionment is to be made in January, April, July and October of each year and the sum is to be distributed among the counties in proportion to the number of fee-paid vehicles registered in each county (sections 2103 and 2110). (See section 1 of the Act, adding Division 3 to the Streets and Highways Code.)

The Act also amends section 781 of the Vehicle Code to provide for the transfer in February of each year from the Motor Vehicle Fund to the "Highway Users Tax Fund" of "an amount equal to" the total moneys remaining at the close of business on December 31 of each year after lawful expenditures and deductions. (Section 27 of the Act.)

The dates on which the foregoing provisions became effective are important for an understanding of the question presented, hence certain provisions of the Act bearing on that question are here set forth:

Section 38 provides that immediate effect is to be given to certain tax levying provisions, and that the amendments to sections 7351 and 8651, Revenue and Taxation Code, shall become operative on July 1, 1947. That section also provides that the rate increase as provided by the amendments to sections 370 and 372 of the Vehicle Code are to become operative on January 1, 1948, and apply with respect to registration of vehicles on and after that date.

Section 39 recites that those sections of the Act providing for the new sections added to the Streets and Highways Code (sections 2000 et seq.) and for the repeal of section 779 of the Vehicle Code, shall become effective on the ninety-first day following the legislative adjournment (i. e., on September 23, 1947) but that they shall not become completely operative until January 1, 1948, "it being the intention of the Legislature that the changes in allocation of funds, and the purposes for which they may be expended shall take effect as of that date, but that the administrative work necessary to enable such changes to be effected in an orderly manner on said date be performed prior thereto."

Section 40 provides that section 781 of the Vehicle Code (relating to the transfer of moneys from the Motor Vehicle Fund to Highway Users Tax Fund) shall not become "fully operative until January 1, 1948, it being the intention of the Legislature that the changes in depositing and distribution of funds effected by these sections shall apply after January 1, 1948, and that in the meantime these sections must be effective in order to permit such administrative action as will be required to make them fully operative on January 1, 1948."

Section 41 provides in part that "The State Controller shall determine the amount of money received during the period July 1, 1947, to January 1, 1948, as a result of the increases in tax rates made by this act." This provision refers to such in-

creases as are brought about by the amendments to sections 7351 and 8651 of the Revenue and Taxation Code (effecting increases in distribution and use taxes on motor fuel, becoming operative on July 1, 1947) and which are referred to as "new money". The section finally provides that, "The amount of new money so determined by the Controller shall be apportioned by him under the provisions of the law as amended by this act during the month of January, 1948. During said period July 1, 1947, to January 1, 1948, the Controller shall apportion, transfer and distribute moneys received under the tax rates heretofore existing as provided by the law prior to the enactment of this act." As indicated, the statute providing for the apportionment before the enactment of the Act was section 779 of the Vehicle Code.

In the period from July 1, 1947, to January 1, 1948, there was paid to the Department of Motor Vehicles some \$1,975,692.30 as registration and weight fees under sections 370 and 372 and as special plate fees under section 375 of the Vehicle Code (which latter section was not amended by the Act). Since the increases under section 370 and 372 provided by the Act were not to become operative until January 1, 1948, the sum mentioned constitutes "old money" paid into the Motor Vehicle Fund under the former law, as distinguished from moneys received under the Act in that period solely on account of increases which became operative on July 1, 1947 (such as those provided for in amended sections 7351 and 8651 Revenue and Taxation Code). No question is here raised as to the distribution of the "new money" paid in during that period, and it is only petitioner's share of the "old money" which is involved in this proceeding.

Petitioner contends that there was a valid appropriation of these moneys to the counties by virtue of the following language in section 779 prior to its repeal, that "Thirty-one and three-fourths per cent (31-3/4%) of the moneys received and reported * * * in the Motor Vehicle Fund is hereby appropriated and shall be paid to the counties * * * in the months of February and August"; and that it is entitled to a share of this old money under

the recitals of section 779 and in accordance with the provisions of section 41 of the Act, above set forth.

The controller refuses to pay the sum thus demanded by petitioner, claiming that he has no authority to do so in that there was no fund in existence from which the allocation could be made because the repeal of section 779, requiring the distribution to be made in February, became operative on January 1, 1948. He contends that this view is supported by the provisions of section 39 of the Act, hereinbefore quoted, and that thereunder all apportionments of funds are to be governed by the provisions of the new Act and not by former section 779 of the Vehicle Code. It is urged that inasmuch as that section has been repealed, there is no provision pursuant to which the allocation may now be made, and that since section 781 of the Vehicle Code was amended to provide for the transfer of moneys from the Motor Vehicle Fund to the Highway Users Tax Fund, there is no money to be allocated except in accordance with the provisions of the Act creating that fund and providing for payments from it.

Petitioner recognizes the import of section 39 and other provisions of the Act relied on by the controller as indicating a legislative intent that the new Act shall become operative on and after January 1, 1948, but contends that the provisions of section 41 of the Act operate as a saving clause and require the controller to apportion only the "new money" in accordance with the Act, and that the old money is intended to be dispersed in accordance with the previously existing law incorporated in section 779 prior to its repeal.

[1,2] The contentions of the petitioner should be upheld. It is not necessary that there be an express saving clause in order to save rights under a statute. It is sufficient if an intent to that effect appear by legislative provision at the session of the Legislature effecting the repeal of the statute from which the rights are to be saved. *Traub v. Edwards*, 38 Cal.App.2d 719, 102 P.2d 463; *Black on Interpretation of Laws*, 2d Ed., pp. 424 and 425. As noted, section 41 makes a clear distinction between

the new money received in the period from July 1, 1947, to January 1, 1948, and "moneys received under the tax rates heretofore existing." It provides that the new money received from the newly imposed rate increases shall be apportioned during the month of January, 1948; but that during the period from July 1, 1947, to January 1, 1948, the controller shall apportion, transfer and distribute moneys received under the tax rates theretofore existing, as provided by the law prior to the enactment of the Act. We are satisfied that the construction of section 41 urged by the petitioner accomplishes the result intended by the Legislature. Such intention is indicated in that section by the careful segregation of the new and old moneys, by the different methods there prescribed for their distribution to the counties, and by the specific directive to the controller that during the period mentioned he shall apportion and distribute the moneys received under the tax rates theretofore existing, as provided by the law prior to the enactment of the Act.

It is urged, however, that the wording of the last sentence of section 41 expresses the intention that the controller is to apportion, transfer and distribute the old moneys only between July 1, 1947, and January 1, 1948, and that by the repeal of section 779, effective January 1, 1948, there is no authorization for him to apportion or distribute these moneys in February. The moneys were appropriated under section 779 on a calendar year basis, payable in August and February, and the controller concedes that the time of payment was deferred to February in order to allow a sufficient time to elapse for the computation and apportionment of the funds. Since there had been a valid appropriation of these moneys to the counties, their right thereto continued irrespective of the time provided for their payment. To accept the contention advanced by the controller would be to ignore the language in section 41 that for the period from July 1, 1947, to January 1, 1948, the moneys received under the tax rates theretofore existing were to be apportioned and distributed "as provided by the law prior to the enactment of" the Act.

[3] It is a cardinal rule that statutes should be given a reasonable interpretation and in accordance with the apparent purpose and intention of the law makers. Such intention controls if it can be reasonably ascertained from the language used. *Dickey v. Raisin Proration Zone No. 1*, 24 Cal. 2d 796, 802, 151 P.2d 505, 157 A.L.R. 324; *Dempsey v. Market Street Ry. Co.*, 23 Cal. 2d 110, 113, 142 P.2d 929; *Burns v. Massachusetts Bonding and Ins. Co.*, 62 Cal.App. 2d 962, 971, 146 P.2d 24; 23 Cal.Jur. p. 722 et seq.; 10 Cal.Jur.Supp. p. 348 et seq.; section 3542, Civil Code.

So interpreted we conclude that section 779 of the Vehicle Code is "the law prior to the enactment of" the Act of 1947 as contemplated by section 41 and that the "old moneys" apportioned to the counties by section 779 should be apportioned and distributed to them in accordance with the provisions of that section.

Let the peremptory writ issue as prayed.

CARTER, SCHAUER and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

My analysis of the provisions of the Collier-Burns Highway Act (Stats.1947, 1st Extra Sess. pp. 3788-3806), leads me to the conclusion that the petitioner is not entitled to the amounts which it claims to be due under the provisions of the Vehicle Code which were repealed when the new tax plan was adopted.

Prior to the enactment of the new legislation, of the three cents per gallon collected by the state as a tax upon the sale of gasoline (Motor Vehicle Fuel License Tax, Revenue and Taxation Code secs. 8353-8356), the counties received one cent and the cities one-half cent. The income from registration and weight fees (Vehicle Code secs. 776-781) was used in part to pay the expenses of the Department of Motor Vehicles but 31¾% of the amount was allotted to be paid to the counties ratably in February and August of each year. All receipts from the tax on diesel oil, levied at the rate of three cents per gallon (Use Fuel Tax, Revenue and Taxation Code secs. 9301-9304), were used by the state for the expense of bridge repair.

The 1947 act amended various statutes relating to revenues derived from taxation of motor vehicles and fuel used by them. A detailed plan for carrying them into effect was enacted as sections 38 to 41, inclusive, of the new statute. The general purpose of the legislature was to increase the rate of levy of each of these taxes and create the "Highway Users Tax Fund" into which such revenues shall be paid quarterly. As a procedural change, the act specifies that the apportionment of these revenues to the counties, in accordance with the plan long in effect, shall be made from this fund in quarterly installments, payable during the months of January, April, July and October of each year. Sec. 2103, Streets and Highways Code.

By another section of the new legislation (Sec. 2104, Streets and Highways Code), \$5,400,000 is apportioned annually from the new fund among the counties upon the basis of motor vehicle registrations. This amount is substantially the same as the total apportionment made to the counties in 1946 on the basis of a formula prescribed by section 779 of the Vehicle Code (Financial Report of the Joint Committee, 1947, p. 12[2] [a]). The appropriation shall be increased or decreased each year in accordance with the number of motor vehicles registered in the state as compared to the year 1946.

The new act also allocates the net revenue from the tax of one cent per gallon on gasoline as a continuation of the former apportionment (sec. 2105, Streets and Highways Code). By other provisions, the amount received by the state from the increased levy of three-eighths of one cent per gallon upon the sale of gasoline shall be apportioned among the counties quarterly and used by them only for specified purposes (secs. 2106, 2113-2116, Streets and Highways Code).

Unquestionably, the purpose of the 1947 legislature was to exact a larger amount of taxes from some owners and operators of motor vehicles and make a comprehensive consolidation and unification of the highway revenue and appropriation statutes. Aside from increasing the amount of taxes and a few minor regulatory provisions, the system of allocating to the

counties portions of the amount received by the state was unchanged. The state's tax revenues from automobile licenses and the sale of fuel are to be paid into one fund, and all apportionments made from that fund upon a quarterly basis. But the basic plan of the prior legislation was retained.

In August, 1947, the County of Alameda received its share of the registration and weight fees collected by the state during the first six months of that year. In January, 1948, it received approximately \$85,000 as the first quarterly payment under the new system. There was no break in the sequence of payments nor substantial change in the amounts allocated to it by the state; the only difference to the county between the state's distribution of the revenues which are in dispute is in the procedure by which its share of the total net income was distributed to it. However, because of one sentence in section 41, the county contends that it is entitled to an apportionment from the registration fees collected between July 1, 1947, and January 1, 1948. The sum claimed, \$39,611, would increase, to the extent, the apportionment to the County of Alameda from registration and weight fees, over either the formula of the repealed section, 779 of the Vehicle Code, or that specified in the new statute. Making a similar apportionment to the other counties of the state would require, in the aggregate, about \$200,000. But the whole purpose of the new act clearly shows that the legislature was only substituting a change in the rate and method of apportionment to the counties of a portion of its revenues. To allow the counties to receive from the state additional amounts would constitute a duplication of payment to them for the same period of time and from the same tax funds as they received on January 1, 1948.

The petitioner stresses the language of section 779 of the Vehicle Code to the effect that the moneys to be apportioned are "hereby appropriated and shall be paid to the counties * * * in the months of February and August." It is contended that by the last sentence in section 41, the revenues from registration and weight fees which were collected between July 1, 1947,

and January 1, 1948, were immediately "appropriated" by section 779. But under this construction, from what source is the money to come for the first quarterly payment required by the new act?

The act provides that the \$5,400,000 "shall be apportioned among the counties from the Highway Users Tax Fund." There is, however, no accompanying initial appropriation to provide the money for the initial payment in January, 1948. Certain funds were transferred to the new fund from the Motor Vehicle Fuel Fund (Rev. and Tax. Code sec. 8353 [amended 1947]), but such amounts were derived from the gasoline and diesel taxes and fully committed to other specific purposes by the act. Streets and Highways Code sec. 2111. The only money which was available for transfer into the new Highway Users Tax Fund to cover the January, 1948, warrants drawn on that fund in favor of the counties under section 2104 was the balance of taxes collected under the old law on account of registration and weight fees.

The County of Alameda, however, claims that this money should be paid to the counties in February, 1948, under section 779 of the Vehicle Code which was repealed as of the preceding January 1st. If its position is correct, the cities were entitled to their proportionate share of the tax receipts for the last six months of 1947 and the remainder was payable to the State Highway Fund under the old law. Sec. 781, Veh. Code. In that event, on January 1, 1948, there was no money in the new fund against which the counties' warrants of that date were drawn. If the legislature did not authorize the transfer of the net amount of registration and weight fees collected between July 1, 1947, and January 1, 1948, to the new fund for the purpose of paying the January warrants to the counties, those warrants were without authority of law. Two payments cannot be made for the same purpose from the same revenue source.

A statute must be construed so as to give meaning to every part thereof as well as to the statute as a whole. *Whitley v. Superior Court*, 18 Cal.2d 75, 113 P.2d 449; *Ahern v. Livermore Union High School Dist.*, 208 Cal. 770, 284 P. 1105; *Crowe*

v. Boyle, 184 Cal. 117, 193 P. 111; 23 Cal.Jur. 758. Considering the legislation in accordance with that rule, section 41 is explained as a whole and in its several parts by the fact that the legislature was faced with the problem of what to do with the taxes which would accrue during the transitional period provided for by the act. Under the then existing statutes, the semiannual apportionment of the registration and weight fees was due in August, and the third quarterly payment of the gasoline tax apportionment was required to be made in October. There was a special complication in connection with revenue from the gasoline tax for the new amendment was already in effect, and by October the state would have "new money" as well as "old money" in the treasury.

Section 41 was enacted to meet this situation, and as the only payment due during that period under the prior statutes was the distribution to be made in October of the amount received from the gasoline tax, this is the only subject to which the last sentence of that section properly may be said to refer. The "new money" in the gasoline tax revenues was to be apportioned under the new act and held until January, 1948; the "old money" was to be distributed "during said period * * * as provided by the law prior to enactment of this act."

The section has no application whatever to the registration and weight fees collected and not payable in the last six months of 1947. This construction not only reasonably satisfies the context but is compelled by the theory of continuity which the legislature attempted to attain between the old statutes and the new act. Petitioner's contention that section 41 was enacted as a saving clause for section 779 cannot be sustained. It is true that if the intent of the legislature to save rights under a repealed statute can be found from other enactments made at the same session, no express saving clause is needed to preserve those rights. *Traub v. Edwards*, 38 Cal.App.2d 719, 102 P.2d 463; *Black on Interpretation of Laws*, 2d Ed., pp. 424-25. However, in the present legislation the language of section 39 in specifying that the repeal shall "become ef-

fective" September 23, 1947, and the new act "become completely operative" January 1, 1948, clearly negates any possible implication of an extension or saving of rights past the latter date. The legislature was concerned with prescribing what the respondent controller should do during the particular period, not with what he should do subsequently with the moneys accumulated during the period.

For these reasons, in my opinion, the alternative writ should be dismissed and a peremptory writ denied.

TRAYNOR, J., concurs.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



86 Cal.App.2d 650

PEOPLE v. PHYSIOC.
Cr. 4215.

District Court of Appeal, Second District,
Division 3, California.

July 8, 1948.

Hearing Denied Aug. 5, 1948.

1. Poisons ☞9

Under the Health and Safety Code penalizing sale or possession of narcotics, mere possession of a narcotic constitutes substantial evidence to sustain a finding that the possessor of the narcotic knew its nature. Health and Safety Code, § 11500.

2. Poisons ☞9

Evidence supported conviction for violation of Health and Safety Code penalizing possession of narcotics except upon written prescription. Health and Safety Code, § 11500.

3. Criminal law ☞1173(2)

In prosecution for illegal possession of narcotics, where defendant was observed to

throw away an object shortly before arrest which, when subsequently retrieved, was discovered to be a box of narcotics, court did not commit prejudicial error in failing to instruct the jury on its own motion relative to the doctrine of circumstantial evidence. Health and Safety Code, § 11500.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Lewis W. Physioc was convicted of violating the Health and Safety Code penalizing the possession of narcotics, and he appeals.

Judgment affirmed.

Morris Lavine, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

McCOMB, Justice (assigned).

From a judgment of guilty of violating section 11500¹ of the Health and Safety Code (possession etc. of narcotics), after trial before a jury, defendant appeals. There is also an appeal from an order denying his motion for a new trial.

The record discloses these essential facts:

On April 6, 1947, at approximately 4:30 a. m. Officer John A. Tidyman of the Los Angeles Police Department followed defendant into a hotel, located in Wilmington, California. Defendant went upstairs and stopped opposite room number 40, put his hand on the door knob, jumped back from the door, swung around, put his hand in his pocket and brought out an object which struck the opposite wall and then fell to the floor. At this time defendant was ordered to put up his hands which he did and was thereupon handcuffed. Thereafter Officer Tidyman recovered the object which had been thrown in the air, and found that it was a small match box. This box contained several small white pill

¹Section 11500 of the Health and Safety Code reads: "Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or

give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, chiropractist, or veterinarian licensed to practice in this State."

shaped tablets. The box together with the tablets were delivered to the police chemist who reported that each tablet contained a quarter grain of morphine.

*Propositions Urged for Reversal
of the Judgment*

First: *The evidence is insufficient to sustain the judgment for the reasons (a) that Officer Tidyman testified that he lost sight of the object which defendant threw until after defendant had been handcuffed, and (b) that there is no proof that defendant had knowledge of the contents of the box.*

This proposition is untenable.

(a) An examination of the record discloses substantial evidence to support each and every finding of fact set forth above upon which the judgment of guilty was predicated. Officer Tidyman gave direct testimony of each of the facts aforementioned. The mere fact that his eye left the match box momentarily between the time the box came to rest on the hotel floor until after he had finished in helping handcuff defendant did not constitute a hiatus in the proof that defendant possessed the match box which the officer later recovered. It was a question of fact for the jury to determine from the foregoing evidence whether the match box the officer retrieved was the same one defendant had thrown. We believe it to be a fair inference from the facts for the jury to find that the box which the officer picked up was the identical one which defendant had possessed.

[1] (b) The law is settled that the mere possession of a narcotic constitutes substantial evidence to sustain a finding that the possessor of the narcotic knew its nature. (People v. Carlton, 83 Cal.App. 2d 475, 189 P.2d 299; People v. Sweeney, 66 Cal.App.2d 855, 859, et seq., 153 P.2d 371; People v. Randolph, 133 Cal.App. 192, 196, 23 P.2d 777).

[2] Hence, since the evidence disclosed that defendant possessed the narcotic, this was substantial evidence to sustain the implied finding of the jury that defendant knew the nature of the object which he possessed.

[3] Second: *The trial court committed prejudicial error in not instructing the jury*

(on its own motion) relative to the doctrine of circumstantial evidence.

This proposition is also untenable. In the present case the evidence upon which the conviction rests was *direct evidence* and not *circumstantial evidence*; hence the trial court correctly did not give an instruction upon the doctrine of circumstantial evidence.

For the foregoing reasons the judgment and order are and each is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.



86 Cal.App.2d 670

ALEXANDER et al. v. McDONALD et al.
Civ. 16344.

District Court of Appeal, Second District,
Division 2, California.

July 9, 1948.

1. Appeal and error ⇨295

The inadequacy of damages cannot be raised for the first time on appeal but must be presented to the trial court on a motion for a new trial before the appellate court may consider the question.

2. Appeal and error ⇨499(4), 928(4)

Before alleged error in the refusal to give an instruction will be reviewed on appeal record must show a proper request for such instruction and ruling of trial court refusing to give requested instruction, and in the absence thereof, it will be presumed on appeal that the requested instruction was given.

3. Appeal and error ⇨907(1)

In the absence of a contrary showing in record all presumptions in favor of action of trial court will be indulged by the appellate court.

4. Appeal and error ⇨901

The burden is upon appellant to show that error has been committed by the trial court.

Appeal from Superior Court, Los Angeles County; Albert F. Ross, Judge.

Action by John Alexander and others against Leo McDonald and another for damages sustained in motor vehicle collision. From judgments for plaintiffs, the plaintiffs appeal.

Affirmed.

Mason & Howard, Arthur Lasher, and C. Loy Mason, all of Los Angeles, for appellants.

Spray, Davis & Gould and Charles P. Gould, all of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs appeal from a judgment in their favor, after trial before a jury, in an action to recover damages for injuries resulting from an automobile accident.

Questions Presented for Review

First: *Was the sum awarded each of the plaintiffs as damages by the verdict of the jury and judgment thereon inadequate?*

[1] This question cannot be considered by us for the reason that the rule is established that the point that the damages are inadequate cannot be raised for the first time on appeal, but must be presented to the trial court on a motion for a new trial before an appellate court will consider whether the damages are inadequate or not. (Baum v. Murray, 23 Wash.2d 890, 162 P.2d 801, 807. See also Wood v. Keller, 72 Cal.App.2d 14, 17, 163 P.2d 904; Williams v. A. R. G. Bus Co., 47 Cal.App. 568, 570, 190 P. 1036; Bate v. Jolin, 206 Cal. 504, 508, 274 P. 971; cases cited in 2 New California Digest, McKinney, 1946, Appeal and Error, p. 273, sec. 237.)

In the instant case plaintiffs did not make a motion for a new trial. Therefore plaintiffs did not comply with the foregoing rule and have waived the right to have the question of the inadequacy of the damages considered by this court.

Second: *Is plaintiffs' contention correct that the trial court erred in refusing to give three instructions on the subject of damages requested by plaintiffs?*

This question must be answered in the negative and is governed by this pertinent rule:

[2-4] Before alleged error in the refusal to give an instruction will be reviewed upon appeal, the record must show, (1) a proper request for such instruction, and (2) the ruling of the trial court refusing to give the requested instruction. (Gilbert v. Peck, 162 Cal. 54, 57, 121 P. 315, Ann.Cas. 1913C, 1349; In re Estate of Higgins, 156 Cal. 257, 266, 104 P. 6; McFate v. Zuckerman, 130 Cal.App. 172, 179, 19 P.2d 532.) In the absence of such a record it will be presumed on appeal that the requested instruction was given. In the absence of a contrary showing in the record, all presumptions in favor of the action of the trial court will be indulged by an appellate court. The burden is upon the appellant to show that error has been committed in the trial court. Forbes v. Mattos, 35 Cal.App.2d 481, 484, 96 P.2d 166; See also DeLannoy v. Grammatikos, 126 Cal.App. 79, 86, 14 P.2d 542; In re Estate of Allen, 177 Cal. 668, 674 et seq., 171 P. 686. The record in the instant case fails to show that the trial court refused to give the requested instructions, hence the foregoing rules are applicable.

Since no error appears in the record, the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.



86 Cal.App.2d 517

CAVAGNARO et al. v. CITY OF NAPA.
Civ. 7462.

District Court of Appeal, Third District,
California.

June 30, 1948.

Hearing Denied Aug. 26, 1948.

1. Appeal and error ⇐100(1)

Where there is evidence sufficient to sustain implied findings of jury in support of plaintiffs' complaint, verdict of jury in favor of plaintiff and conclusion of trial court are conclusive.

2. Automobiles ⇐245(19)

In action against city for death of deputy sheriff who was run over by fire truck, whether driver gave due warning was for jury. Vehicle Code, § 454.

3. Automobiles Ⓒ244(16)

In action against city for death of deputy sheriff who was run over by fire truck, evidence sustained implied finding that driver did not give due warning, that he did not drive with due regard for safety of deputy, and that he arbitrarily exercised statutory privileges with respect to operation of an emergency vehicle responding to a fire alarm. Vehicle Code, § 454.

4. Automobiles Ⓒ244(33)

In action against city for death of deputy sheriff who was run over by fire truck, evidence that truck was traveling at speed of 5 miles per hour and traveled some 12 or 14 feet after brakes were applied, and that after accident, when driver drove engine up to fire hydrant, he drove it onto curb which was 5 or 6 inches high, before bringing it to a stop, warranted conclusion that brakes were inadequate. Vehicle Code, §§ 454, 670.

5. Automobiles Ⓒ245(75)

Deputy sheriff engaged in directing traffic at intersection in vicinity of fire was not guilty of contributory negligence as a matter of law because of the position which he had assumed in crosswalk. Vehicle Code, § 587.5; Government Code, § 1194; Pol.Code, § 4157.

6. Automobiles Ⓒ244(52)

In action against city for death of deputy sheriff who was run over by fire truck while directing traffic at intersection in vicinity of fire, evidence sustained implied finding that deputy was not guilty of contributory negligence. Vehicle Code, § 587.5; Government Code, § 1194; Pol. Code, § 4157.

7. Appeal and error Ⓒ979(1)**New trial** Ⓒ68

Trial judge is vested with sound discretion to determine on motion for new trial whether verdict is supported by evidence, and on appeal, that discretion will not be interfered with, in absence of clear and affirmative showing of gross, manifest or unmistakable abuse of discretion.

8. New trial Ⓒ68

In action against city for death of deputy sheriff who was run over by fire truck while directing traffic at intersection in vicinity of fire, denial of motion by city

for new trial upon all statutory grounds, after rendition of verdict for plaintiffs, was not abuse of discretion, under the evidence.

9. Evidence Ⓒ155(6)

In action against city for death of deputy sheriff who was run over by fire truck, where driver of truck testified that truck was equipped with mechanism designated as a booster which helped stop the truck, and that the brakes were in good mechanical condition, admission of testimony by member of fire department of another city, called in rebuttal as an expert, that if truck was equipped as asserted and was traveling at rate of speed shown by testimony, it would have been possible to bring it to a stop sooner than was done and that examination of truck itself revealed no booster, was proper.

10. Automobiles Ⓒ246(2, 39)

In action against city for death of deputy sheriff who was run over by fire truck, an instruction stating in part that pedestrian injured by authorized emergency vehicle which is lawfully answering emergency call and is giving required warning is not entitled to redress unless driver has failed to drive with due regard for safety of other persons lawfully using highway was proper under the law and the evidence. Vehicle Code, § 454.

11. Automobiles Ⓒ245(19)

In action against city for death of deputy sheriff who was run over by fire truck, whether driver of truck gave required signal and whether, even if he did so, he drove truck with due regard for safety of others or arbitrarily exercised privileges granted his truck as an emergency vehicle was for the jury. Vehicle Code, § 454.

12. Automobiles Ⓒ246(41)

In action against city for death of deputy sheriff who was run over by fire truck, where complaint charged that city negligently drove truck with inadequate brakes and there was sufficient evidence to sustain a finding that brakes were defective, instruction regarding condition of brakes and obligations of city to maintain brakes in conformity with statute, was proper. Vehicle Code, § 670.

13. Trial $\S$ 252(8), 255(11)

In action against city for death of deputy sheriff who was run over by fire truck, failure to instruct, in connection with instructions regarding brakes, that presumption of negligence arising from violation of ordinance or statute is not conclusive was not error, in absence of request for such instruction and in absence of evidence to show that any defect in brakes was excusable under circumstances. Vehicle Code, $\S$ 670.

14. Appeal and error $\S$ 1170(9)
Automobiles $\S$ 246(30)

In action against city for death of deputy sheriff who was run over by fire truck, instructions on contributory negligence and assumption of risk were proper and in any event did not result in a miscarriage of justice. Const. art. 6, $\S$ 4 $\frac{1}{2}$.

15. Trial $\S$ 228(1), 295(1)

Trial court need not state all law applicable to case in single instruction and charge must be read as a whole, and if without straining any portion of language, charge harmonizes as a whole and fairly and accurately states the law, reversal may not be had because of verbal inaccuracies, because isolated sentences and phrases are open to criticism or because separate instruction does not contain all conditions and limitations which are to be gathered from entire charge.

16. Trial $\S$ 423

Where, before instructing jury, trial court requested counsel for all parties to confer with him and voice any objections which they might have to instructions which had been prepared, and defendant's counsel failed to comply with such request, counsel's failure would not cure fatally defective instructions but would debar counsel from thereafter criticising minor defects.

Appeal from Superior Court, Napa County; Mervin C. Lernhart, Judge.

Action by Vera Cavagnaro and others against the City of Napa to recover damages for death of Henry P. Cavagnaro. Judgment for plaintiffs and defendant appeals.

Affirmed.

Appelbaum & Mitchell, of Oakland, and Coombs & Dunlap, of Napa, for appellants.

King, King & Ghidella and Clarence N. Riggins, all of Napa, for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment in favor of plaintiffs, entered on the verdict of a jury, awarding damages for the death of Henry P. Cavagnaro, husband of one of the plaintiffs and father of the other two. Cavagnaro's death was caused by a fire truck belonging to defendant which ran over him while he was in an intersection directing traffic in the vicinity of a fire in the city of Napa.

Decedent, who was about 62 years of age, was employed as a clerk in the office of the California Highway Patrol, and was an uncompensated deputy sheriff of Napa County and wore a deputy sheriff's badge. He had previously been a traffic officer for the county of Napa, during which occupation he had been crippled in an accident which had rendered his left arm practically useless, and had crippled him to the extent that he could not run and walked with a limp.

The scene of the accident was the intersection of Third Street and Soscol Avenue. Third Street runs east and west and Soscol Avenue approximately north and south, the latter street terminating a few hundred feet north of its intersection with Third Street. About 2 o'clock p. m. on the day of the accident a fire broke out on premises owned by Cavagnaro's brother, situated near the north end of Soscol Avenue. Cavagnaro was at the time at a hotel on the east side of Soscol Avenue, north of Third Street. He immediately proceeded to Third Street and took up a position in the crosswalk, holding back traffic coming from the east on that street; and when two fire engines responding to the fire alarm appeared on the scene, traveling from west to east on Third Street, he directed the first one up Soscol Avenue, toward the fire. When the second engine, which was driven by Paul Bohen, reached the intersection it first turned northward toward the fire. It then stopped or paused slightly, then proceeded at reduced speed eastward and then southward, swinging in an arc which carried it into the intersection where Cavagnaro was standing,

and striking him, his body falling under the truck which continued to progress a distance estimated by one witness as from 10 to 12 feet, before coming to a stop.

Plaintiffs in their complaint based their right to recover damages upon two grounds, the first that the brakes of the fire engine were "inadequate to bring said fire truck to a complete stop when operated upon a dry asphalt or concrete surface where the grade does not exceed 1%, at a speed of ten miles an hour or less, within a distance of 9.3 feet, and within a distance of 20.8 feet when operated on such a pavement under such conditions at a speed of fifteen miles an hour" (Veh.Code, sec. 670); the second was that Bohlen "drove and operated said fire truck in a careless and negligent manner and with wilful disregard for the safety of said Henry P. Cavagnaro."

In its answer defendant denied the aforesaid allegations, and charged Cavagnaro with contributory negligence, asserting also that the latter had voluntarily placed himself in a position of danger and thereby assumed the risks incident thereto.

[1] Subsequent to the rendition of the verdict by the jury, defendant moved for a new trial upon all of the statutory grounds. This motion was denied, at which time the trial court, as part of its order of denial, rendered an opinion in which it set forth evidence which, in its opinion, was sufficient to sustain the implied findings of the jury in support of the allegations of plaintiffs' complaint. If there be such evidence the verdict of the jury and the conclusion of the trial court are binding upon this court.

Appellant contends that the fire engine was not operated with wilful disregard for the safety of decedent, that it was not maintained and operated in a dangerous and defective condition with inadequate brakes, that decedent was guilty of contributory negligence as matter of law, that certain rulings on evidence made by the trial court were prejudicial to appellant, and that the jury was misdirected in various respects.

In support of its first contention appellant asserts that the fire engine was an authorized emergency vehicle within the provisions of the Vehicle Code, and was

being driven in response to an emergency call, and that the evidence is insufficient to show that the driver of same drove it without due regard for the safety of persons using the highway, or that he was arbitrarily exercising the privileges declared in section 454 of the Vehicle Code or was guilty of wilful misconduct.

Section 454, so far as pertinent here, provides that the driver of an emergency vehicle when responding to a fire alarm shall be exempt from certain provisions of the Vehicle Code, but only when the said vehicle sounds a siren as may be reasonably necessary; also that the driver of such vehicle shall not be relieved from the duty to drive with due regard for the safety of all persons using the highway, nor be protected from the consequences of an arbitrary exercise of the privileges of the section.

Both appellant and respondents rely upon *Lucas v. City of Los Angeles*, 10 Cal.2d 476, 75 P.2d 599. In that case a police automobile, operated upon authorized emergency business, but traveling at a high rate of speed and disregarding a traffic signal, crashed into a car at an intersection, inflicting injuries upon plaintiff who was riding in said car as a guest. A judgment for plaintiff was reversed, the court saying that as the siren of the police car was sounding the case must be considered as one where the statutory warning was given, wherefore the vehicle was exempt from the rules applying to speed and traffic signals; and that the sole question of law involved was whether, under the statutes then in effect, the driver of the police car was arbitrarily exercising the rights conferred upon him by section 454 of the Vehicle Code, or was driving without due regard for the safety of others using the highway. It was said that "due regard" for the safety of others means that the driver of the emergency vehicle shall, by suitable warning, give others a reasonable opportunity to yield the right of way, and that negligence cannot be predicated upon speed or right of way if proper warning is given; and it was concluded that the judgment should be reversed since the emergency was conceded, the sounding of the siren was proved by the only substantial evidence of-

ferred, and an arbitrary exercise of the privileges was not shown. However, in considering what might constitute an arbitrary exercise of the privileges conferred by section 454, *supra*, it was said that where an operator of an emergency vehicle has given the required warning, but sees that another has not heard or heeded it, it might be an arbitrary exercise of the privileges to continue on into an inevitable collision.

In numerous cases the necessity for an emergency vehicle to give due warning by horn or siren has been considered. In *Raynor v. City of Arcata*, 11 Cal.2d 113, 116, 77 P.2d 1054, it was said that the vital issue was whether the fire chief, whose car collided with plaintiff's car when the chief was responding to a fire alarm, sounded his siren as he proceeded at a high rate of speed, and that the evidence was conflicting on this matter. While a judgment for plaintiff was reversed in that case, the reversal was based upon erroneous instructions. In *Eddy v. City of Los Angeles*, 28 Cal.App.2d 89, 96, 82 P.2d 25, a judgment for defendant was reversed, it appearing that the emergency vehicle, a police car, was not equipped with a siren, and that the driver only sounded his horn when he was some 200 feet from plaintiff whom he struck while she was in a crosswalk. Also see *Reed v. City of San Diego*, 77 Cal.App.2d 860, 868, 177 P.2d 21; *Isaacs v. City and County of San Francisco*, 73 Cal.App.2d 621, 626, 167 P.2d 221; *Head v. Wilson*, 36 Cal.App.2d 244, 247, 97 P.2d 509; *Stone v. City and County of San Francisco*, 27 Cal.App.2d 34, 37-40, 80 P.2d 175, in all of which cases the necessity for the giving of warning by the sounding of a siren or other sound equipment is emphasized. Such cases do not hold, however, that even where a warning signal is given, a defendant city may not be held liable where the driver of an emergency vehicle nevertheless fails to drive with due regard for the safety of others, or arbitrarily exercises the privileges declared by statute. (See 136 A.L.R. page 590 et seq.)

[2] In the case before us there is evidence that Bohen's siren was sounding as he proceeded into the intersection, but there is also evidence that after he hesitated or paused before he drove his vehicle in the

arc and struck Cavagnaro, his siren was not sounding. Therefore, whether Bohen gave due warning or not presented a question of fact for the jury which it has impliedly resolved against appellant.

[3] As to whether Bohen in any other respect drove without due regard for the safety of persons using the highway, including Cavagnaro, and whether he arbitrarily exercised the privileges declared in section 454, his own testimony shows that he saw Cavagnaro standing in the crosswalk just before he came into the intersection, but that he then looked away—"glanced to see where the fire was"—and did not see him again until he was within two feet of him. He testified:

"Q. The first time that you looked at him, about how many feet were you from him? A. Well, I was making a swing and I saw somebody standing in the street.

"Q. Then you stated, I believe, that you directed your attention elsewhere? A. That is right."

The testimony shows that Cavagnaro was a man 6 feet in height, weighed some 284 pounds; that Bohen had known him practically all of his life and was quite intimate with him; and that as the fire truck approached Cavagnaro was waving one arm directing traffic, and motioning the approaching truck to the fire hydrant which was located near the southwest corner of the intersection. There is also evidence that another officer in plain clothes, who had arrived at the scene after Cavagnaro had taken up his position directing traffic, was standing near Cavagnaro, and only avoided being struck by making a hasty retreat, but that Cavagnaro, while he attempted to avoid the impact, was unable to do so. Bohen testified that he did not recognize Cavagnaro but the jury may well have disbelieved this statement. There is a conflict in the testimony as to where Cavagnaro was standing when struck, whether in the crosswalk or nearer the center of the intersection, and whether, in making the turn, the fire truck traveled as far east as the crosswalk, or turned nearer the center of the intersection. But the evidence is ample to support the contention of plaintiffs that Cavagnaro was actually standing in the

crosswalk, and the jury may have so concluded.

In view of this testimony we think that the jury was not without some justification for concluding as it impliedly did, that Bohen did not give due warning, that he did not drive with due regard for the safety of decedent, and that he arbitrarily exercised the privileges declared by section 454, *supra*.

[4] We think, also, that there was evidence justifying a conclusion that the fire truck was not equipped with adequate brakes. While the evidence is somewhat conflicting on this point, the trial court pointed out in its opinion that between the time the truck paused and the time it struck Cavagnaro it was traveling at a speed of only five miles per hour. It is conceded that it was being operated upon a dry asphalt or concrete surface where the grade did not exceed 1%. Under the provisions of section 670 of the Vehicle Code, with adequate brakes, if traveling at a speed of 10 miles per hour or less, it should have been possible to bring the truck to a stop within 9.3 feet; but there is evidence that though Bohen had applied his brakes and was reducing his speed before he struck Cavagnaro, and was traveling at a speed of only 5 miles per hour or less, and that when about 2 feet from Cavagnaro he put on his brakes as hard as he could, the truck progressed some 10 or 12 feet after the contact. There is also testimony that after the accident, when Bohen drove the engine up to a fire hydrant he drove it up onto the curb which was 5 or 6 inches high, before bringing it to a stop. While there is testimony on the part of Bohen which it is claimed negatives the foregoing evidence, he admitted that he had never tested the truck to determine whether its brakes were sufficient to comply with section 670, *supra*, and generally speaking, showed ignorance of the braking equipment on the machine. Also, a witness testified that after the accident Bohen said to him, "You know you can't stop this damn thing very easy." Defendant produced no witness except Bohen to testify to the condition of the brakes, and the jury may well have concluded from the evidence before it that they were inadequate.

[5, 6] We cannot say, either, that Cavagnaro was guilty of contributory negligence as matter of law. As a deputy sheriff, one of whose duties it was to preserve public order and security (Govt.Code, sec. 1194; Pol.Code, sec. 4157), he was engaged in the direction of traffic at a place where an emergency existed by reason of the fire (Veh.Code, sec. 587.5). He was the first officer to appear and only one other officer appeared until after the fire trucks arrived. That officer stationed himself in a position to control traffic approaching the intersection from Soscol Avenue as well as that on Third Street. The trial court pointed out and numerous witnesses testified that traffic was heavy that day by reason of a parade held in connection with the county fair, and that the fire brought a throng of people to the intersection. Engaged as he was in the performance of a duty, and standing in the crosswalk, it cannot be said, as matter of law, that on observing the approach of the fire truck it was not reasonable for Cavagnaro to assume that it would proceed up Soscol Avenue to the scene of the fire or go to the fire hydrant located on the southwest corner of the intersection and toward which testimony shows decedent directed it. Also it cannot be said that decedent could not reasonably have believed that the truck, in turning as it did, would not swing into the crosswalk where he stood, or that the driver of the truck could not or would not observe and recognize him and direct his vehicle or stop it so as to avoid striking him. The evidence cannot be said to have been insufficient to support the implied finding of the jury that decedent was not guilty of contributory negligence.

It is said in *Pewitt v. Riley*, 27 Cal.2d 310, 316, 163 P.2d 873, quoting from *Anthony v. Hobbie*, 25 Cal.2d 814, 818, 155 P.2d 826, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists, that reasonable or sensible men could have drawn that conclusion and none other, that where there are different inferences that may be drawn, one for and one against, the one against will be followed, and that before it can be held as matter of law that contributory

negligence exists, the evidence must point unerringly to that conclusion.

[7,8] On the motion for a new trial the court apparently gave careful consideration to the question of the sufficiency of the evidence, as in its opinion it pointed out testimony which it considered sufficient to sustain the verdict. As has often been stated by our courts, the trial judge is vested with a sound discretion to determine on such motion whether the verdict is supported by the evidence, and, on appeal, that discretion will not be interfered with in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion. (20 Cal.Jur., sec. 13, pp 27-28.) No such abuse of discretion appears here.

[9] Appellant next complains that testimony given by witness Jackson was erroneously admitted to its prejudice. Jackson, a member of the fire department of the city of Calistoga, who had had 17 years' experience in repairing automobiles and trucks, and was familiar with the trucks used by his own fire department, one of which was the same as Bohen's truck, was called by plaintiffs in rebuttal as an expert witness, and permitted to testify regarding the distance within which a truck such as the one here involved could, under specified conditions, be stopped. Defendant's witness Bohen had testified in support of defendant's case that defendant's truck was equipped with a mechanism designated as a booster which helped to stop the truck "so that you do not have to press so hard." He also testified that his brakes were in good mechanical condition. Jackson's testimony was adduced apparently to contradict Bohen and to impeach him, and Jackson was permitted to give his expert opinion that if defendant's truck was so equipped and in such condition and traveling at the rate of speed shown by the testimony, it would have been possible to bring it to a stop sooner than was done. Defendant brought the truck out for inspection by the jury, representing that it was in the same condition as at the time of the trial, and Jackson examined it. He testified he could find no booster on it. While the weight to be given Jackson's testimony might be subject to question, as probably

was argued to the jury, we cannot say that its admission was erroneous under the pleadings and the testimony previously given in the case. It tended to show that the brakes of defendant's truck were not adequate to meet the statutory requirement, that had they been adequate Bohen could have stopped before striking decedent, and also to contradict Bohen's testimony that the vehicle was equipped with a booster.

[10,11] As regards appellant's contentions that the court erred in the giving of certain instructions, it first sets forth five instructions as follows:

(1) "You are instructed, that because of the public necessity for the operation of authorized emergency vehicles in cases of an emergency and after giving audible signal, as required by law, upon the immediate approach of such vehicles, the operators of such vehicles are relieved from the general rules of the road applicable to other vehicles."

(2) "The necessity for a clear and speedy pathway for fire trucks lawfully responding to a fire alarm is recognized under the law and unless the driver has failed to drive with due regard for the safety of other persons using the highway or has arbitrarily made use of the privileges granted a fire truck under such circumstances there can be no legal responsibility to a person using the street who might come in contact with such vehicle."

(3) "You are instructed that where an authorized emergency vehicle is lawfully answering the emergency call and is giving the required warning, as required by law, an injured pedestrian is not entitled to redress in the courts, *unless the driver of the emergency vehicle has failed to drive with due regard for the safety of other persons lawfully using the highway or has arbitrarily made use of the privileges granted a fire truck under such circumstances as to amount to wilful misconduct and without due regard for the safety of others lawfully using the highway.*"

(4) "You are instructed that, while the law relieves the driver of a fire truck belonging to the City and which is being driven in response to a fire alarm and sounding its siren from certain regulations apply-

ing to other motor vehicles, the law does require the driver of said fire truck under said circumstances to drive with due regard for the safety of all persons using the highway."

(5) "If the driver of the fire truck intentionally drove the truck towards and into Henry P. Cavagnaro with the knowledge that it was likely to result in serious injury to him, or with a wanton and reckless disregard of its possible consequences, and if Henry P. Cavagnaro was injured by reason thereof, the driver may be said to have acted arbitrarily and without due regard to the rights of Henry P. Cavagnaro."

Appellant says that (1) and (2), which it proposed, are correct, but that the portion of (3) in italics, which was added by the trial court, is erroneous, as are instructions (4) and (5). We fail to see that there is any inconsistency between the language used in the two which appellant approves and those which it claims are erroneous, unless appellant means that the giving of a signal relieves the driver of an emergency vehicle from responsibility for driving without due regard for the safety of others using the highway or from an arbitrary exercise of his privileges. We are cited to no authority so holding, and section 454, *supra*, is to the contrary, and at appellant's request an instruction embodying that section was given to the jury. Appellant asserts that the instructions criticised are not justified under the evidence, but it was for the jury to decide whether Bohen gave the signal required by law, and whether, even if he did so, he drove his vehicle with due regard for the safety of others or arbitrarily exercised the privilege granted his truck as an emergency vehicle.

[12] Appellant next attacks instructions given regarding the condition of the brakes on the fire engine, and the obligations of the city to maintain its brakes in conformity with section 670 of the Vehicle Code. With one exception, referred to below, it is not contended that the instructions given are erroneous in themselves, but that they should not have been given because "there was no evidence in the case upon which the jury could properly base a finding that the

brakes on the fire engine violated the law." In giving these instructions the court recited that the condition of the brakes was an issue in the case as the complaint charged that the city was carelessly and negligently driving the truck with inadequate brakes. Under these circumstances it was proper for the court to advise the jury as to the law applicable to this issue. And as we have already held that there was sufficient evidence to sustain a finding that the brakes were defective, we cannot say that there was no such evidence.

Appellant relies upon *Ketchum v. Pattee*, 37 Cal.App.2d 122, 98 P.2d 1051, but in that case there was no evidence presented showing or tending to show that the brakes on defendant's vehicle were defective or that defendant attempted to stop it to avoid the accident. On the contrary, the driver did not attempt to stop, but swerved his truck in an effort to avoid hitting the victim. The facts of the case are in nowise similar to those in the case before us.

[13] Appellant also asserts that in giving two of its instructions regarding the effect of a violation by the city of section 670, *supra*, it erred in failing to advise the jury that as stated in *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 589, 177 P.2d 279, "an act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances." Appellant fails to note, however, that the foregoing quotation is followed by the words "Until so rebutted, it is conclusive." In the case before us it may be said in this connection, first, that appellant made no request for any such instruction, and second, that no evidence was presented by it in an attempt to show that any defect in its brakes was justifiable or excusable under the circumstances. It stood upon the testimony of Bohen alone that the brakes were in good condition. Therefore, no question of excuse or justification for a defective condition of the brakes was made an issue for the jury to decide. And in the *Satterlee* case it is stated with cited authority (29 Cal.2d at page 588, 177 P.2d at page 283) that unless and until justifica-

tion or excuse for violation of a statute appears, the general rule applies and it must be treated as negligence per se.

[14] Error is also predicated upon certain instructions on contributory negligence and assumption of risk. It cannot be denied that the court gave all of the instructions requested by defendant upon these subjects. But, though the jurors were told that at the time of the accident Cavagnaro was a mere volunteer in attempting to direct the movements of the fire engine, that he assumed the risks thereof and that he was bound to yield the right of way to the fire engine, it urges that the effect of the instructions given was to tell the jury that they "could excuse the decedent from the doctrines of contributory negligence and assumption of risk, if he was trying to protect his brother's property which was on fire, or if he was a courtesy, honorary, or uncompensated deputy sheriff, or if he had once been a county officer." This conclusion is predicated upon the giving of the following instructions:

(15) "In deciding whether Henry P. Cavagnaro was guilty of contributory negligence, you may consider the reason, if any, why he took a position in the street directing traffic, if you find that he did so, his experience in such work, if he had any prior experience, and all the other facts and circumstances shown by the evidence."

(21) "A man may take risks to protect the property of himself or others from destruction provided he uses such care as an ordinarily careful man would use under the same circumstances. The amount of risk he may take and the precautions he should use depend on the facts and circumstances of the case and are to be determined by the jury."

(25) "If Henry P. Cavagnaro was a duly appointed and qualified deputy sheriff of the County of Napa, he had all the rights and duties of the sheriff throughout the County of Napa and including the area of the City of Napa therein."

Firstly, we do not think that the aforesaid instructions justify the conclusion drawn by appellant; and secondly, in the light of the instructions requested by defendant and

given by the court on the subject of contributory negligence and assumption of risk, which are too numerous to be set forth herein, there being 14 or 15 of them, even if the said instructions were subject to criticism, which we do not decide, in view of Article VI, section 4½, of the Constitution we are of the opinion that no miscarriage of justice resulted therefrom.

[15] It is said in 24 Cal.Jur., pp. 857-861: "It has been often stated that a trial court is not required to state all of the law applicable to a case in a single instruction. The charge must be read as a whole, that is to say, the instructions given should be considered in connection with each other, and if, without straining any portion of the language, the charge harmonizes as a whole and fairly and accurately states the law, a reversal may not be had because of verbal inaccuracies, because isolated sentences and phrases are open to just criticism, or because a separate instruction does not contain all of the conditions and limitations which are to be gathered from the entire charge."

Also see *Westover v. City of Los Angeles*, 20 Cal.2d 635, 637, 128 P.2d 350, and cases there cited.

[16] We believe that the jury were fully and fairly advised as to the law applicable to the case; and because some of the instructions do not accord with defendant's theories, or with that portion of the evidence which is most favorable to defendant, it does not follow that such instructions are erroneous. Appellant does not contend that the court failed to give any instructions requested by it. Furthermore, the record shows that before instructing the jury the trial court requested counsel for all parties to confer with him and voice any objections they might have to the instructions which had been prepared, but that defendant's counsel failed to comply with such request. And while it does not follow that counsel's failure in this behalf would cure fatally defective instructions, it should debar such counsel from thereafter criticising minor defects.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

PEOPLE v. McCONNELL et al.
Cr. 2067.

District Court of Appeal, Third District,
California.

July 6, 1948.

Rehearing Denied July 20, 1948.

1. Criminal law ☞1202(1)

The enumeration of burglary in habitual criminal act as one of the offenses on which determination of habitual criminality can be based, without mention of degree of crime, means that degree of offense is not material to determination of habitual criminality. Pen.Code, § 644.

2. Criminal law ☞304(11)

District Court of Appeal takes judicial notice of the laws of Kansas. Code Civ. Proc. § 1875, subd. 3.

3. Criminal law ☞1202(1)

Defendant's conviction of auto theft in Kansas was properly considered in adjudicating defendant an habitual criminal where at time defendant's offense was committed in Kansas the theft of an automobile was a felony in that state and constituted "grand theft" as defined in California Penal Code, which offense is included in habitual criminal act as one of the offenses to be considered in determining habitual criminality. Gen.St.Kan.1935, §§ 21-533, 21-534; Pen.Code, §§ 487, 644.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

4. Criminal law ☞1202(1)

Imprisonment in the Kansas Industrial Reformatory constitutes "imprisonment in a state prison" within the provisions of the habitual criminal act. Pen.Code, § 644.

See Words and Phrases, Permanent Edition, for all other definitions of "Imprisonment in a State Prison" and "State Prison".

5. Criminal law ☞1202(4)

Where defendant admitted two prior convictions, on trial of primary offense court properly refrained from trying issue presented by amended information regarding the two prior offenses. Pen.Code, § 1025.

6. Criminal law ☞1130(6)

Generally, matters not raised in an opening brief may not be raised in a closing brief.

7. Criminal law ☞1202(3)

Courts of California cannot take evidence to prove, and upon that evidence adjudicate for themselves, that a defendant was not guilty of a crime with which he had been charged, for which he had been tried or to which he had pleaded guilty, and of which he had been convicted in another state.

Appeal from Superior Court, San Joaquin County; Geo. F. Buck, Judge.

Abbott F. McConnell and John D. Edwards were convicted of second degree robbery, and John D. Edwards was adjudged to be an habitual criminal. From the judgment, and from an order denying his motion for a new trial, John D. Edwards appeals.

Judgment and order affirmed.

John D. Edwards, pro se.

Fred N. Howser, Atty. Gen., and Doris Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

On October 14, 1947, appellant Edwards and one Abbott F. McConnell were charged with robbery committed in San Joaquin County on October 3, 1947. Subsequently, and on November 12, 1947, an amended information was filed in which Edwards was charged with two priors, the first, "auto theft", alleged to have been committed in Kansas in 1928, followed by imprisonment in the State Industrial Reformatory at Hutchinson, Kansas, and the second, kidnapping, in the state of Kansas, alleged to have been committed in 1933, followed by imprisonment in the Kansas State Penitentiary. No priors were charged against McConnell.

Both defendants pleaded not guilty to the alleged robbery, but Edwards admitted the two priors. At the trial defendants were represented by the public defender. McConnell took the stand in his own behalf, but Edwards refrained from testifying.

Both were convicted, the degree of the offense being fixed by the jury as robbery in the second degree. Judgment was pronounced against both and Edwards was adjudged to be an habitual criminal. A motion for a new trial was interposed by both and denied, and both appealed, though separately, from the judgment and from the order denying a new trial.

McConnell has not pursued his appeal, but Edwards, appearing personally, urges before this court that his adjudication as an habitual criminal was erroneous. While his briefs do not set forth very clearly the grounds for this contention, apparently they are that as his conviction in this state was for robbery of the second degree he was not a person subject to adjudication as an habitual criminal under section 644 of the Penal Code; second, that the first prior, "auto theft", is not one of the felonies enumerated in said section; and third, that his service of sentence was in the Kansas Industrial Reformatory which is not a state prison, and that he is for that reason also excluded from the provisions of that section.

[1] In the recent case of *People v. Stein*, 31 Cal.2d 630, 191 P.2d 409, it was held that section 644 enumerates burglary without mention of the degree of the crime and therefore the degree is not material. Also see *In re Tedford*, 31 Cal.2d 693, 192 P.2d 3.

[2, 3] Answering the second point raised, and taking judicial notice of the laws of Kansas as we are authorized to do (Code Civ.Proc., sec. 1875, subd. (3); *In re McVickers*, 29 Cal.2d 264, 274, 278, 176 P.2d 40), the theft of an automobile was a felony in Kansas (Gen.Stats. of Kan. Anno. Corrick (1935) secs. 21-533 and 21-534) in 1928 when defendant's offense was committed there, and it constituted grand theft as defined in section 487 of our Penal Code; and in 1947, when defendant was convicted of robbery in California, grand theft was, and now is, included in section 644, supra. Therefore, under the decisions in *Re McVickers*, supra, and *In re Harincar*, 29 Cal. 2d 403, 176 P.2d 58, the conviction of auto theft in Kansas was properly considered in adjudicating appellant an habitual criminal.

[4] As for appellant's contention that imprisonment in the Kansas Industrial Reformatory does not constitute imprisonment in a state prison, within the provisions of section 644, supra, recent decisions of our Supreme Court are to the contrary. See *In re Gilliam*, 26 Cal.2d 860, 161 P.2d 793; *In re Loncaric*, 71 Cal.App.2d 144, 162 P.2d 313; *People v. Stein*, supra.

[5] Appellant also urges that at his trial on the primary offense, the court should have tried the issue presented by the amended information regarding the two alleged priors. There is no merit in this contention since defendant admitted them. *People v. De Soto*, 33 Cal.App.2d 478, 481, 92 P.2d 466. Section 1025 of the Penal Code specifically provides that if a defendant admits the commission of the prior offenses, the charge of such convictions must not be read to the jury, nor alluded to on the trial. See *People v. Hobbs*, 37 Cal.App. 2d 8, 98 P.2d 775.

[6, 7] In his closing brief appellant raises points not made in his opening brief, and sets forth what he designates as statements of fact regarding his prior offenses—that he was a minor at the time of their commission, that the district attorney advised him to plead guilty on the promise of probation, that he had no legal counsel, and that the trial court erred in not ascertaining the degree or validity of such offenses. The general rule is that matters not raised in an opening brief may not be raised in a closing brief. *People v. Todd*, 9 Cal.App. 2d 237, 245, 49 P.2d 611. But even if that rule be disregarded, appellant's contentions may not be considered here for the reason set forth in *Re Norcutt*, 31 Cal.2d 743, 192 P.2d 453, 454, that: "The courts of this state cannot 'take evidence to prove, and upon that evidence adjudicate for themselves, that a defendant was not guilty of a crime with which he had been charged, for which he had been tried or to which he had pleaded guilty, and of which he had been convicted in another state.' *In re Wolfson*, 1947, 30 Cal.2d 20, 31, 180 P.2d 326, 333."

The judgment and the order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concur.

86 Cal.App.2d 696

WOLFE v. HELLER.

Civ. 16131.

District Court of Appeal, Second District,
Division 3, California.

July 9, 1948.

1. Vendor and purchaser ⇨334(1)

The purchaser was not entitled to recover deposit made outside of escrow as part of purchase price of realty on ground that submission by purchaser and vendor of escrow instructions which differed in substantial particulars established non-existence of any contract between parties, where purchaser's letter transmitting deposit to defendant referred only to vendor's instructions and referred to "our agreement" and stated that deposit might be retained as liquidated damages if purchaser did not complete the escrow.

2. Vendor and purchaser ⇨186

Where it was reasonable to infer from circumstances that purchaser had been aware of assignment of a portion of lease income of property involved and, in any event, purchaser had constructive knowledge of recorded assignment, existence of assignment did not justify purchaser's failure to complete escrow in connection with purchase of property.

3. Damages ⇨81

A three months' option to purchase valuable property constituted a sufficient consideration for purchaser's deposit of a portion of purchase price with agreement that deposit might be retained as liquidated damages if escrow was not completed.

4. Damages ⇨81

Where prospective purchaser of property of approximate value of \$130,000 was given three months' option to purchase, agreement that \$2,500 deposit made by purchaser on purchase price might be retained by vendor as liquidated damages if purchaser did not complete the escrow was valid. Civ.Code, § 1671.

tiff to the defendant as part of the purchase price of real property. Judgment for the defendant, and the plaintiff appeals.

Judgment affirmed.

Martin Goldman and Leo A. Freeman, both of Los Angeles, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent.

WOOD, Justice.

This is an action to recover \$2500 which was paid by plaintiff to defendant as part of the purchase price of real property, upon the understanding that said amount might be retained by defendant as liquidated damages in the event plaintiff did not complete an escrow. Judgment was for defendant, and plaintiff appeals.

On July 14, 1944, defendant signed escrow instructions, No. 72-12228, which named the Long Beach branch of the Bank of America escrow holder, and which set forth the terms of sale of the property by defendant to plaintiff. The instructions recited that the purchase price was \$130,000, that plaintiff should pay \$27,500 into escrow, and pay \$2500 outside of escrow, and assume a mortgage of \$100,000; and that if the escrow holder should be unable to comply with the instructions on or prior to October 14, 1944, it should comply as soon thereafter as possible unless a written demand for return of money or instruments be made by a party to the escrow. The instructions also recited "It is also further understood that these instructions are not to become binding upon me until such time as I have received the sum of \$2500.00 outside of escrow on or before July 24, 1944, and upon receipt of said sum, I will notify you in writing." Those instructions were not signed by the plaintiff. On July 15, 1944, plaintiff signed other escrow instructions, No. 362-9186, which named the Wilshire-Western branch of the Bank of America escrow holder. These instructions were not signed by the defendant, and they were different in substantial respects from those signed by defendant. One of those differences was that plaintiff's instructions included a provision to the effect that defendant should assign to plaintiff "the existing lease covering

Appeal from Superior Court, Los Angeles County; Joseph M. Maltby, Judge.

Action by Jean Wolfe against Rosa Heller to recover \$2,500 paid by the plain-

the subject property." Plaintiff's instructions did state, however, that \$2500 had been "paid to seller outside of this escrow." On the same day, July 15th, the Wilshire-Western branch of the bank, hereinafter referred to as the Wilshire branch, wrote a letter to the Long Beach branch, enclosing a copy of plaintiff's escrow instructions and a certified check of one A. Bisno for \$2500. In that letter the escrow instructions of both plaintiff and defendant were referred to by writing the numbers of both escrows at the top of the letter, and it was stated therein that the \$2500 check should be delivered to defendant, and that the \$2500 was the "sum referred to in the buyer's instructions as paid outside of escrow." That check was returned to the Wilshire branch, and thereafter on July 19, 1944, the plaintiff wrote a letter to defendant, enclosing the same check for \$2500, and referring to defendant's escrow number only. That letter was as follows:

"July 19, 1944.

Mrs. Rosa Heller,
c/o Bank of America,
4th & Pine,
Long Beach, California

Attention Mr. C. A. Swope

In Re: Escrow No. 74-12228.

Dear Sir:

This will be your authority to accept the check in the sum of Twenty-five Hundred Dollars paid to you outside of escrow in connection with the purchase of the property in Santa Barbara, California, occupied by Montgomery Ward & Company upon the understanding that in the event the purchaser does not complete the escrow this amount may be retained by you as liquidated damages.

The check signed by A. Bisno has been forwarded to you through Mr. Swope which is the \$2500.00 provided for by our agreement.

Yours very truly,
Jean Wolfe
Jean Wolfe."

On July 20, 1944, defendant wrote a letter to the Long Beach branch notifying it that she had "received a certified check for \$2500.00 as payment out of escrow referred to in your escrow No. 74-12228 be-

tween me and Jean Wolfe." There were various written communications thereafter between the banks relating to documents necessary to close the escrow. The documents referred to therein included a letter, dated October 3, 1944, written by the Wilshire branch requesting a grant deed, copy of the lease, assignment of said lease, and other documents. On October 5, 1944, the Long Beach branch wrote a letter to the Wilshire branch, enclosing a grant deed, statements of identity made by defendant and plaintiff, a rent statement signed by defendant, and tax bills; and stating that defendant would endeavor to deliver the lease and assignment of lease into escrow the next day. It does not appear that there were any further proceedings in escrow, and it does not appear that plaintiff performed any of the obligations on her part to be performed, except the payment of \$2500. On October 17, 1944, plaintiff's attorney wrote a letter to defendant in which he stated as follows: "I have examined the documents that were sent to the Los Angeles Escrow and discovered that there had been an assignment of a portion of the lease income to the Pacific Mutual Life Insurance Company. It appears, therefore, that there can be no compliance with Jean Wolfe's demand for an assignment by the seller of the existing lease. * * * and because the transaction as agreed upon cannot be completed through no fault of the purchaser, demand is hereby made upon you for the return of the \$2500, paid outside of escrow." This action was filed on March 4, 1946.

[1] Appellant contends that there was no meeting of the minds, and that no contract existed between the parties. It is true, as argued by appellant, that the escrow instructions of plaintiff and defendant, being different in substantial respects, did not constitute an agreement between them. It appears, however, from other circumstances that there was an agreement between the parties regarding the conditions under which plaintiff paid the \$2500 to defendant; and that defendant was entitled to retain the \$2500. The court found that on July 19, 1944, plaintiff paid \$2500 to defendant by transmitting said sum by said letter, hereinabove quoted,

specifying therein the conditions under which plaintiff paid said sum to defendant; that no further payment was made to defendant by plaintiff; that defendant fully performed every act on defendant's part to be performed; and that plaintiff never completed the escrow referred to in said letter of July 19, 1944. After the \$2500 check, which accompanied plaintiff's instructions, had been returned, the plaintiff wrote the said letter of July 19th to defendant and enclosed therein the same check which had been returned. In that letter she referred to defendant's instructions only and stated that if plaintiff did "not complete the escrow" the said \$2500 might be retained by defendant as liquidated damages. Also in that letter defendant said that the check "is the \$2500.00 provided for by our agreement." It is to be noted that defendant's instructions provided that her instructions were "not to become binding" upon the defendant unless she received \$2500 outside escrow on or before July 24, 1944. It appears from plaintiff's letter of July 19th that she intended, by paying the \$2500, to comply with said provision of defendant's instructions, and that it was her intention that defendant should, by the acceptance of the \$2500, become bound by defendant's instructions. Defendant accepted the check for \$2500 on July 20, 1944, and thereby became bound to perform all the conditions on her part to be performed under her escrow instructions. One of those conditions was that she should keep the escrow open at least until October 14th—a period of approximately three months—and during that time she should hold the valuable real property available for transfer to plaintiff. During that period of time she held the property available for plaintiff, delivered into escrow certain documents including a grant deed wherein plaintiff was grantee, and performed all other conditions on her part to be performed under her escrow instructions. As above shown, plaintiff did nothing toward completing the escrow with the exception of paying the \$2500. She did not deposit in escrow, or offer to deposit therein, any part of the balance of \$27,500 required by the escrow.

The findings of the court are supported by the evidence.

[2] The matter of the assignment of "a portion of the lease income," referred to in the letter of October 17th by plaintiff's attorney—written four days after the stated time for closing the escrow, is not justification for plaintiff's failure to complete the escrow. Although appellant does not contend in her briefs that said assignment is such justification, that matter of the assignment should be referred to. Defendant's escrow instructions state that the rents should be prorated as of the date of close of escrow, thereby indicating that it was contemplated by defendant that the lease would be transferred to plaintiff either by conveying the property by grant deed or by making a specific assignment of the lease. Defendant has not contended that the lease was not to be transferred to plaintiff. Plaintiff did not testify that she did not have actual knowledge of the assignment of the rent when she paid the \$2500. At the time the transaction was entered into plaintiff knew the provisions of the lease. In the proposed instructions signed by plaintiff she said: "I hereby waive approval of said lease in this Escrow as the terms thereof are familiar to me and are satisfactory." It is to be assumed that she also had knowledge of the assignment of the rent. In 1940 defendant made and recorded the assignment of the rent as security for the payment of the \$100,000 encumbrance on the property, and it was provided in the assignment that it should not interfere with the lessor's collection of the rent so long as there was no default under the encumbrance and so long as the rent was collected only one month in advance. Also in 1940, on the same day the assignment was made, she made a written agreement that if 40 per cent of the annual percentage rental exceeded \$2000 she would pay such excess to the encumbrance holder, the Pacific Mutual Life Insurance Company, to apply on said indebtedness. That agreement was also recorded in 1940, on the same day the assignment was recorded. In view of plaintiff's statement, that she was familiar with the terms of the lease and that they

were satisfactory and that she waived approval of the lease in escrow, and in view of the fact that she did not testify that she did not know of the assignment and agreement when she entered into the transaction, it is reasonable to infer that, in addition to her constructive knowledge of the recorded assignment and agreement, she had actual knowledge regarding them. Even if she had only constructive knowledge regarding them, she is not in a position to contend, as stated in her letter of October 17th, that by reason of the written assignment she should recover the \$2500.

[3] It is not clear why plaintiff opened another escrow at a place other than the place where defendant started the escrow for the transaction herein. Such method makes it more difficult to ascertain the contractual obligations, if any, between the parties. It also affords a prospective buyer an opportunity to avoid being bound by contract to purchase the property, and to avoid liability in the event he later elects to abandon the transaction. Plaintiff now argues in effect that the different escrows and the letter created such confusion, ambiguity, and uncertainty that there was no meeting of the minds of the parties, and that no contract was made. It is clear, however, from plaintiff's letter of July 19th, that plaintiff paid the \$2500 to defendant, pursuant to the provisions of defendant's instructions, and upon the condition that said sum might be retained by defendant as liquidated damages if plaintiff did not complete the escrow which was started by defendant. It is also clear that defendant accepted the \$2500 upon that condition. By reason of that letter and the payment of the \$2500 in connection with defendant's escrow instructions, plaintiff caused the defendant to hold this valuable property available for plaintiff for a period of approximately three months. The result of the transaction, insofar as plaintiff was concerned, was that plaintiff, without being bound by contract to purchase the property, obtained the privilege of purchasing the property within a period of approximately three months. Appellant's contention that there was no consideration for the payment of the \$2500 is not

sustained. The privilege of purchasing the property within said period of time was a sufficient consideration.

[4] An agreement regarding liquidated damages is valid "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages." (Civil Code, sec. 1671.) The provision as to liquidated damages in the agreement here involved is valid. The property was of the approximate value of \$130,000, and defendant was deprived of the right to sell it to anyone other than plaintiff for a period of approximately three months.

The judgment is affirmed.

SHINN, Acting P. J., and McCOMB, J. (Assigned), concur.



86 Cal.App.2d 355

BASKETT v. CROOK.

Civ. 7494.

District Court of Appeal, Third District,
California.

June 22, 1948.

I. Contracts ⇐28(3)
Joint adventures ⇐1
Marriage ⇐50(5)
Partnership ⇐53
Property ⇐9
United States ⇐91

Findings that plaintiff and defendant had not lived together as husband and wife, that they had not engaged in any joint business enterprise or copartnership, that there was no agreement between them with respect to ownership of any real or personal properties except that United States war bonds in the sum of \$1,200 were placed in their joint names, that plaintiff had no interest in any of the other real or personal property involved, and that plaintiff was entitled only to one-half interest in such bonds, were sustained by the evidence.

2. Gifts Ⓒ47(1)**Payment** Ⓒ65(1)

Where plaintiff and defendant lived together but business and property were owned by defendant and there was no evidence that defendant ever agreed to give or convey any of the property to plaintiff on account of his contributions, services, relationship, or otherwise, presumption was that plaintiff's labor and contributions from his pay checks were intended as payments for his share of living expenses or as gifts.

3. Property Ⓒ9

Where plaintiff and defendant lived together but business and property were owned by defendant and there was no evidence that defendant ever agreed to give or convey any of the property to plaintiff on account of his contributions, services, relationship, or otherwise, money paid to defendant and expended by her or deposited in her bank account over which she had exclusive control must be presumed to belong to her.

4. Equity Ⓒ25

Where, according to plaintiff's testimony, relationship between plaintiff and defendant was knowingly illicit without any agreement with respect to property rights, equity would afford plaintiff no remedy under such circumstances.

5. Husband and wife Ⓒ248

In the absence of a valid subsisting marriage, community interest in property cannot be acquired. Civ.Code, §§ 164, 687.

6. Joint tenancy Ⓒ3

Where there is no genuine belief of either party that they are married and living together as husband and wife, in the absence of an agreement or other evidence of ownership, they may not be deemed to be joint tenants or cotenants in the property acquired by either of them during that relationship.

7. Trusts Ⓒ89(1)

Mere proof that plaintiff and defendant lived together but that business and property were owned by defendant and that defendant worked in the business, and that later, while in separate employment, he turned over part of his earnings to defend-

ant, was insufficient to show a resulting trust in property in favor of plaintiff.

8. Trusts Ⓒ89(4)

Clear and conclusive evidence is required to establish a resulting trust in either real or personal property.

9. Trusts Ⓒ86

It is necessary to show that it was the intention of the parties to create a resulting trust.

10. Property Ⓒ9

The presumption is that the holder of the title to property is the owner thereof.

11. Trusts Ⓒ89(2)

The amount of money contributed to particular property by the claimant must definitely appear in order to enforce a resulting trust in his favor.

12. Appeal and error Ⓒ172(1)

That a resulting trust existed in appellant's favor could not be asserted for the first time on appeal.

13. Appeal and error Ⓒ171(1)

A reviewing court should adhere to the theory upon which a case was tried and determined by the trial court.

14. Appeal and error Ⓒ882(3)

A litigant may not change his position and adopt a different theory of action for the first time on appeal.

Appeal from Superior Court, El Darado County; George H. Thompson, Judge.

Action by Charles Baskett against Pearl Crook, formerly known as Pearl DeMers, for a decree determining plaintiff's interest in certain property and for partition and sale of real property and for other relief. From the judgment entered, the plaintiff appeals.

Judgment affirmed.

Charles H. Baldwin, of Richmond, for appellant.

Henry S. Lyon, of Placerville, for respondent.

THOMPSON, Justice.

The complaint alleges that plaintiff and defendant, while living together as hus-

band and wife, acquired, by their joint efforts, specified real and personal properties which they own as tenants in common, and which are in the possession of the defendant; that she thereafter married another man and, upon demand, refuses to convey or deliver any of said property to plaintiff. The plaintiff prays for a decree determining his interest in the property, and for partition and sale of the real property and conveyance to him of his share thereof.

The evidence shows that plaintiff and defendant first met at a dance in Oakland in 1939. He was then a married man who was separated from his wife. He was not then employed. Mrs. De Mers was a widow. She owned and operated a small grocery store in Oakland. There were living rooms in the store building. She also owned household goods, a Ford automobile, a small sum of money she had inherited from her husband's estate, and two Prudential Life insurance policies which she afterward cashed for the aggregate sum of \$1,050. The plaintiff had no money or property. By common consent the plaintiff occupied a room in the store building and helped the defendant in household duties and in waiting on customers. There was no agreement of the parties to marry and no agreement with respect to property rights. The plaintiff testified that they lived together as husband and wife without any pretense of marriage. The defendant testified that they did not live together as husband and wife, but lived in separate rooms, and that she never agreed that plaintiff should have any portion of the real or personal property or of the proceeds of the business. The defendant kept her own bank account, conducted her own business, personally negotiated her own sales and purchases of properties and paid the bills. The real property, store business and automobiles were held in her own name. After about one year the defendant sold her store for \$600 and purchased another small store in her own name. The parties occupied rooms in that store building under circumstances similar to those previously existing. After about two years the plaintiff secured employment with Western Dye Company at \$35 per week.

Later he was employed by Dobeckmun & Company, in Berkeley, at \$240 per month. He turned over his pay checks, or a part of them, to the defendant, who paid expenses with some and may have deposited a portion thereof in her bank account. The last mentioned store business was also sold by the defendant for about \$600.

The defendant bought a cottage in Richmond in 1943 for \$750. She negotiated the purchase and paid for it with her own funds. Some of the cash received from her life insurance policies went into the purchase and improvements of that property. The plaintiff performed services in remodeling that house. They lived in that home for sometime as they had previously lived. The mother of the defendant also lived there with them. The defendant bought a new Ford sedan automobile for \$1,100, applying her old machine upon the purchase price at a valuation of \$275. It was bought and licensed in her name. In 1945, the defendant sold the Richmond home for \$3,100 cash. With a part of that money she purchased United States War bonds in the amount of \$1,200, which bonds she placed in the joint names of both of them. The balance of that money was placed in her own bank account. Until the commencement of this suit the plaintiff never claimed any interest in any of said properties, nor interfered in any manner with defendant's business transactions. In 1945, after the plaintiff was employed, he remained away from Richmond, except that he said he returned for the weekends. Without consulting the plaintiff or informing him of her intentions, the defendant married Mr. Crook. The plaintiff thereafter wrote her two letters, in neither of which he claimed any interest in the properties. This suit was commenced in June, 1946.

The court found that plaintiff and defendant did not live together as husband and wife, or hold themselves out as such; that they were not engaged in any joint business enterprise or copartnership; that there was no agreement between them with respect to the ownership of any of the real or personal properties involved in the action, except that the United States War bonds in the sum of \$1,200 were placed in

their joint names; that plaintiff had no right, title or interest in any other real or personal property, including the grocery businesses and the Richmond real property, except one-half interest in said bonds, and that the defendant is the sole owner and entitled to possession of all other properties of every character and nature. Judgment was accordingly rendered, awarding plaintiff one-half of said bonds, and determining that the defendant is the owner and entitled to all other properties and the proceeds thereof." From that judgment the plaintiff has appealed.

The appellant asserts that the findings and judgment are not supported by the evidence, and that the real and personal properties were acquired by the joint efforts and contributions of funds of both parties while they lived together and held themselves out as husband and wife. For the first time, on appeal, the plaintiff claims that a resulting trust was created in his favor in one-half of all real and personal properties.

[1-3] We are of the opinion the findings and judgment are adequately supported by the evidence. The grocery businesses, the automobiles and the real property involved in this action belonged to the defendant. They were purchased by her and were held in her name. She maintained her bank account in her own name. She individually negotiated all purchases of real and personal properties, and conducted the businesses. There is no evidence defendant ever agreed to give or convey any of said property to plaintiff on account of his contributions, services, relationship, or otherwise. In the absence of evidence to the contrary, we must assume his labor and contributions from his pay checks were intended as payments for his share of the living expenses or as gifts. The money paid to defendant and expended by her or deposited in her bank account, over which she had exclusive control, must be presumed to belong to her. *De Hart v. Allen*, 43 Cal.App.2d 479, 111 P.2d 342. The war bonds, which were purchased by the defendant in the joint names of both parties, were divided equally between them.

[4-6] There is no evidence of a putative or common-law marriage in this case,

or that the parties in good faith believed themselves to be married or held themselves out to the public as husband and wife. Nor is there evidence that they ever intended to become married. The defendant testified that they did not hold themselves out as husband and wife, and that they did not live together as such. According to plaintiff's testimony, their relationship was knowingly illicit, without any agreement with respect to property rights. Equity affords no remedy for a meretricious joint adventure under such circumstances. There were no community interests acquired in the property. Community interests in property may not be acquired under Sections 164 or 687 of the Civil Code, by a man and woman who knowingly live together without marriage, under a void marriage or in meretricious relationship. In the absence of a valid, subsisting marriage, community interests in property cannot be acquired. *Feig v. Bank of Italy*, 218 Cal. 54, 56, 21 P.2d 421; *Schneider v. Schneider*, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386; *Santos v. Santos*, 32 Cal. App.2d 62, 89 P.2d 164; *Macchi v. La Rocca*, 54 Cal.App. 98, 201 P. 143. It is true that, in the absence of a definite agreement, when a man and woman live together as husband and wife, believing in good faith that they are married, the property which they acquire by their joint efforts may be equitably distributed between them as cotenants. *Vallera v. Vallera*, 21 Cal. 2d 681, 684, 134 P.2d 761; *Santos v. Santos*, supra; *Macchi v. La Rocca*, supra. When there is no genuine belief of either party that they are married and living together as husband and wife, in the absence of an agreement or other evidence of ownership, they may not be deemed to be joint tenants or cotenants in the property acquired by either of them during that relationship. *Oakley v. Oakley*, 82 Cal.App.2d 188, 192, 185 P.2d 848; *Vallera v. Vallera*, supra. In the *Vallera* case last cited, the plaintiff brought suit for separate maintenance and for a division of community property. She had lived and cohabited with the defendant for three years without marriage and without any agreement with respect to property acquired by them. She knew that he was then married to another woman.

Marian Vallera relied on her evidence of a "common law marriage." The trial court found that they were not married, that their relationship was meretricious, that there was no community property involved, but determined that they were tenants in common in the property which they acquired during that period, and distributed one-half interest therein to each of them. On appeal the Supreme Court reversed that judgment. The court said [21 Cal.2d 681, 134 P.2d 762]:

"* * * The controversy is thus reduced to the question whether a woman living with a man as his wife but with no genuine belief that she is legally married to him acquires by reason of cohabitation alone the rights of a co-tenant in his earnings and accumulations during the period of their relationship. It has already been answered in the negative. *Flanagan v. Capital Nat. Bank*, 213 Cal. 664, 3 P.2d 307. Equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith are not present in such a case.

"Plaintiff's lack of good faith in alleging the belief that she had entered into a valid marriage would not, however, preclude her from recovering property to which she would otherwise be entitled. If a man and a woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property. [Citing authorities.] * * * There is no evidence that the parties in the present case made any agreement concerning their property or property rights." (Italics added.)

In this case the evidence affirmatively shows that no agreement was ever made between the parties with respect to their earnings or to the property acquired, except that the United States War Bonds in the sum of \$1,200 were purchased in their joint names. But one-half of those bonds was awarded to the plaintiff, of which award the defendant does not complain. There is no evidence in this case that any of plaintiff's pay checks or earnings were invested in the properties in question. It does appear that an unspecified amount of

his wages for a short period was turned over to the defendant, a part of which she says she may have deposited in her bank account. But from that account she drew checks and paid bills for their maintenance and other expenses. Not a dollar of plaintiff's wages was traced to any property which was purchased by the defendant. There is no evidence upon which an equitable distribution of any sum of money or property could be made to the plaintiff.

In the Oakley case, supra [82 Cal.App.2d 188, 185 P.2d 849], a marriage ceremony was performed between the parties in Mexico. They returned to California where they lived together as husband and wife for nearly five years. That purported marriage was void. The plaintiff brought suit for divorce and for \$5,000 as the reasonable value of her services while she lived with the defendant. He filed an answer and cross complaint asking for a divorce. The evidence was conflicting. The trial court denied her application for divorce and refused to grant her a judgment for her services. The court found that she "has performed no services for defendant while believing she was his legitimate wife." Judgment rescinding the purported marriage was granted the defendant on his cross complaint. From that judgment the defendant appealed, contending that she was entitled to compensation for her services. On appeal the judgment was affirmed. The court said:

"In the absence of an agreement between plaintiff and defendant for the division of his earnings or for the payment by him to her of a stated sum or for the reasonable value of her services to him over and above the value of the support and maintenance which he furnished her, she is not entitled to a judgment therefor. There is no evidence of any such agreement between them. Where, as here, both parties knowingly participated in the fraudulent marriage the trial court properly rendered judgment annulling the marriage but otherwise, as a court of equity, refused further relief, leaving them in the position in which they had placed themselves."

The principle determined in the Oakley case is directly applicable to the circum-

stances of this case. See 35 Am.Jur. 219, sec. 55.

[7-11] Finally the appellant contends, for the first time on appeal, that a resulting trust was created in the property in his favor. But there is a total absence of evidence to support that contention. Clear and conclusive evidence is required to establish a resulting trust in either real or personal property. *Stromerson v. Averill*, 22 Cal.2d 808, 815, 141 P.2d 732; *Rench v. McMullen*, 82 Cal.App.2d 872, 187 P.2d 111; 23 A.L.R. 1500, note. It is necessary to show that it was the *intention* of the parties to create the trust. The presumption is indulged that the holder of the title to property is the owner thereof. *Woodside v. Hewel*, 109 Cal. 481, 42 P. 152; 25 Cal. Jur. 247, sec. 114. The amount of money contributed to particular property by the claimant must definitely appear to enforce a resulting trust in his favor. 25 Cal.Jur. 190, sec. 57. In *Bertelsen v. Bertelsen*, 7 Cal.App. 258, 94 P. 80, upon facts similar to those of the present case, the parties lived "as man and wife," in illicit relations, without marriage, for a period of three years. He gave her \$700 with which to buy a rooming house to which she took title. She exchanged that property for Los Angeles real property which was also conveyed to her. He subsequently gave her \$860 with which she bought another rooming house in her own name. He had knowledge of those transactions, and failed to complain of her taking title in her name until after their separation. He then brought suit to establish a resulting trust in the properties. The trial court denied the relief sought. Plaintiff appealed. The judgment was affirmed. The District Court of Appeal said:

"We think the court properly refused the relief. We would not be inclined, even if the findings that the sums of money paid defendant were in the nature of a gift were not entirely supported by the evidence, to disturb the judgment. The whole transaction seems to have for its basis payments in consideration of a continued course of prostitution. But, aside from this, there is ample evidence to support the finding that

the sums paid defendant by plaintiff were in the nature of a gift, from which it follows that the proceeds of such money became the defendant's property."

[12-14] Moreover, it is too late to inject into this case a new theory of the creation of an asserted resulting trust for the first time on appeal. A resulting trust was not pleaded, nor do the evidence or findings support that theory. The record of the trial discloses no reference to the subject of resulting trusts. That theory was not called to the attention of the trial court. This case was tried on the theory that plaintiff and defendant acquired the property in question by their joint earnings and contributions while they were living together as husband and wife. No agreement with respect to the property or a division thereof was alleged or proved. No specific amount of plaintiff's money was alleged or proved to have been contributed toward the purchase of any specified property. None of the money from his pay checks was traced to any of the properties in question. A resulting trust was not involved in this trial. A reviewing court should adhere to the theory upon which a cause is tried and determined by the trial court. A litigant may not change his position and adopt a different theory of action for the first time on appeal. *Munfrey v. Cleary*, 75 Cal.App.2d 779, 785, 171 P.2d 750; *Martin v. Diaz*, 124 Cal.App. 200, 205, 12 P.2d 57; 2 Cal.Jur. 237, sec. 68.

In the *Munfrey* case, *supra* [75 Cal.App. 2d 779, 171 P.2d 753], this court said in that respect:

"Also as a general rule where a case has been tried upon one theory that theory must be adhered to on appeal, and a party who has tried his case wholly or in part on a certain theory, which theory was acted upon by the trial court, cannot, on appeal, change his position and adopt a different theory, since to do so would be unfair to the trial court and to opposing counsel. [Citing authorities.]"

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

86 Cal.App.2d 664

PEARSON v. HILL et al.

Civ. 16274.

District Court of Appeal, Second District,
Division 1, California.

July 9, 1948.

1. War ☞4

In action by buyer to quiet title to trucks and trailers and for declaratory relief, evidence among other things, as to contract of sale coupled with an agreement by seller to furnish freight and other merchandise to be hauled and transported by buyer supported finding that seller intended to and did charge in excess of prices prescribed by maximum price regulation. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

2. Sales ☞1(4)

Where agreement incorporated in contract for sale of trucks and trailers, to furnish freight and other merchandise to be hauled by buyer, prescribed no minimum amount of freight to be furnished, nor type thereof, nor where it was to be carried, nor rates to be paid, and did not bind seller to furnish any minimum tonnage or sufficient freight to keep trucks working to capacity, agreement by seller was so uncertain as to be unenforceable, particularly where buyer was not bound to accept such freight as might be furnished and agreement could be cancelled on six months notice.

3. War ☞4

Transaction in which buyer agreed to pay approximately \$3,400 over ceiling price of trucks and trailers in return for agreement by seller to furnish an unspecified and unascertainable amount of hauling business for period of time which could be as short as six months violated Emergency Price Control Act. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

4. Appeal and error ☞782

Attempted appeal from order denying motion for new trial would be dismissed.

Action by C. R. Pearson against Herb Hill and others to quiet title and for declaratory relief. Judgment for plaintiff and defendants appeal.

Affirmed.

Milton B. Safier, of Los Angeles, and S. W. Spizer, of Huntington Park, for appellants.

Hazlett & Plummer and John N. Burt, all of Los Angeles, for respondent.

WHITE, Justice.

Defendants have appealed from a judgment against them after trial before the court without a jury in an action to quiet title to certain trucks and trailers and for declaratory relief.

Defendant Hill operated a trucking business in Los Angeles. In May, 1946, he advertised in a newspaper substantially as follows: "Bobtails plus five year contract permanent, better than wages. Hill Transportation, 8022 Beach Street." In response to the advertisement plaintiff visited defendant Hill's place of business and purchased two trucks or "tractors" and two trailers. The transaction was evidenced by a contract which, so far as here material, provided as follows:

"Whereas, First Party (defendant Hill) is the owner and operator of that certain transportation business known as 'Hill Transportation'; and

"Whereas, the parties hereto have agreed upon the sale of certain equipment by First Party to Second Party (plaintiff) and the hauling and transportation of freight and merchandise by Second Party for First Party upon the terms and conditions hereinafter set forth;

"Now, Therefore, in consideration of the mutual promises and covenants herein contained, the parties hereby agree as follows:

"1. First Party hereby agrees to sell to Second Party and Second Party agrees to buy from First Party one (1) 1935 International Tractor, bearing Engine No. FAB 16886; one (1) 1934 GMC trailer, bearing Serial No. BB 1164; one (1) 1940 Ford 8 Tractor, bearing Engine No. 99T-226631, and one (1) 1936 Spencer trailer, bearing Serial No. X61586.

Appeal from Superior Court, Los Angeles County; Paul Vallee, Judge.

"2. First Party hereby agrees to furnish freight and other merchandise to be hauled and transported by Second Party for a term of five (5) years from date hereof. Second Party shall pay all expenses, cost of repairs, maintenance, and public liability and property damage insurance on said equipment.

"3. It is agreed that First Party shall retain Twenty per cent (20%) of the gross proceeds of such hauling and transportation and to pay the Board of Equalization and California Railroad Commission taxes and to keep full, correct and proper books of accounts of the transactions of the parties.

"4. That as consideration for the foregoing, Second Party hereby agrees to pay to First Party the sum of Six Thousand six hundred thirty-nine and 95/100 Dollars (\$6,639.95) in the following manner: Two thousand and no/100 Dollars (\$2,000.00) upon the execution of this agreement, the receipt whereof is hereby acknowledged, and the balance of Four thousand six hundred thirty-nine and 95/100 Dollars (\$4,639.95) payable at the rate of Three hundred nine and 33/100 dollars (\$309.33) per month on the 1st day of each calendar month commencing July 1, 1946. All of the foregoing payments shall be made to Walt Kidd Finance Co., 570 N. Lake Avenue, Pasadena 4, California.

"5. In the event that Second Party shall default in any payment as herein provided, the entire unpaid balance shall become immediately due and payable at the option of First Party and First Party may immediately retake possession of the trucks and trailers without securing an order of court and all of the rights of the Second Party in and to said trucks and trailers shall be terminated and all payments made shall be retained by First Party as and for the use of said equipment.

"6. Either party hereto may terminate this agreement to haul freight and merchandise upon giving Six (6) months notice in writing to the other party."

The Office of Price Administration ceiling price for the four pieces of equipment thus purchased was \$2,585.64. After entering into the agreement plaintiff paid two

installments of \$309.33 each to the Walt Kidd Finance Company, making a total payment under the contract of \$2,618.66. He made no further installment payments, but in September, 1946, commenced the instant action, seeking in his first cause of action to quiet title to the vehicles. In the second cause of action he set forth the making of the contract, the enactment of the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, § 901 et seq., and the issuance of Maximum Price Regulation No. 341. He further alleged that he had paid more than the ceiling price for the vehicles; that as a condition for the sale the defendant required plaintiff to agree to the hauling agreement (paragraph 2 of the contract above set forth); that defendants knew there was no scarcity in demand for hauling and no bona fide need for the hauling agreement; that when the contract was executed defendants knew of the ceiling prices on the equipment and that plaintiff did not know; and that a controversy existed between the parties.

The trial court found that the Walt Kidd Finance Company was the lending agent of defendant Hill; that concurrently with the execution of the contract above set forth plaintiff paid to defendant Hill \$2,000, and thereafter paid to Walt Kidd Finance Company \$618.66, and that such payments were made pursuant to the contract; that under Maximum Price Regulation No. 341 (8 Fed. Reg. 11176) the ceiling price of the equipment purchased was \$2,585.64; that defendant Hill committed a violation of section 11 of Maximum Price Regulation No. 341, in charging plaintiff a price in excess of \$2,585.64; that defendant Hill required plaintiff to finance the purchase through a particular lending agency, to-wit, defendant Walt Kidd operating as Walt Kidd Finance Company, which was prohibited by Maximum Price Regulation No. 341. The court further found that it was not true that defendant Hill required plaintiff to purchase any services so as to increase the total payments above the ceiling price or required plaintiff to purchase any other commodity or service in connection with the purchase of the equipment; but that in connection with the transaction defendant Hill intended to charge in excess

of the ceiling price established under the regulation and knew or should have known of the provisions of such regulation, and intended to violate the same. As conclusions of law, the court found that plaintiff was the owner of the vehicles in question; that defendants had no interest therein; and that plaintiff was under no further obligation to defendants. Judgment was entered accordingly.

Appellants rely for reversal upon the following points: (1) that the evidence is insufficient to sustain the judgment and the court erred in denying a nonsuit; (2) that the judgment and findings are contrary to the facts and contrary to law. It is urged that there was no violation of the Maximum Price Regulation for the reason that the parties did not primarily enter into an agreement for the sale of equipment, but into "a business contract for the sale of trucks and trailers along with a 5-year contract for the furnishing of material for hauling and shipping."; that the contract is not severable—the agreement for the sale and the agreement for the furnishing of material to be hauled are interdependent, and "it cannot be said that so much of the consideration was for the one and so much for the other; the entire contract was but one deal." In order to sustain the judgment, argue appellants, the trial court would have to find that the entire consideration was in payment solely for the equipment and none for the furnishing of freight to be hauled. "And in fact, the court does so find. * * * The evidence, in fact, is to the effect that the consideration of \$6,639.95 was for the entire contract, including both the equipment and the agreement to furnish materials for hauling." Additional facts relied upon by appellants are that defendant Hill was not in the used truck business, but in the business of hauling and shipping; that there is no evidence that plaintiff desired to buy the equipment independently of the hauling contract or had any use for the trucks other than in connection with the hauling business to be provided by defendant Hill, or that Hill would sell equipment independently of a hauling contract. Appellants draw the analogy of a person who buys a going business consisting of a building, equipment, accounts, good will and delivery trucks for a lump

sum, and assert that in such case the purchaser could not quiet title to the trucks merely because he had paid that portion of the consideration which represented the ceiling price of the trucks.

[1] We cannot uphold appellants' contentions that the evidence is insufficient or that the judgment is against law. We must hold that there is substantial evidence to support the finding that defendant Hill intended to and did charge plaintiff prices for the trucks and trailers in excess of those prescribed by the Maximum Price Regulation. The testimony of the parties throws no particular light on the transaction, but the contract in evidence discloses on its face an attempted evasion of the price control regulations.

Appellants, as heretofore noted, make much of the fact that the contract is not "severable" and that it is impossible to separate the consideration agreed to be paid for the equipment from that agreed to be paid for the hauling agreement. The very fact that the contract is so framed is a telling point against appellants' position that no violation occurred or was intended.

[2] The wording of the agreement leaves no doubt that the additional consideration, that is, the hauling agreement, moving from defendant Hill to plaintiff was largely illusory. The agreement "to furnish freight and other merchandise" prescribes no minimum amount of freight to be furnished, nor the type thereof, nor where it is to be carried, nor the rates to be paid. It does not bind Hill to furnish any minimum tonnage or sufficient freight to keep plaintiff's trucks working to capacity. It is so uncertain as to be wholly unenforceable. Moreover, plaintiff was not bound by the agreement to accept such freight as might be furnished. The agreement to furnish freight could be cancelled on six months' notice. In other words, plaintiff agreed to pay approximately \$3,400.00 over and above the ceiling price of the equipment in return for an agreement to furnish an unspecified and unascertainable amount of hauling business for a period of time which could be as short as six months.

[3] Furthermore, under the contract, the equipment purchased by plaintiff was to stand as security for the payment of the

entire \$6,000.00, and this even though the seller should exercise his option to terminate the hauling agreement long before the payments were completed.

The trial court was warranted in finding that the transaction here in question was in violation of the Emergency Price Control Act, as a prohibited evasion. See *United States v. Armour & Co. of Delaware, D.C.*, 50 F.Supp. 347; *Brown, Adm'r, v. Banana Distributors of Conn., D.C.*, 52 F.Supp. 804; *Walker v. Bailey, Ala.App.*, 33 So.2d 891. This finding being supported, the fact that the further finding, that Hill required plaintiff to finance through a particular lending agency in violation of the act, was assertedly outside the issues raised by the pleadings, becomes immaterial.

The foregoing covers all points raised on this appeal.

[4] The attempted appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



**TRAVELERS INS. CO. v. INDUSTRIAL
ACCIDENT COMMISSION et al.**

Civ. 13725.

District Court of Appeal, First District,
Division 2, California.

June 30, 1948.

Rehearing Denied July 30, 1948.

Hearing Granted Aug. 26, 1948.*

1. Evidence ⚡1420

The value of the opinion of an expert must be tested by the facts upon which it is based.

2. Workmen's compensation ⚡1420

Testimony of physician taken as a whole was that it was possible that lead poisoning contributed to the death of employee.

3. Workmen's compensation ⚡1420

Where symptoms of last illness of employee were as characteristic of meningitis of which employee died as of blood poisoning, testimony of physician that it was possible that blood poisoning contributed to employee's death was insufficient to sustain an award for death.

Certiorari by the Travelers Insurance Company to review an award of the Industrial Accident Commission of the State of California for the death of John Anthony Odello.

Award annulled.

Leonard, Hanna & Brophy, of San Francisco, for appellant.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondents.

DOOLING, Justice.

Certiorari to review an award of the Industrial Accident Commission for the death of John Anthony Odello. It is undisputed that the primary cause of death was fibrinopurulent meningitis. This is a disease caused by a variety of organisms, some more virulent than others. It was impossible to determine the organism involved in this case because the decedent's body had been embalmed before the autopsy was performed.

The decedent was a lead burner and the autopsy disclosed an abnormal amount of lead stored in his bones, brain and kidneys. The commission found that the decedent sustained injury arising out of and in the course of his employment, consisting of lead poisoning which proximately resulted in his death. The sole question presented is whether there is any substantial evidence to support the finding that lead poisoning was a contributing factor to decedent's death from meningitis.

The testimony of three medical men was introduced. They were in agreement that for the lead in decedent's system to constitute a contributing factor to the death the lead must be circulating in the blood stream and must have produced an anemia thus reducing the decedent's resistance to the infectious organism which was respon-

* Subsequent opinion 203 P.2d 747.

sible for the meningitis. Periodic blood tests which had been taken of decedent's blood prior to the onset of the meningitis and a blood test taken after the onset of the disease and not long before his death showed no anemia. It was the conclusion of Dr. Leon, who had attended decedent in his last illness, and of Dr. Carr, a pathologist, that in view of this history lead poisoning played no part in the death from meningitis although they conceded a possibility that it could have done so. Dr. Duggan, reviewing the record, in a written report submitted to the commission concluded with this sentence: "I do not see how one can positively rule out lead poisoning as a factor in this man's death."

Dr. Duggan was afterwards called for oral examination and testified extensively. Excerpts from his testimony are here quoted:

"Q. Doctor, you are not able to state that the man probably had lead in the blood, he might or might not have? A. I would say that it was possible.

"Q. But not it was more probably (sic) that he did than that he did not? A. I can't answer that question.

"Q. Then the second step I have in mind is this: In the absence of lead circulating in the blood the mere storage of lead in the bones would not be such to adversely affect his general health? A. It might have apparently in this case from the blood counts found before his death, he apparently wasn't suffering any—

"Q. (Interrupting) Anemia? A.—any anemia and possibly suffering very little effect from the lead which undoubtedly had started in the bones.

* * * * *

"Q. And where you have the findings of no anemia and no stippling, these two findings would indicate insofar as they themselves are concerned, that the patient did not have lead poisoning, they would definitely lead you to believe the patient did not have lead poisoning? A. They would definitely lead you to believe the patient did not have lead poisoning.

"Q. Now, Doctor, so far as the other symptoms he had you mentioned are concerned, I assume you are referring to his

headaches and nausea and vomiting and other symptoms? A. I am referring to his headaches, his delirium, his convulsions and typical types of cerebral symptoms that he had.

"Q. Might these be equally well attributed to the meningitis as to the lead poisoning? A. That is true.

"Q. So that on a differential diagnosis these other symptoms do not establish lead poisoning, in view of the fact that the man had meningitis, that is correct? A. That is correct.

"Q. And accordingly the possibilities of his having had lead poisoning remain only a possibility from the facts here, that is correct? A. That is correct.

"Q. And you could not say that the lead might or might not have affected the course of his illness? A. That is correct.

* * * * *

"Q. You would not be willing to say that it was one of the probable factors? A. No. I would say that it was one of the possible factors.

* * * * *

"A. The reason I say that—we know he had some lead poisoning—unquestionably he had an abnormal amount of lead stored in his bones, and in the presence of certain things, particularly in infectious disease and other things that cause alkalinity of the blood, this lead in the bones is very often liberated into the circulation, and you may get symptoms from the free circulating lead in the bloodstream, and we gather that the man had meningitis, and we know that the man had an abnormal amount of lead stored in his bones, so I still do not see how it can be positively ruled out that the lead had no part whatsoever in this man's death. The meningitis may have liberated some of this infection, some of this stored lead in the bones, and it may have been liberated into the circulation. We have no way of proving or disproving that, so that it might have been a combination—that is the way I honestly feel.

"Q. Yes. I understand. First the man might have had lead poisoning incident to the meningitis, as you put it, and it cannot be said whether he did or did not? A. That is right.

"Q. And second, if he had such lead poisoning, whether he died solely by reason of meningitis or would have any way? A. May be.

"Q. No one can say—is that correct? A. Correct.

* * * * *

"Q. Is it your opinion that the meningitis may have activated the lead stored in the bones and this might be a factor in his death? A. That is very possible.

* * * * *

"There is no positive evidence—I must qualify the answer—there is no positive evidence that the lead caused his death, but I feel it definitely could have had a part in his death.

* * * * *

"Well, Dr. Carr found definite evidence of meningitis and some evidence of encephalitis, and lead does definitely cause encephalitis sometimes, and since there were two different things found here by Dr. Carr, it is possible that the lead could have been an extension of the meningitis that caused the encephalitis."

We have quoted from Dr. Duggan's testimony at such length because it squarely presents the question (Dr. Duggan's testimony being the strongest given in favor of the award) whether medical testimony that a disease *possibly*, as distinguished from *probably*, caused or contributed to death is sufficient to support a finding that it did. We feel that Dr. Duggan's evidence as a whole squarely presents this question despite the fact that in two isolated instances he did use the word *probable* or its derivatives in his testimony, as follows:

"Q. In the absence of stippling there is no evidence to assume on the contrary that he was suffering from lead poisoning, is there, Doctor? A. Well, I don't know. In a few of these cases I would say there is a possibility he might have been suffering from lead poisoning, due to the amount of lead found in the body on autopsy.

"Q. But that is only a possibility? A. Yes, a possibility.

"Q. And by no means a probability? A. Yes, a probability. There is no possible way I know you could prove that.

"Q. Well as between the possibility of his having suffered lead poisoning or not having suffered it, are the probabilities or possibilities equal, one or the other? A. Well, I could hardly answer that, but there is a probability that he was suffering from lead poisoning.

"Q. Is it equally probable that he was not? A. Well, with that amount of lead found, I would have to be inclined to believe he had some evidence of lead in his bones more than normally.

"Q. But as to whether it was circulating in the bloodstream you cannot say one way or the other? A. No, I can't."

We pause to comment on this evidence that, taking the recognized meaning of *probable*: "Having more evidence for than against; supported by evidence strong enough to establish presumption, but not proof, of its truth" (Webster's New International Dictionary, 2d Ed.), Dr. Duggan's statement that he could hardly answer whether the greater possibility lay on one side or the other is destructive of his use of the word *probable* and its derivatives in the balance of the quoted testimony. That the witness recognized this himself seems clear from the fact that two pages later in the transcript appear the questions and answers previously quoted:

"Q. Doctor, you are not able to state that the man probably had lead in the blood, he might or might not have? A. I would say that it was possible.

"Q. But not it was more probably that he did than that he did not? A. I can't answer that question."

Later, in answer to a single leading question Dr. Duggan testified:

"Q. Now, Doctor, it is your feeling that the probabilities are in favor of the lead being a factor in Mr. Odello's death, isn't that correct? A. That is correct."

[1,2] The foundation laid for this answer by the other testimony of Dr. Duggan herein quoted is not sufficient to support a conclusion of probability but only one of possibility in view of the rule that the value of the opinion of an expert must be tested by the facts upon which it is based. Estate of Powers, 81 Cal.App.2d 480, 184 P.2d 319, and cases cited on p. 561. Taking

Dr. Duggan's testimony as a whole it is clear that he was testifying only to medical possibilities and not to medical probabilities.

So far as we have been able to discover the question in this precise form has never been considered by any California appellate court. The rule appears to be consistently followed in other jurisdictions of this country where the question has arisen "that medical testimony as to the possibility of a causal relation between a given accident or injury and the subsequent death or impaired physical or mental condition of the person injured is not sufficient, standing alone, to establish such relation." Note in 135 A.L.R. 517 and cases collected on pp. 517-518; and see the following later cases: McIntire v. Industrial Commission, Ohio App., 63 N.E. 2d 167; Mack v. Branch No. 12, etc., 207 S.C. 258, 35 S.E.2d 838, 843; Seattle-Tacoma Shipbuilding Co. v. Department of L. & I., Wash., 173 P.2d 786, 791; White v. Maverick Production Co., Wyo., 182 P.2d 818, 823.

Consistent with this rule are Hartford Accident & Indemnity Co. v. Indus. Acc. Com., 140 Cal.App. 482, 486, 35 P.2d 366; William Simpson C. Co. v. Ind. Acc. Com., 74 Cal.App. 239, 240 P. 58; and Roebing's Sons Co. v. Industrial A. Com., 36 Cal. App. 10, 171 P. 987, opinion of Supreme Court denying hearing 36 Cal.App. pages 15, 16, 171 P. 989; and in Bethlehem Steel Co. v. I. A. C., 21 Cal.2d 742, 744, 135 P.2d 153, 154, the court said: "It is also true that to justify an award there must be an affirmative showing of a case within the statute and it must affirmatively appear that there exists a *reasonable probability* that the employee contracted the disease because of his employment." (Italics ours.)

It is true that medical testimony of possibility plus other evidence may be sufficient to support a conclusion of probability. Note in 135 A.L.R. 532 et seq. In this class apparently falls Maryland Cas. Co. v. Indus. Acc. Com., 91 Cal.App. 574, 267 P. 321, cited by respondent.

[3] The only evidence here relied upon other than the medical testimony is that of the physical symptoms of the decedent before and during his last illness. The

symptoms during the last illness were at least equally as characteristic of meningitis as of lead encephalitis. They therefore furnish no independent evidence upon which the commission could rely since decedent admittedly died of meningitis. The symptoms testified to by the wife which preceded the last illness were characterized by Dr. Carr as symptoms of lead poisoning, but he specifically testified that in the absence of anemia this would not lower the decedent's resistance to the meningitis organism which caused his death, and it was his conclusion that opposed to the findings of the blood counts the symptoms were not sufficient to establish a probability of anemia.

Award annulled.

NOURSE, P. J., and GOODELL, J.,
concur.



86 Cal.App.2d 632

**LEVY v. NATIONAL AUTOMOBILE &
CASUALTY INS. CO.**

Civ. 16320.

District Court of Appeal, Second District,
Division 1, California.

July 7, 1948.

Hearing Denied Aug. 30, 1948.

1. Executors and administrators ⚡537(8)

Where creditor's petition to transfer funds from decedent's estate to plaintiff was not filed until some years after administratrix qualified, it was not alleged that petition was filed or presented within time limited by statute after publication of notice to creditors to file claims, nor did it appear that suit on rejected claim was begun within the statutory time after notice of rejection complaint by creditors of decedent on surety bond of administratrix for default of administratrix was demurrable. Probate Code, §§ 702, 714.

2. Executors and administrators ⚡537(8)

Complaint by creditor of decedent on surety bond of administratrix for default

of administratrix was demurrable where it was not alleged that suit was brought within three months of date of rejection of claim. Probate Code, § 714.

3. Pleading ⚡192(3)

Allegation in creditor's complaint on surety bond of administratrix of decedent's estate that administratrix failed to give notice to creditors of decedent "as prescribed by law" was demurrable as a conclusion of the pleader.

4. Executors and administrators ⚡537(8)

Creditor's complaint on administratrix' bond alleging approval of administratrix' final account and order of distribution but not alleging that probate court ever entered an order requiring administratrix to pay creditor anything on account of his claim was demurrable. Probate Code, § 954.

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by A. F. Levy against National Automobile & Casualty Insurance Company, a corporation, on a surety bond of Agnes Levi, administratrix with will annexed of the estate of Carrie F. Levi, deceased. From a judgment of dismissal entered after a demurrer to plaintiff's complaint was sustained, plaintiff appeals.

Affirmed.

A. F. Levy, in pro. per.

Victor Hyatt, of Los Angeles (George C. Bliss, of Beverly Hills, of counsel), for respondents.

WHITE, Justice.

This is an appeal from a judgment of dismissal entered after a demurrer to plaintiff's complaint was sustained, the plaintiff declining to amend.

The contents of the complaint, so far as is necessary to set forth here, are as follows: That Carrie F. Levi died testate in Los Angeles County and Agnes Levi was appointed special administratrix of her estate on February 15, 1943, and thereafter, on October 30, 1944, was appointed administratrix with the will annexed; that defendant corporation was the surety on

her bond. "That the testate decedent was during her lifetime indebted to the plaintiff herein in the principal sum of \$2,000.00 and subsequently interest thereon accrued in the sum of \$415.00; whereupon the petition on or about June 8th, 1945 was duly presented to said administratrix seeking the transfer of \$2,415.00 from said estate to this plaintiff in pursuance thereof. The principal sum of \$2,000.00 to be charged against the residue of the estate and the accrual of \$415.00 to be charged against the corpus of the estate. The said administratrix, having defaulted thereon, an action thereon was began in this court, entitled A. F. Levy, plaintiff (and also the within plaintiff) v. Agnes Levi as Administratrix of Carrie F. Levi (aforesaid) No. 504367 and thereafter said Administratrix acknowledged her default and in said action on Dec. 9th, 1943 (1946) her default in last said action was duly entered in the sum of \$2,415.00 plus \$28.50 costs or total sum of \$2,443.50."

By a second cause of action it is alleged: "That this plaintiff on or about the 16th day of April, 1945, filed in said estate matter, and also with Agnes Levi as General Administratrix, his creditors additional claim, as per vouchers attached thereto in the sum of \$140.73 who thereafter admitted and acknowledged the correctness of said amount but refused to pay to this plaintiff any part thereof or claim that any part thereof had been paid or otherwise satisfied. That a final settlement of the Administratrix's account and Decree of Distribution was made on August 29th, 1945 and a distribution subsequently was made without this plaintiff's creditor claim included therein, and the said general Administratrix having failed to give notice to creditors as prescribed by law, which this plaintiff states herein as an issuable fact and not a conclusion of law."

Defendant bonding company demurred upon the grounds that the complaint contained no allegation in either cause of action that the claim sued on was allowed or rejected by the administratrix or the probate judge as required by sections 710 and 711 of the Probate Code; that the first cause of action contained no allegation that the claim was rejected and the suit referred

to in the first cause of action brought within three months from the date of rejection of the claim, as required by section 714 of the Probate Code; that the first cause of action did not set forth that notice of pendency of the suit therein referred to was filed as required by section 714 of the Probate Code, nor an allegation that a certified transcript of the judgment in such suit was filed in the probate proceedings as required by section 730 of the Probate Code. Defendant further pointed out by demurrer that "there is no allegation in either alleged cause of action set forth in the complaint that a claim against the estate, which is the basis of this suit, was filed or presented within the time required by section 707 of the Probate Code"; and finally, that the second cause of action contained no allegation that the judge of the superior court in probate had indorsed his approval of the claim as required by section 710 of the Probate Code.

[1] It is at once apparent that the demurrer was well taken. From the first cause of action it appears that the petition to "transfer" funds was not filed until some years after the administratrix qualified. There is no allegation to the effect that the petition was filed or presented within the time limited by section 702 of the Probate Code after the publication of notice to creditors, nor does it appear from the first cause of action, assuming that the petition may be treated as a creditor's claim, that suit on a rejected claim was begun within the statutory time after notice of rejection thereof. (Prob.Code, sec. 714.)

[2,3] The demurrer is likewise well taken as to the second cause of action, for the reason that if the alleged claim was rejected suit thereon should have been brought within the time prescribed by law (Prob.Code, sec. 714). Treating the allegation that the administratrix "acknowledged the correctness of said amount" as an approval of the claim, there is no allegation that the claim was thereafter approved by a judge of the probate court. The allegation in the second cause of action, "and the said general administratrix having failed to give notice to creditors as prescribed by law," is but a conclusion of the pleader. (21 Cal.Jur. p. 32, sec. 16.)

Further discussion of the defects of the complaint herein would be fruitless. Appellant has elected to stand upon his complaint after being fully advised of its deficiencies by the court's ruling on the demurrer.

[4] It further appears from the complaint that the administratrix's final account was approved and distribution ordered, but there is no allegation that the probate court ever entered an order requiring the administratrix to pay the plaintiff any sums on account of his alleged claims. (Prob.Code, sec. 954.)

Because appellant is acting as his own attorney, we have been solicitous on his behalf, to the extent of examining the record of the various superior court proceedings involved. Such examination discloses that this appeal is utterly without merit. The record reveals that the alleged default of the administratrix was entered by the clerk through inadvertence, the administratrix having filed an answer to which a demurrer was interposed and overruled. The erroneous entry of default was duly set aside. The claim upon which the second cause of action is based was not filed or presented until two years after publication of notice to creditors.

The judgment is affirmed

YORK, P. J., and DORAN, J., concur.



86 Cal.App.2d 566

PEOPLE v. KUHLMAN et al.
Cr. 4206.

District Court of Appeal, Second District,
Division 3, California.

July 2, 1948.

Rehearing Denied July 16, 1948.

See 196 P.2d 80.

I. Criminal law 1001

Under statutes, court could impose fine not exceeding \$200 as condition of probation of defendant convicted of bookmaking. Pen.Code §§ 337a, subd. 2, 672, 1203.1.

2. Criminal law ☞1001

Where defendant convicted of bookmaking was fined \$1,000 payable \$50 monthly as condition of probation, and such fine was valid to extent of \$200 only, and defendant failed to make the monthly payments on such valid portion of fine, defendant violated the probation, and subsequent order revoking probation was not arbitrary and without just cause. Pen.Code, §§ 337a, subd. 2, 672, 1203.1, 1203.2.

3. Criminal law ☞1001

An order granting probation is not final, and imposition of fine as condition of probation is not a judgment imposing a fine. Pen.Code, §§ 1203.1, 1203.2.

SHINN, Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Lucille M. Kuhlman and Helen Virginia Cabell were charged with bookmaking. Helen Virginia Cabell pleaded guilty and was sentenced to imprisonment and was granted probation. From an order revoking the probation, Helen Virginia Cabell appeals.

Order affirmed.

Chotiner & Chotiner, of Beverly Hills, and Leland E. Zeman, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant Cabell pleaded guilty to a charge of violation of section 337a, subdivision 2, of the Penal Code, a felony, which offense is commonly known as "bookmaking." On February 25, 1947, she was sentenced to imprisonment in the county jail for six months, execution of sentence was suspended, and she was granted probation for the period of three years upon condition that she pay a fine of \$1,000. On March 17, 1947, the terms of probation were modified to permit defendant to pay the fine at the rate of \$50 a month. On September 22, 1947, the court,

in the presence of defendant, made an order revoking the order granting probation, for the reason that defendant had failed to make payments on the fine. Defendant appeals from that order.

[1] Appellant's contention, that the fine of \$1,000 is in excess of the maximum fine which the court had the power to impose as a condition of probation herein, is sustained. Section 337a of the Penal Code prescribes that the punishment for violation of that section is imprisonment of not less than thirty days and not exceeding one year. That section does not prescribe a fine as punishment. Section 672 of the Penal Code, however, provides as follows: "Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding two hundred dollars, in addition to the imprisonment prescribed." Section 1203.1 of the Penal Code provides, in part, as follows: "The court, * * * in the order granting probation and as a condition thereof * * * may fine the defendant in such sum not to exceed the maximum fine provided by law in such case * * *." That section 1203.1 also provides that the court, in granting probation "may impose and require any or all of the above mentioned terms of imprisonment, fine and conditions and other reasonable conditions * * *." The court, therefore, had the power to impose a fine as a condition of probation, but the amount of a fine which may be so imposed, for violation of section 337a, is prescribed by section 672 and may not exceed \$200.

[2] Appellant also contends, in effect, that the condition of probation, whereby she was fined \$1,000, was void, and that her failure to make the payments thereon as directed was not, therefore, a violation of probation. Such contention is not sustainable. The fine, as a condition of probation, was valid to the extent of \$200. At the time probation was revoked, the following statements were made: "The Court: Why haven't you kept up these payments? The Defendant: I haven't the money. The Court: I was told at the time we modified the order that you could make the payment of \$50.00 a month. The De-

defendant: That was with the understanding that the party I worked for was to pay it. The Court: I don't know of any understanding, all we know was that you agreed to make the payments." It does not appear that she made any payment, and it is not contended by appellant that she paid \$200 or that she paid any amount. It appears from the statement of appellant, at the time probation was revoked, that she never intended to pay any part of the fine, and it appears, on the contrary, that she was depending on some other bookmaker to pay it. The appellant failed to make the payments on the valid portion of the fine, and thereby violated a condition of probation.

[3] Appellant's further contention, that the order revoking probation was arbitrary and without just cause, is not sustained. There is no finality to an order granting probation, and the imposition of a fine as a condition of probation is not a judgment imposing a fine. In *re Martin*, 82 Cal.App. 2d 16, 22, 185 P.2d 645; In *re Goetz*, 46 Cal. App.2d 848, 851, 117 P.2d 47. Section 1203.2 of the Penal Code provides that "at any time during the probationary period" the court is authorized to revoke an order for probation if there is reason to believe from the report of the probation officer, or otherwise, that the defendant has violated the terms of his probation. "The discretion of the court to revoke an order of probation is 'very broad.'" *People v. Silverman*, 33 Cal.App.2d 1, 5, 92 P.2d 507, 510. As above shown, it appears that appellant did not intend to comply with the condition imposed.

The order is affirmed.

McCOMB, J., assigned, concurs.

SHINN, Acting Presiding Justice.

I dissent. I agree with what is said in the main opinion with the exception of the conclusion, which is erroneous and unsupported by the reasoning of the opinion. Certainly the fine was good to the extent of \$200, and the holding that it was not entirely void is unassailable. It would follow, as a matter of course, that since appellant has not paid \$200 of the fine she would not be entitled to be released on probation by order of this court, which ap-

pears to be the only question considered by my associates. But she does not seek her release; she seeks only a reversal of the order revoking probation, which would return the matter for reconsideration. The opinion does not reach the real question, namely, whether under all the circumstances, and in the interest of justice, the matter of probation should be reconsidered by the trial judge. It is too clear to me to admit of argument that justice can be served in no other manner.

The amount of the fine was fixed at \$1,000 after appellant's attorney had explained to the court that it is customary for bookmaker employers to pay the fines, as well as the attorneys' fees, of their employees. Appellant, her attorney, and also the judge understood that appellant could not pay the fine herself. The attorney asked for and was granted time to arrange for the payment of the fine by the employer. Everyone understood that a fine of \$1,000 would be legal. The judge understood so when he revoked the order of probation. Appellant had two comrades who might have been expected to assist her, namely, her bookmaker employer and her husband. While the price set upon the lady's liberty would seem to have been beyond the stretch of the chivalry or financial ability, or both, of these two gentlemen, it may be that they only considered the odds to be unattractive and that a fine of \$200 would have been paid. Be that as it may, appellant now faces a six months term in jail for failure to pay an excessive fine, without having had an opportunity to retain her liberty by paying a legal fine. The trial judge believed her to be entitled to probation. Inability or unwillingness to pay a \$200 fine cannot be assumed from the failure to pay a fine of \$1,000. Appellant therefore stands on the threshold of the jail by reason of a judicial error. It is due to the able trial judge that he be given an opportunity to correct this error, and I am confident that no one would more readily or willingly correct a mistake that threatened to work an injustice. I can see nothing but injustice in sending appellant to jail because of her failure to pay an excessive fine, without giving her an opportunity to pay a legal fine and thus retain her liberty. With an

obviously dim comprehension of what was going on in the skilled legal minds of the gentlemen who were conducting the proceedings, was she the one, and the only one, who should have known the law? Is she the one whose duty it was to see that the law was properly administered? Affirmance of the order would say so, and would leave her to suffer the consequences of the mistake, while the court, the district attorney, the probation officer, and appellant's attorney, all officers of the court and all equally guilty of the mistake, are given no opportunity to rectify it.

The order should be reversed and the court should proceed in the matter of probation as upon an original application.



86 Cal.App.2d 499

DETHLEFSEN v. STULL

Civ. 13602.

District Court of Appeal, First District, Division 2, California.

June 30, 1948.

1. Libel and slander ⇨1

"Libel" is a false and unprivileged publication by writing which exposes any person to hatred, contempt, ridicule or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation, and includes almost any language which upon its face has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation. Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for all other definitions of "Libel".

2. Libel and slander ⇨6(2)

To be "libelous per se" a writing need not charge or impute a crime, but any writing, falsely charging a person with a violation of confidence reposed in him or with

treachery to his associates, is actionable per se. Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for all other definitions of "Libelous Per Se".

3. Libel and slander ⇨6(2)

Letter charging that former partner was an undesirable associate because he was allegedly dishonest in financial dealings with his copartner was "libelous per se." Civ.Code, § 45.

4. Embezzlement ⇨15

Larceny ⇨7

A partner can neither steal nor embezzle partnership funds.

5. Libel and slander ⇨19

In construing a letter alleged to be libelous, court's function is to construe writing in sense that is most natural and obvious and in which persons to whom letter was sent would be most likely to understand it, and court will read it as he conceives average persons not trained in technicalities would read it. Civ.Code, § 45.

6. Libel and slander ⇨6(2)

In action by partner against copartner for libel, letter purporting to represent plaintiff as an undesirable partner because allegedly dishonest in financial dealings with copartner was not ambiguous and not susceptible of an innocent interpretation to prevent its being libelous per se. Civ. Code, § 45.

7. Libel and slander ⇨100(7)

In action by partner against copartner for libel in letter to firm customers stating that plaintiff was an undesirable partner because dishonest in financial dealings with copartner, allegation that defendant published letter, undenied by defendant who alleged that letter was delivered to customers and trade of defendant, was sufficient to establish publication notwithstanding there was no testimony offered that the letter was either received or read by anyone. Civ.Code, § 45.

8. Libel and slander ⇨19

An alleged libelous publication is to be construed as well from the expressions used, as from the whole scope and ap-

parent object of the writer. Civ.Code, § 45.

9. Libel and slander ⇨101(5)

In libel action, burden of proving truth of statement is upon defendant though it is not necessary to prove literal truth of an allegedly libelous accusation in every detail so long as imputation is substantially true so as to justify gist or sting of the remark. Civ.Code, § 45.

10. Libel and slander ⇨112(3)

In libel action arising out of publication of letter wherein defendant indicated that plaintiff was an undesirable partner because of alleged dishonesty in financial dealings with copartner, evidence sustained finding that statements libelous per se were untrue. Civ.Code, § 45.

Appeal from Superior Court, City and County of San Francisco; Hon. Frank T. Deasy, Judge.

Action by Thomas A. Dethlefsen against Robert J. Stull for libel. From the judgment, defendant appeals.

Judgment affirmed.

Carroll F. Jacoby, of San Francisco, for appellant.

Marcel E. Cerf, Robinson & Leland, of San Francisco, for respondent.

GOODALL, Justice.

Respondent sued appellant for libel and recovered a judgment for \$1,000 general damages, \$1,000 exemplary damages, and costs. A motion for new trial was denied and this appeal was taken.

From 1942 until 1946 the litigants were partners in a business which dealt in articles and devices used by magicians. During appellant's absence at the war respondent carried on the business. After appellant's return differences arose between them and a suit was brought by appellant against respondent for a dissolution and an accounting. A settlement was reached out of court, evidenced by a written agreement dated September 10, 1946, from which it appears that the parties divided equally between themselves the merchandise on hand, and appellant bought from respondent for \$1750

"the machinery and equipment of said partnership, the leasehold interest thereof, and the exclusive right to use" the firm name. On September 18 the matter was wound up completely by the payment by appellant to respondent of the difference between the \$1750 purchase price and the amount which respondent owed appellant on the settlement, and respondent gave appellant a receipt for such payment.

Respondent then inserted in a trade journal an announcement of the dissolution. Appellant felt that this called for some action on his part, and in the first part of October he mailed (as the court found) "to the customers and potential customers of plaintiff within a 200-mile area of San Francisco and to dealers in magic throughout the United States", a letter announcing the dissolution and soliciting a continuance of patronage for himself, in which he said:

"As you may know, I served in the U. S. Navy for about three years, during which time I was away from San Francisco. Upon my return certain differences developed as a result of Mr. Dethlefsen's activities. Among other things an audit of the books disclosed that, over a period of months, Mr. Dethlefsen had received moneys belonging to the firm in the sum of about \$1400. which he had failed to deposit to the firm's account.

"In order to protect my interest in the business, I filed suit against Mr. Dethlefsen to recover the business from him, and for an accounting. The suit was thereafter settled out of court, as a result of which Mr. Dethlefsen acknowledged his indebtedness to the firm and returned the moneys due. I received the exclusive right to the name 'Stull Magic Manufacturing Co.', and the premises and equipment * * *".

The complaint alleged that by these words defendant "intended to charge and assert, and to be understood as charging and asserting and by the readers of said letter * * * was in fact understood as charging and asserting that this plaintiff, in violation of his trust as a partner, had dishonestly withheld funds from the partnership and was of corrupt and dishonest character". The court found this allegation to be true, and it found the following part of the letter to be untrue: "Among

other things an audit of the books disclosed that, over a period of months, Mr. Dethlefsen had received moneys belonging to the firm in the sum of about \$1400. which he had failed to deposit to the firm's account * * * as a result of which Mr. Dethlefsen acknowledged his indebtedness to the firm and returned the money due."

Appellant contends that the court erred in determining that the language amounted to a charge of grand theft, thereby rendering it libelous per se, and that the evidence does not support the finding of falsity.

"Libel is a false and unprivileged publication by writing * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ.Code, sec. 45.)

[1] This definition "is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation." *Bates v. Campbell*, 213 Cal. 438, 441, 2 P.2d 383, 385, citing cases.

That the language is libelous per se is settled by the case of *Tonini v. Cevasco*, 114 Cal. 266, 272, 46 P. 103, 105, where one of the utterances was "The agency of G. B. Cevasco & Co. must state * * * that * * * they were compelled to discharge Mr. M. G. Tonini for his conduct not irreprehensible" and the other was: "* * * Mr. Tonini has not moved away, but has been discharged * * * for conduct not irreprehensible." The case of *Jimeno v. Commonwealth Home Builders*, 47 Cal.App. 660, 191 P. 64, is likewise authority for such holding.

[2, 3] To be libelous per se the writing need not charge or impute a crime, *Stevens v. Snow*, 191 Cal. 58, 62, 214 P. 968; 16 Cal.Jur. p. 44. Falsely charging a person with a violation of confidence reposed in him or with treachery to his associates is actionable per se. *Jimeno v. Commonwealth*, 47 Cal.App. 660, 666, 191 P. 64, supra; 16 Cal.Jur. pp. 42, 43. The clear meaning of the letter, to say the very least, is that respondent was an undesirable partner because he was dishonest in his financial dealings with his copartner.

In the course of the trial the judge made the following comment: "Yes, but the next line, he really accuses him of embezzling \$1,400, and says he brought suit against him and the suit was settled. That is the substance—the suit was thereafter settled out of court as the result of which Mr. Dethlefsen acknowledged his indebtedness to the firm and returned the money due. That indicates that he admitted that he had pilfered or embezzled \$1,400, and when he was caught, he returned it, and the suit was the means of making him return it.

"One reading the letter would come to this conclusion: 'Oh, oh, my good friend went in the Navy and while he was so patriotically occupied, his partner started robbing him.' He says that in effect."

[4] Appellant argues that, since the partnership is admitted, and since it is settled law that a partner can neither steal nor embezzle partnership funds. *People v. Foss*, 7 Cal.2d 669, 670, 62 P.2d 372; *People v. Hotz*, 85 Cal.App. 450, 452, 259 P. 506. The court entertained an erroneous view that the letter had charged either grand theft or embezzlement, or both.

[5] That does not follow at all. It was the function of the court to construe the letter in the sense that is most natural and obvious, and in which the persons to whom the letter was sent would be most likely to understand it. *Tonini v. Cevasco*, 114 Cal. 266, 274, 46 P. 103, supra. The customers and the dealers in magic who received the letter would not know that, according to law, a partner can neither steal nor embezzle partnership funds, and the judge was simply placing himself in the situation of the persons who received the letter (see *Bates v. Campbell*, 213 Cal. 438, 442, 2 P.2d 383, supra) and was reading it as he conceived average persons, not "trained in technicalities" would read it. See *Western Broadcast Co. v. Times-Mirror Co.*, 14 Cal. App.2d 120, 124, 57 P.2d. 977; *Swift & Co. v. Gray*, 9 Cir., 101 F.2d 976, 981.

[6] Appellant relying on *Peabody v. Barham*, 52 Cal.App.2d 581, 126 P.2d 668, argues that if the writing is susceptible of an innocent interpretation it is not libelous per se. He does not, however, suggest or illustrate how the language could be given

such meaning. The trier of the facts concluded that there was no ambiguity and that the letter charged wrongdoing.

[7] Appellant also argues that there was no testimony that the letter was either received or read by anyone. All evidence on this point was dispensed with by the admissions in the pleadings. Respondent alleged that defendant published the letter. In his answer appellant did not deny the publication, but alleged "that said letter was delivered to the customers and trade of defendant * * *".

This brings us to the appellant's plea of the truth of his statements.

Appellant set up the firm books and on his return from the war in October, 1945, struck a balance. The partners then agreed to divide the responsibilities; appellant undertook to handle procurement and manufacturing and respondent undertook to handle the office and keep the books, including the depositing of the firm's funds. Respondent adhered to the bookkeeping system which appellant had set up.

About July 7 or 8, 1946 the trouble between the partners had become serious. About July 13, appellant took possession of the books and from then into September he kept them and they were not available to respondent; during that time respondent had the bank book.

By July 13 or 14 each partner had consulted his lawyer and the situation thenceforth was summed up by respondent as follows: each partner kept a certain amount of cash which came in, and nobody went to the bank and nobody gave anybody anything after the lawsuit was filed, while appellant testified that when he took the books and would not give them to respondent, respondent took the bank book and would not give it to appellant.

The books contained an account called "Studio Cash", the function of which was to show in one column the proceeds of sales that came in over the counter or by mail, and in the other column the money either paid out by cash or deposited in bank. Appellant testified that "The difference between the two * * * columns of that account, shows the money that Mr. Dethlefsen had in his possession that had come in,

but had not been deposited or spent in some way."

Appellant testified that when he took the books he made an audit covering the period from his return from the war until July 13; that when he filed the dissolution suit on July 23 he saw from the books that there was about \$1400 in "Studio Cash" for which respondent had to account to the partnership, and in the complaint therein he alleged that respondent owed the partnership \$1400. He admitted that he did not then have the benefit "of seeing the bank books to know that anything had been deposited" and further that he did not take note of a credit to respondent of \$277.90.

Between July 13 and July 22 respondent made four deposits in the bank of accumulated partnership funds aggregating \$992.91. It was the responsibility of respondent to enter these deposits on the books, which would have changed the "Studio Cash" figure from about \$1400 to considerably less but appellant's seizure of the books on July 13 prevented this.

When, therefore, appellant filed the accounting suit on July 23 and alleged that respondent owed the partnership \$1400, his allegation was not in accord with the actual facts.

The complaint in that suit was based on an incomplete set of books in which no entry had been made for ten days (although the business was being carried on and was not at a standstill) and it was based on an incomplete audit which admittedly did not take into account the deposits of almost \$1000 which had been made in the ten-day interval.

The audit and the accounting suit are of importance herein because appellant saw fit to base the charges in his letter upon them. The letter was sent out early in October and therefore spoke as of that time. The facts just discussed were at that time fully known to appellant, for in September he had personally brought the books up to date and had entered all the firm's transactions from July 13 onward including all deposits made while he had withheld the books.

When he wrote the letter in question he persisted in making the same statement that he had made in the complaint in the ac-

counting suit on July 23 respecting the \$1400.

[8] In *Bates v. Campbell*, 213 Cal. 438, 441, 2 P.2d 383, 385, it is said "the alleged libelous publication is to be construed 'as well from the expressions used as from the whole scope and apparent object of the writer' [citations]".

The apparent object of the writer in the instant case, according to the trial judge's view, was to convey to the persons who read the letter the idea as the judge put it, that respondent had embezzled \$1400 "and when he was caught, he returned it, and the suit was the means of making him return it". This is indicated by appellant's persistence in using the figure \$1400, which is the central theme of the letter and the only figure mentioned therein. It is indicated by the language that "as a result of which [i. e., the accounting suit] Mr. Dethlefsen acknowledged his indebtedness to the firm and returned the moneys due", for the phrase "returned the moneys" indicates that moneys had been taken. Moreover, no moneys were "returned". The accounting suit to which the letter refers was filed on July 23. The four deposits aggregating \$992.91 were made between July 13 and 22 hence they could not have been made as the result of a piece of litigation not yet filed.

The statement that "over a period of months, Mr. Dethlefsen had received moneys belonging to the firm in the sum of about \$1400, which he had failed to deposit" could mean only a constant and prolonged withholding of about \$1400. The record shows that the undeposited money shown by "Studio Cash" varied from time to time and there was no such figure as \$1400 "over a period of months".

The accounting suit was never tried. It was dismissed "with prejudice". In September the parties arrived at a settlement out of court and the amount of \$639.14 was found by the parties to be owing by respondent to the partnership, one-half of which of course was his own. Appellant's half, or \$319.57 was deducted from the \$1750 which, by agreement, appellant was to pay to respondent. It was with these accomplished facts before him that appellant wrote the letter carrying the \$1400

implication as its central theme and conveying the thought, as the trial judge concluded, that the suit had forced the "return" of about \$1400.

What really happened was that when the dispute reached fever heat appellant took the books into his own possession. He audited them and filed his accounting suit based on the face of books in which no entries had been made for ten days and in which entries could not have been made by respondent. Having arrived at the \$1400 figure which he used as the basis for the accounting suit, he used the same figure as the basis for his accusatory letter at a time when, by his own investigation, he knew that \$1400 was a false quantity.

[9, 10] The burden of proving the truth of the statements was upon the appellant. It is true, as contended by him, that "it is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true so as to justify the 'gist' or 'sting' of the remark". *Emde v. San Joaquin etc. Council*, 23 Cal.2d 146, 160, 143 P.2d 20, 30, 150 A.L.R. 916. Without repetition, we are satisfied from what has been said that this burden was not sustained, but that the finding that the charge was untrue is amply supported.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



86 Cal.App.2d 445

PEOPLE v. MASON.

Cr. 4214.

District Court of Appeal, Second District,
Division 2, California.

June 29, 1948.

Rehearing Denied July 8, 1948.

I. False pretenses ☞7(5)

Although a "false representation" must relate to past or present fact to sup-

port a conviction under statute defining offense of grand theft, a fraud can consist of a promise to do an act if promisor at time of such promise entertains a present intention of not performing his promise. Gen.Laws, Act 3814.

See Words and Phrases, Permanent Edition, for all other definitions of "False Representation".

2. False pretenses $\Rightarrow$ 49(3)

Evidence supported conviction of grand theft in connection with procuring automobile for worthless stock in oil company on theory either of false pretense or trick and device. Pen.Code, § 484.

3. Embezzlement $\Rightarrow$ 10

Where defendant took \$5,000 to hold in trust, an embezzlement could have occurred at any time after money was received, and it would have been grand theft under statute. Pen.Code, § 484.

4. False pretenses $\Rightarrow$ 49(3)

Evidence supported conviction of grand theft on theory of larceny by trick and device in connection with funds that he procured from one as down payment on corporate stock in Nevada corporation organized by defendant and others. Pen. Code, § 484.

5. Criminal law $\Rightarrow$ 371(3, 12), 372(9)

In prosecution for grand theft based on procuring funds in connection with sale of stock in Nevada corporation in which defendant was one of the organizers, evidence of other similar transactions as that forming basis of present charge and at a time reasonably near the transaction was admissible as demonstrating defendant's motive, plan, design, and criminal intent. Pen.Code, § 484.

6. Criminal law $\Rightarrow$ 371(12)

Where several crimes of accused are of same general character and tend to same common end, evidence thereof is admissible to show motive which impelled perpetration of crime for which defendant is on trial in order to show that crime charged was a section of pattern of his life and character.

7. Licenses $\Rightarrow$ 42(4)

Evidence supported conviction of selling and issuing shares of stock in Nevada

corporation without first having applied for and secured a permit from California Commissioner of Corporations in violation of Securities Act, though showing that defendant sold his "personally owned" stock, where it appeared that proceeds of sale were used for benefit of the corporation. Gen.Laws, Act 3814, § 2(c) 3.

8. Licenses $\Rightarrow$ 18½

Every prospective vendor of securities has duty first to ascertain whether a permit has been issued for such sale by sovereign power. Gen.Laws, Act, 3814 § 2(c) 3.

9. Witnesses $\Rightarrow$ 240(1, 2)

Leading questions may be properly asked when they are designed more quickly to reach testimony material to issues, and trial court has wide discretion in determining extent to which such question may be asked. Code Civ.Proc. § 2046.

10. Witnesses $\Rightarrow$ 240(2)

Permitting deputy district attorney to ask leading and suggested questions on direct examination of witnesses over defendant's objection thereto was not an abuse of discretion. Code Civ.Proc. § 2046.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Monte G. Mason was convicted of grand theft of and violating Corporate Securities Act. General Laws, Act 3814, and he appeals.

Affirmed.

N. E. Youngblood, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Henry A. Dietz, Deputy Atty. Gen., and William E. Simpson, Dist. Atty. and Jere Sullivan and H. L. Arterberry, Deputy Dist. Attys., all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellant was convicted of eight felonies: Two for grand theft, counts I and VIII; six for violating the Corporate Securities Act, Gen.Laws, Act 3814, counts IX and III to VII inclusive. As grounds for reversal of the judgments and the order deny-

ing a new trial it is now contended that (1) "the evidence was insufficient to support the judgment of conviction"; (2) "the court erred by admitting evidence of other sales"; (3) the district attorney was guilty of prejudicial misconduct.

The Proof Supports the Judgment on Count I

Inasmuch as counts III to IX grew out of appellant's connection with a different corporation from that mentioned in count I, by a discussion of the evidence upon the latter count an attempt will first be made to determine whether the proof was sufficient to warrant the conviction of grand theft as there charged.

Appellant was secretary-treasurer of the Americal Exploration, Inc., in the fall of 1944. He had an office in Hollywood and resided in Burbank. He asserted the corporation's ownership of an oil well near McKittrick in Kern county and that at the time in question the hole had been drilled below 5,000 feet. The complaining witness, Miss Brevik, lived in Berkeley; owned a convertible automobile of 1941 vintage. While in Los Angeles she was told by her friend, Mr. Enders, of appellant's oil well, and they visited the latter's home about November 1, 1944, where in the presence of Enders and Mrs. Mason appellant told her the well had reached a depth of 5,500 feet, and that they "expected it to come in at any time." Pursuant to appointment Miss Brevik drove the quartet to McKittrick, saw the derrick, the tools and men at work and small particles of oil which appellant said were coming from the well. He told her that he had invested \$50,000 in the well as operating expenses; that she could get in because she was a friend of Enders; that the deal was "sure-fire" to strike oil which would enhance the value of the Americal Exploration stock four to six times; that they would drill more wells. "A few days later"—November 2, 1944—she and Enders called on appellant at his office. He then told her that the corporation "needed money for oil drilling equipment and that by turning in an automobile for equipment he could get a great deal better deal." The witness then agreed to transfer to appellant her

automobile, worth \$4,500, for a certificate of 4,000 shares of the stock of Americal Exploration, Inc., which stood in the name of appellant. It was signed by M. G. Mason as secretary. He assigned the certificate to her in the presence of Enders and she assigned her certificate of ownership of the car and delivered it to appellant.

Miss Brevik never received any income on the stock or anything for it. A short time later she visited the "well", found it "totally shut down," only the derrick and tools were there and they were idle. In her talks with appellant about the well he told her there was trouble but they would begin drilling again. But when she finally, about January 1, 1946, visited the scene again the premises were still deserted. Although appellant told Enders that he had obtained \$10,000 of drilling equipment for the convertible, the proof was that appellant sold the car to one McFadden, a secondhand dealer in Hollywood, for \$1,800. He testified to nothing substantially contradictory of the testimony of the state's witnesses except that he declared that McFadden had paid him only \$1400 for the vehicle, the OPA ceiling price.

The foregoing facts support the conviction under count I. Appellant's statement that the corporation needed drilling equipment and that Miss Brevik's automobile would be used for obtaining such equipment are evidence of his false pretense. Also, his statement that the company planned to drill other wells accompanied by his declaration of the well's depth of 5,500 feet was an implied representation that the company was financed for extensive operations. Such representations disclose his intent to deceive and effected a fraud by causing Miss Brevik to part with her property for worthless stock. The complainant was corroborated by the witnesses Enders and McFadden and by appellant's admissions. Penal Code, secs. 484, 1110; Fricke Criminal Law, Second Edition, pp. 205, 215.

[1] While it has been held that under section 484 a false representation must relate to a past or present fact to support a conviction (*People v. Jackson*, 24 Cal. App.2d 182, 203, 74 P.2d 1085), yet it is now established that a fraud can be just as easily perpetrated by a promise to do an

act if the promisor at the time of such promise entertains a present intention of not performing his contract. *People v. Gordon*, 71 Cal.App.2d 606, 624, 163 P.2d 110; *People v. Ames*, 61 Cal.App.2d 522, 531, 143 P.2d 92. The secret intention of a contracting party not to perform a promised act which induces his contractee to execute their agreement is an essential feature of his representation, and may be just as effective in the matter of inducing the contract as would be the declaration of a vendor that the crystalized chassis of his old motor car is new steel or that the termite-infested foundation of his house is made of cement. See *People v. Gordon*, supra. Whether a promise made to effect a transaction by subverting the will and judgment of the promisee was dishonest is a matter for the determination of the trier of fact, and in the absence of prejudicial error on the trial of the issues such determination will not be disturbed on appeal.

However, if perchance the trial court might have rejected the thesis of appellant's guilt on the theory that his promise could not constitute a fraudulent statement as provided by section 484, then it was warranted in concluding that such promise was a trick and device whereby to acquire possession and ownership of the automobile and that he was, therefore, guilty of grand theft. *People v. Hennessey*, 201 Cal. 568, 581, 258 P. 49. It cannot be denied that the statement and promise of appellant reasonably justified the implied finding that complainant transferred her automobile to appellant solely by reason of such promise and statements to her and to Enders. They represented the financial soundness of the corporation and a definite plan to increase its production. Both were golden snares for the unwary, and when made by a clever promoter in the presence of a derrick and tools and an active effort to penetrate deep oil-bearing strata they were irresistible. Confronted with such evidence a trial court should find no difficulty in finding that the accused was inspired by a sinister design to acquire his victim's property and that he did so by trick and device.

[2] But the validity of the judgment is not to be determined solely by the merits of appellant's promise to use the automobile

for the purpose of obtaining other drilling machinery. When he stated that the corporation had plans for drilling additional wells the implication was unavoidable that it was possessed of sufficient finances for further subterranean explorations. Such representation was substantial in character; was calculated to deceive, and did deceive. It was material to the issue of theft (Penal Code, sec. 484) and related to an existing fact. The trial court was warranted in drawing such an inference, and that supports a finding of grand theft on the theory of either false pretense or trick and device. *People v. Hennessey*, supra.

Count VIII

The only conviction for grand theft other than on count I is that alleged in count VIII whereby appellant was accused of grand theft in that by false pretense he feloniously took \$5,000.00 from one Bertrand on July 23, 1946. The proof was that about June 17, 1945, appellant and three others, to wit, Messers Thaheld, Landry and Wallace, acquired an option to purchase the patent rights to a diesel motor then held by the Shaffer Tool Works, vendee of one Thaheld, the inventor. They caused to be organized Diesel Power, Inc., a Nevada corporation, about June 20, 1946, for which appellant paid the United States Corporation Service approximately \$400. Accompanied by his associates and one Barton about July 2, 1946, appellant visited Las Vegas, Nevada, where they took over the corporation. At the meeting held there the optionees were installed as directors and officers: Landry, president, Thaheld, vice president, Wallace, secretary-treasurer, and appellant, chairman of the board. Of the total authorized capital stock, 500,000 shares were then issued to Landry, Thaheld, Wallace and Mason in equal shares in payment for the option to purchase the patent rights.

Upon their return to Los Angeles appellant proceeded to act as general promoter of the company's interests and to make sales of his "personally owned shares" without first having obtained a permit from the corporation commissioner of this state. He was introduced by Barton to the witness Bertrand in July, 1946, as an officer of the corporation and salesmanager of its stock.

He immediately offered Bertrand 20,000 of such shares for \$13,333, falsely stating that he had "picked up" the stock from Barton. After Bertrand had declined to make the purchase and appellant had unsuccessfully attempted to induce Mrs. Bertrand to consent to the investment, appellant stated: "We are going to do something about this immediately, because I have to go to the S.E.C. and file on this tomorrow before noon, and I promised Mr. Barton that I would take care of this for him and see that you were in on this, so you would not miss purchasing the stock." Bertrand then told appellant that he could raise \$12,500 on some of his real property and would like to borrow \$40,000 on his building. In event of such loan he "could buy a lot of the stock." Appellant there upon stated that he could get a loan for him, and made other statements hereinafter set forth. Pursuant to their discussion and appointment, appellant met Bertrand at a bank designated by the latter on the following day and at once repeated that he had to file with S.E.C. before noon; that if Bertrand would make a deposit of \$5,000 on the stock he could procure a loan of \$40,000 for him; that he would hold the deposit in trust until he got the loan through. Bertrand borrowed \$6,000 from the bank, and in reliance upon the promise of appellant to place the money in trust he paid appellant \$5,000 and received from appellant certificate Number 10 from the stock book of Diesel Power, Inc., for 20,000 shares in favor of Bertrand and wife. Appellant did not procure the loan he promised and never returned the \$5,000 although demand therefor was made. On September 6 Barton and Landry met appellant at his bank to see the record of the trust fund account which appellant had promised to establish for Bertrand in the amount of \$5,000. In response to their request to see the trust account appellant replied that "the Cashier had the funds between the pages of a book and nobody else knew where it was."

In an ostensible attempt to obtain the loan of \$40,000 for Bertrand appellant accompanied by a stranger visited Bertrand's place of business on the very day he received the \$5,000 to inspect the property to be mortgaged. When Bertrand inquired

by telephone later concerning the loan, appellant advised him that the prospective mortgagee had suffered a heart attack and that he could not be seen. That concluded appellant's efforts to perform his agreement made at the time of receiving the \$5,000 which the court believed in fact never to have been held in trust for a moment.

[3, 4] Such evidence lacked none of the essentials of grand theft. Either appellant held Bertrand's money for a while and embezzled it or promptly upon receipt of it, he appropriated it to his own use. In either event he was guilty of grand theft. Inasmuch as appellant took the \$5,000 to hold in trust an embezzlement could have occurred at any time after the money was received, and it would have been grand theft under section 484, Penal Code. *People v. Cannon*, 77 Cal.App.2d 678, 689, 176 P.2d 409. But since the evidence supports an implied finding that at the time of his receipt of the money appellant intended permanently to deprive Bertrand of its ownership, then his conviction of grand theft was also justified on the theory of larceny by trick and device. *People v. Hennessey*, 201 Cal. 568, 581, 258 P. 49; *People v. Jones*, 61 Cal.App.2d 608, 620, 143 P.2d 726; *People v. Von Badenthal*, 8 Cal.App.2d 404, 408, 48 P.2d 82.

Evidence of Similar Transactions Not Error

[5, 6] For the purpose of establishing the perfidy of appellant at the times of his obtaining the moneys from the witnesses Bevik and Bertrand the prosecution introduced testimony of nine separate transactions. All involved (1) sales of the diesel stock and false statements as to the properties, progress earnings and dividends of the corporation, or (2) false statements as to his own wealth. From the victims of such misrepresentations he obtained sums ranging from \$1,000 to \$16,000—no part of which was in any instance ever repaid and for which the victims received nothing of value. There was no error in admitting the evidence of such transactions. They were of the same common design and pattern as that perpetrated upon Bertrand at the time of obtaining the \$5,000, and in time reasonably near the transactions with

him. They demonstrated appellant's motive, plan, design and criminal intent, and the evidence thereof was therefore properly received. *People v. Thorne*, 10 Cal.2d 705, 708, 76 P.2d 491; *People v. Hennessey*, 201 Cal. 582, 258 P. 49; *People v. Gordon*, 71 Cal.App.2d 606, 631, 163 P. 2d 110; *People v. Gray*, 52 Cal.App.2d 620, 657, 127 P.2d 72. Where several crimes of the accused are of the same general character and tend to the same common end, evidence thereof is admissible to show the motive which impelled the perpetration of the crime for which the defendant is on trial in order to show that the crime charged was a section of the pattern of his life and character. *People v. Dunn*, 40 Cal.App.2d 6, 16, 104 P.2d 119.

Counts III, IV, V, VI, and VII Were
Established

[7] By these five counts appellant was accused of selling and issuing to the parties named therein shares of stock in Diesel Power, Inc., without first having applied for and secured a permit from the commissioner of corporations of California so to do. The only attack made upon these judgments is that the stock sold as alleged in the five counts was "personally owned stock" in that appellant as owner thereof in Nevada imported the stock into California and as such owner made the sales specified. He contends that the sales mentioned in the five counts are specifically exempted by the provisions of the Corporate Securities Act. On the contrary, by section 2, subdivision (c), par. 3 (Act 3814, Deering's General Laws), it is provided that the provisions of the act shall not apply to the sale of a security when made by a vendor not the issuer thereof who, "*being a bona fide owner of such securities, disposes of his own property for his own account, and such sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of such security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this act.*" This language is tantamount to declaring it to be a felony if by the sale of a security prior to the issuance of a permit to the issuer by the corporation commissioner the vendor causes the issuer thereof to profit or to be ad-

vanced by such sale. The uses to which appellant applied portions of his proceeds of sales of the diesel stock fully justify the implied finding that he sold his "personally owned" stock for the benefit of the corporation.

After the corporation's organization appellant and his associates took over its affairs at Las Vegas on July 2, 1946. When the certificates were written for each of the four parties sharing in the issue there was no stock certificate book. Detached, loose certificates were utilized. Subsequently, at Los Angeles, appellant obtained a book of certificates and made the entries on the stubs. He kept possession of the stock certificate book until about December 1, 1946. He interested Barton, a friend of Thaheld, in the promotion of Diesel Power, Inc. and advised him that purchases of the stock could be made only through appellant personally prior to the issuance of a permit to the corporation. For the purpose of aiding appellant to effect sales of his shares Barton contacted the following persons on the following dates and received from them their checks for the following sums, to wit:

Name	Date	Shares	Sum
Haslett	July 9, 1946	7,500	\$5,000
Dunn	July 9, 1946	7,500	5,000
Lowry	July 9, 1946	3,000	2,000
Small	July 9, 1946	3,000	2,000
Haslett	Sept. 4, 1946	7,500	5,000

Also, on July 23, 1946, appellant in person sold 20,000 shares to Bertrand and received \$5,000 on account.

The following events warranted the implied finding that such sales were made for the promotion of the corporation and "with the intent of violating or evading" provisions of the Corporate Securities Act. On July 9, 1946, appellant opened an account in Los Angeles with the California Bank, Sixth and Western Branch, wherein he deposited all checks of the named vendees. Subsequently he drew checks against that account in payment of the following debts of the corporation: (a) Printing bill in the sum of \$1,026.38; (b) the \$2,000 June, 1946, installment on the option to purchase the diesel patent rights; (c) expenses of Barton, Thaheld and himself in excess of

\$800 to Chicago to confer with the officers of an aviation company; (d) \$2,000 due for the July, 1946, installment on the option to purchase the patent rights; (f) in addition to the foregoing, in August, 1946, appellant used the \$800 which he had borrowed from Bertrand for the purpose of making the trip to Chicago in August of that year.

It was only by reason of appellant's deposit of Haslett's check of \$5,000 that he was enabled to make payment of two of the option installments.

[8] Not having first obtained a permit to issue and sell the shares of the diesel corporation, the conclusion from the incontestable facts that appellant had violated the Act is unimpeachable. *People v. McCabe*, 60 Cal.App.2d 492, 499, 141 P.2d 54. It is the duty of every prospective vendor of securities first to ascertain whether a permit has been issued for such sale by the sovereign power. *People v. Stowell*, 45 Cal.App.2d 580, 584, 114 P.2d 614. The authorities cited by appellant neither defeat nor assuage the judgments here for review. *People v. Smith*, 111 Cal.App. 177, 295 P. 105; *People v. Murphy*, 17 Cal.App.2d 575, 62 P.2d 592. Smith's conviction was affirmed notwithstanding his defense paralleled that of Mason. The jury was not compelled to believe his testimony but was entitled to consider the circumstances as to whether he was owner or acting for the corporation. In the Murphy case the facts were held less favorable to an acquittal than were the facts in the Smith case.

No Prejudicial Misconduct

[9,10] Appellant bases his claims of misconduct by the deputy district attorney upon the latter's asking leading and suggestive questions on direct examination of the witnesses Bevik, Landry and Barton notwithstanding appellant's objections thereto. Not only is it proper to ask leading questions when they are designed more quickly to reach the testimony material to the issues (*People v. Orona*, 79 Cal.App.2d 820, 827, 180 P.2d 694), but the trial court has a wide discretion in determining the extent to which such questions may be asked. *People v. Wilson*, 46 Cal.App.2d 218, 224, 115 P.2d 598. In defining the term "lead-

ing question" (Code Civ.Proc., sec. 2046) as one "which suggests to the witness the answer which the examining party desires," the legislature contemplated only answers material to the issue under consideration. For the orderly expedition of a trial it is proper by leading questions for the examiner to place the circumstances of the witness before the court. See Wellman's "Day in Court," page 152, and "Art of Cross-examination."

The judgments and the order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.



86 Cal.App.2d 182

BROCK v. SOUTHERN PAC. CO. et al.
Civ. 13622.

District Court of Appeal, First District,
Division 1, California.

June 15, 1948.

Rehearing Denied July 15, 1948.

Hearing Denied Aug. 12, 1948.

1. Malicious prosecution ☞72(1)

In action for malicious prosecution for institution of proceedings of commitment of plaintiff as a mentally ill person, where complaint alleged that defendant was employed by city and county of San Francisco as investigator for District Attorney's office and that he was a special officer, etc., and proof showed that defendant was a peace officer and investigator in the psychiatric division of District Attorney's office, instruction that defendant was sued in his official capacity was proper, particularly in view of fact that no instruction was given that defendant was thereby rendered immune. Welfare and Institutions Code, §§ 5000-5160.

2. Appeal and error ☞930(2)

The appellate court must presume that the jury followed the instructions given.

3. Trial ☞251(2)

In action for malicious prosecution for institution of proceedings for commitment of plaintiff as a mentally ill person, where court refused to give defendant's instruction relating to official immunity, refusal to give plaintiff's instruction on same subject was not error. Welfare and Institutions Code, §§ 5000-5160.

4. Judgment ☞199(3)

On defendant's motion for judgment notwithstanding the verdict, evidence of plaintiff must be taken as true and plaintiff must be given the benefit of every legitimate inference that may be drawn from the evidence, and motion should be granted only when there is no evidence of sufficient substantiality to support the verdict.

5. Malicious prosecution ☞64(1)

Where statements made by doctors employed by railroad hospital concerning plaintiff's mental illness were not communicated to anyone but plaintiff and plaintiff's brother and proceedings to commit plaintiff as mentally ill were instituted by city and county official nearly two years later, evidence was insufficient to hold railroad liable for alleged malicious prosecution. Welfare and Institutions Code, §§ 5000-5160.

6. Judgment ☞720

A judgment that railroad was not liable for alleged malpractice in puncturing plaintiff's spine while in railroad hospital was conclusive in subsequent action between the parties for alleged malicious prosecution.

7. Judgment ☞720

A judgment for railroad in action under Federal Employers Liability Act was conclusive as to absence of any cause of action against railroad in subsequent action between the parties for alleged malicious prosecution.

8. Malicious prosecution ☞42

Where there was no evidence that physician in general employ of railroad hospital was acting as agent for railroad hospital when, in capacity of a regular medical examiner appointed by the Superior Court, he saw and talked to the plaintiff against whom proceedings had

been instituted by a city and county official to have plaintiff committed as mentally ill, any statements then made by physician could not serve as a basis for fastening liability on railroad company in action by plaintiff for malicious prosecution on account of proceedings to have plaintiff declared mentally ill. Welfare and Institutions Code, §§ 5000-5160.

9. Malicious prosecution ☞56

One claiming to have been maliciously prosecuted must prove want of probable cause on the part of anyone alleged to have instituted the malicious prosecution.

10. Malicious prosecution ☞56

Where there was no evidence of want of probable cause in making statements that plaintiff was afflicted with "somatic delusions especially associated with the gastro-intestinal tract" and recommending the plaintiff's detention, railroad employer of physician could not be held liable for malicious prosecution instituted by city and county official to have plaintiff committed as mentally ill. Welfare and Institutions Code, §§ 5000-5160.

11. Malicious prosecution ☞25(1)

In action for malicious prosecution because of proceedings instituted by city and county official to have plaintiff confined as mentally ill, in determining whether psychiatrist had probable cause in stating to such official that plaintiff was psychotic and should be confined in state institution, the medical records upon which the statements were made must be considered. Welfare and Institutions Code, §§ 5000-5160.

12. Malicious prosecution ☞64(2)

In action for malicious prosecution arising out of proceedings instituted by city and county official to have plaintiff committed as mentally ill, undisputed evidence showed that psychiatrist had probable cause for stating that plaintiff was psychotic and should be confined in state institution. Welfare and Institutions Code, §§ 5000-5160.

13. Malicious prosecution ☞25(1)

A psychiatrist was not required to exhaust all sources of information bearing upon the facts which had come to his

knowledge in order to have probable cause for statements that plaintiff was psychotic and should be confined in state institution. Welfare and Institutions Code, §§ 5000-5160.

14. Appeal and error ⇨ 109, 782

An order granting motions for judgment notwithstanding the verdict is not appealable, and attempted appeal from such order would be dismissed. Code Civ.Proc. § 963. *

Appeal from Superior Court, City and County of San Francisco; Samuel F. Finley, Judge.

Action by Bert Brock against the Southern Pacific Company, the Board of Trustees of the Leland Stanford Junior University and Matt Quinn for malicious prosecution. From judgment entered on verdict in favor of the defendant Quinn, from an order granting motions of the Board of Trustees of Leland Stanford Junior University and the Southern Pacific Company for judgment notwithstanding verdict awarding plaintiff \$50,000 and from judgment entered pursuant thereto, the plaintiff appeals.

Judgment on verdict in favor of defendant Quinn affirmed, appeal from order granting motions for judgment notwithstanding the verdict dismissed, and judgment notwithstanding the verdict in favor of Southern Pacific Company and Board of Trustees of Leland Stanford Junior University affirmed.

Ernest E. Emmons, Jr., and Philander Brooks Beadle, both of San Francisco, for appellant.

Dunne & Dunne, of San Francisco, for respondent Southern Pac. Co.

Robert L. Lamb and Theodore Tamba, both of San Francisco, for respondent Board of Trustees, etc.

Alfred Del Carlo, of San Francisco, for respondent Quinn.

WARD, Justice.

This is an action for malicious prosecution based upon a proceeding under Welfare and Institutions Code sections 5000-

5160 for the commitment of plaintiff as a mentally ill person. Plaintiff appeals (1) from the judgment entered on the verdict in favor of defendant Matthew A. Quinn (sued as Matt Quinn) and against plaintiff; (2) from the order granting the motions of the Board of Trustees of Leland Stanford Junior University (sued as Leland Stanford University), a corporation, and the Southern Pacific Company, a corporation, for judgment notwithstanding the verdict awarding plaintiff \$50,000, and from the judgment entered pursuant thereto. The action was dismissed as to the City and County of San Francisco, a municipal corporation, Dr. C. A. Walker, Dr. Henry W. Newman, Dr. P. P. Poliak, Dr. L. M. Wilbur, Dr. Arthur Beardsley, and fifteen John Does.

Recognition is currently being given to the need for minimizing formal court procedure in working toward a change in public attitude as to proceedings for the commitment of the mentally ill from "committed like a criminal" to "admitted like a patient." Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill, 56 Yale L. Jour. 1179, 1208 (1947); and see Commitment of the Mentally Ill, 24 Tex.L.Rev. 307 (1946). At the same time it is generally recognized that "One who initiates civil proceedings against another which allege the other's insanity * * * is liable for the harm to the other's reputation caused thereby, if (a) the proceedings are initiated (i) without probable cause, and (ii) primarily for a purpose other than that of securing the adjudication of the claim on which the proceedings are based, and (b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought." Restatement, Torts, sec. 678; accord, Barton v. Woodward, 32 Idaho 375, 182 P. 916, 5 A.L.R. 1097; Beckham v. Cline, 151 Fla. 481, 10 So.2d 419, 145 A.L.R. 711. The existence of a cause of action for malicious prosecution based upon a proceeding under Political Code section 2168 was recognized by the Supreme Court in Griswold v. Griswold, 1904, 143 Cal. 617, 77 P. 672; and Franzen v. Shenk, 1943, 192 Cal. 572, 221 P. 932.

In keeping with a trend toward modernization of commitment legislation (Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill, *supra*), the Legislature in 1937 enacted Welfare and Institutions Code sections 5000-5160. Section 5155 of said code which was added in 1939 (Stats.1939, ch. 295, sec. 34, p. 1566) provides that "This chapter shall be liberally construed so that, as far as possible and consistent with the rights of mentally ill persons and others, such mentally ill persons shall be treated, not as criminals, but as sick persons." Subsequent to these enactments, the appellate courts have on two occasions assumed the propriety of a malicious prosecution action based upon the filing of a petition under Welfare and Institutions Code section 5047. *Pulvermacher v. Los Angeles Co-ordinating Committee*, 1943, 61 Cal.App.2d 704, 143 P.2d 974; *Jensen v. Leonard*, 1947, 82 Cal.App. 2d 340, 186 P.2d 206.

The following "Statement of Facts" appears in appellant's opening brief: "Plaintiff was employed by respondent Southern Pacific Company as a carpenter for a number of years prior to 1939. On September 14, 1939, he was admitted to the Southern Pacific Company's General Hospital at San Francisco as an employee-patient, his complaints being for injuries sustained while at work. While in the hospital he was given a spinal puncture by a student doctor. He was there under the care of Dr. C. A. Walker and Dr. Arthur Beardsley relative to his injuries. At various times during his stay in the hospital plaintiff was urged to 'enter a state institution,' 'go to your family' or 'go to a farm.' Plaintiff refused to do so, stating that, since Southern Pacific Company had injured him, the railroad should supply him with medical care.

"During the latter part of his stay in the Southern Pacific Hospital plaintiff was threatened by Dr. Beardsley, who told him that if he did not leave the hospital voluntarily, he would see to it that plaintiff would be placed in a mental institution. Dr. Walker wrote on October 14, 1939, to Elmer Brock, plaintiff's brother, requesting that appellant be committed to a state institution and asking plaintiff's brother to take steps to remove the patient from the

Southern Pacific Company Hospital. Dr. Walker also requested authority to proceed with plaintiff's commitment to a state institution. This letter was followed by a telegram from Dr. Walker stating 'your brother should be transferred at once to a State Institution.' Plaintiff was discharged from the Southern Pacific Hospital on March 23, 1940, but did not leave until March 26th. On that day he was ordered out. Plaintiff was still in a sick and disabled condition at that time.

"Upon his release, plaintiff became a patient of Dr. Andrew B. Stockton, who diagnosed his principal ailment as a severe case of arthritis of the back. Plaintiff was a patient of Dr. Stockton at the time of his attempted commitment hereinafter mentioned. Dr. Stockton did not find plaintiff to be mentally ill. He advised plaintiff to go to the Stanford Hospital for clinic treatment of his back.

"On July 14, 1940, plaintiff entered the San Francisco Hospital. During his stay there he contracted typhoid fever and remained until August 27, 1940.

"Upon his release from the San Francisco Hospital plaintiff retained counsel, who, on September 25, 1940, filed an action for malpractice arising out of the spinal puncture which had been administered to him at the Southern Pacific Company Hospital. On August 30, 1941, plaintiff filed an action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., and based upon the injuries sustained in September, 1939. Defendant Southern Pacific Company was named as a defendant in both actions. These two suits were pending on September 18, 1941.

"Plaintiff first reported to Stanford Hospital on July 1, 1941. From that date until August 28, 1941, he was seen in the Stanford Hospital as an out-patient about ten times. During this period he was not advised that he was under mental observation, but was under the impression that he was receiving treatment for his arthritic condition. While under treatment at Stanford Hospital, plaintiff was requested to, and did, sign 'permission' slips authorizing former hospitals and doctors to reveal his past medical history to the Stanford Hospital. Pursuant to such authorization

a letter was obtained from the Southern Pacific Company Hospital dated August 6, 1941 over the signature of Dr. C. A. Walker.

"On August 29, 1941, Dr. Henry Newman, chief of the Stanford Hospital Neuropsychiatric Clinic, wrote a letter on the letterhead of the Stanford Hospital to the district attorney's office, attention of defendant Matt Quinn, stating that plaintiff was suffering from somatic delusions, was 'a menace to himself and society', and should be committed to a State Hospital as a mentally ill person. * * *

"Thereafter, on September 10, 1941, defendant Matt Quinn signed a petition alleging that plaintiff was so mentally ill that without supervision and care he constituted a menace to himself and the person and property of others. Quinn's conclusion to this effect was based upon the statement referred to in Dr. Newman's letter of August 29, 1941. On September 18, 1941, plaintiff was arrested pursuant to a warrant based upon Quinn's petition and confined in the psychopathic ward in the San Francisco Hospital.

"Plaintiff held a patent on a process which he had perfected for manufacturing a synthetic petroleum fuel. While he was detained under the alleged insanity charge, defendants tried to force him to reveal information concerning the process. Defendants had acquired no rights in the patent, by purchase or otherwise, but threatened to continue prosecuting plaintiff unless he would divulge information concerning it.

"Dr. Beardsley, who had previously threatened plaintiff while a patient in the Southern Pacific Hospital, examined him at the San Francisco Hospital after the arrest. Dr. Beardsley then again threatened plaintiff, stating that he would see to it that plaintiff would be placed where he could not sue the Southern Pacific Company again. Dr. Beardsley also acted as one of the two medical examiners appointed by the Court to examine plaintiff and certify as to his mental condition. Dr. Beardsley, with Dr. Harold E. Fraser, thereafter joined in certifying to the Court that plaintiff was mentally ill. Plaintiff demanded a jury trial on the issue of his san-

ity. Dr. Beardsley appeared as a witness and testified that plaintiff was mentally ill. Dr. Stockton testified that he was not.

"The jury, on October 17, 1941, returned a verdict of not mentally ill and plaintiff was thereupon released from a confinement totaling 29 days."

The foregoing is supported largely by plaintiff's own testimony. The actions brought by plaintiff against the defendant Southern Pacific Company were determined in the latter's favor. Defendants' Exhibits B and C, constituting the files in cases #304,569 and #297,642; Brock v. Southern Pacific Co., 74 Cal.App.2d 806, 169 P.2d 402; see, also, Brock v. Fouchy, 76 Cal.App.2d 363, 172 P.2d 945.

I. The Judgment in Favor of Defendant Matt Quinn.

The appeal from the judgment against plaintiff and in favor of Quinn is based entirely upon two claimed errors in instructions; one given and one refused. The instruction given informed the jury that the action was against Quinn in his official capacity through his appointment by the district attorney. The refused instruction was based upon the listed peace officers designated in Penal Code section 817.

There is no merit to plaintiff's contention that the instruction stating that Matt Quinn was sued "in his official capacity through appointment by the District Attorney of the City and County of San Francisco" is not substantiated by the record. While it is true that the title to the second amended complaint upon which the matter went to trial names as a defendant, "Matt Quinn", the body of the said complaint states "That plaintiff is informed and believes and upon such information and belief, alleges that said defendant City and County of San Francisco, a municipal corporation, at all of the times herein mentioned employed defendant Matt Quinn in the capacity of investigator in the office of the District Attorney of said City and County of San Francisco." Furthermore his "Appointment and Oath" from both the present district attorney and his predecessor "appoint and constitute Matthew A. Quinn, Special Officer, in and for the City and County * * *."

[1, 2] Quinn offered evidence to support his contention that he was immune from this type of action for two reasons, namely, (1) he testified that he was a peace officer appointed by the chief of police of the City and County of San Francisco, and (2) documentary evidence supports his testimony that he was an investigator working for and on behalf of, and in the place of the district attorney, in the psychiatric division of the district attorney's office. Although the trial court instructed the jury that Quinn was sued in his official capacity through appointment by the district attorney, no instruction was given that he was thereby rendered immune. On the contrary, the jury was instructed as follows: "If, as to any defendant, the plaintiff has failed to prove any one of these elements by a preponderance of the evidence, that defendant is entitled to your verdict * * * as I have stated, the plaintiff has the burden of proving all the elements to which I have called your attention as if as * * * to either Southern Pacific Company or Stanford University or Matt Quinn there is no evidence showing as to it or him any necessary element of plaintiff's claim or even if there is some such evidence, if the plaintiff has failed to sustain the burden of proof by a preponderance of the evidence any one of the necessary elements of his case as to either of these defendants, it will be your duty to return your verdict in favor of said defendant * * * and if you find that Defendant Matt Quinn filed said petition in good faith exercised of his own best judgment and with probable cause and without malice, you will bring in a verdict in favor of Defendant Matt Quinn." As was said in another action for malicious prosecution, "We must assume that this instruction was followed by the jury." *Robinson v. McKnight*, 103 Cal.App. 718, 729, 284 P. 1056, 1062.

[3] The instruction which the trial court refused to give reads as follows: "You are instructed that a 'peace officer' under the laws of this State, 'is a sheriff of a county, marshal of a municipal court, constable of a township, marshal, policeman of a city or town.' If the evidence before you shows that the appointment of a policeman in the City and County of San Francis-

co must be made by the chief of police under the provisions of the charter of said City and County of San Francisco, and you further find that there is no evidence before you of the appointment of the defendant Matt Quinn as a policeman, special or otherwise, by the chief of police of said City and County of San Francisco, you must find that the defendant Matt Quinn was not a 'peace officer' within the meaning of the law of this State. If you so find, you are further instructed that the defendant Matt Quinn stands in the same position as a private citizen in this action and enjoys no immunity from civil liability." This instruction was properly refused in view of the fact that the trial court did not instruct the jury according to Quinn's theory that he was immune from this type of action. *Timbrell v. Suburban Hospital, Inc.*, 4 Cal.2d 68, 72, 47 P.2d 737; see cases cited, 24 Cal.Jur. 804, 805.

II. The Judgments in Favor of Southern Pacific Company and the Board of Trustees of the Leland Stanford Junior University.

[4] The motions for judgment notwithstanding the verdict were properly granted as to both Southern Pacific Company and the Board of Trustees of the Leland Stanford Junior University since "giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." *Card v. Boms*, 210 Cal. 200, 202, 291 P. 190, 191; accord, *Brandenburg v. Pacific Gas & Elec. Co.*, 28 Cal.2d 282, 284, 169 P.2d 909; and see *Blank v. Coffin*, 20 Cal.2d 457, 126 P.2d 868 and *Hicks v. Reis*, 21 Cal.2d 654, 134 P.2d 788. The conclusion reached herein is in accord with the recent case of *Jensen v. Leonard*, supra, wherein the appellate court affirmed a judgment entered upon a nonsuit granted as to the physician who filed a petition under Welfare and Institutions Code section 5047, and a judgment entered upon a directed verdict in favor of the co-defendant who had referred the plaintiff to said physician.

[5] The evidence which plaintiff contends establishes the essential elements of a cause of action for malicious prosecution against Southern Pacific Company will first be reviewed. Plaintiff testified that in October, 1939, while he was a patient in the Southern Pacific hospital under the care of Dr. Beardsley and Dr. Walker, the former urged him to leave the Southern Pacific hospital and "enter a state institution" or "go to his family" or "go to a farm" or "take care of myself"; when plaintiff replied that the Southern Pacific Company should supply his medical needs, Dr. Beardsley said "We will get you out of here, if you don't go we will get you out by some other method." Under the rule set forth in *Card v. Boms* supra, it must be assumed that the statements attributed to Dr. Beardsley were actually made. Plaintiff's testimony is corroborated by a letter dated October 11, 1939 and a telegram dated November 1, 1939, sent by Dr. Walker to plaintiff's brother advising him that plaintiff needed mental treatment, and requesting him to take steps "towards his removal from our hospital, or either to a private mental institution or commitment to a California State Hospital, or give us authority to proceed with such commitment." Nearly two years passed before Quinn signed the petition under Welfare and Institutions Code section 5047. Plaintiff produced no evidence that Dr. Beardsley's statements were communicated to anyone but Brock, nor that the letter and telegram were shown to anyone but his brother. "In order that a defendant may be held liable for the malicious prosecution of a lunacy proceeding, it must appear, of course, that he instituted, or instigated the institution of, the proceeding." 145 A.L.R. 713-714. Plaintiff's own evidence indicates that the invention of Dr. Beardsley and Dr. Walker as revealed in said evidence was not carried out for plaintiff was permitted to remain at the Southern Pacific hospital until nearly the end of March, 1940.

[6] Some mention has been made of the "puncture of the spine" as indicating maliciousness, but it is admitted that a suit for mal-practice primarily based upon this incident resulted in a judgment against Brock. " * * * a judgment or

decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again at issue between them. In re Clark's Estate, 190 Cal. 354, 212 P. 622; Freeman on Judgments, Sections 249, 253." *Elliott v. Bertsch*, 59 Cal.App.2d 543, 549, 139 P.2d 332, 335.

Plaintiff contends that Dr. Walker's letter dated August 6, 1941, pursuant to a request from the Stanford hospital, following the signing of a "permission" slip by plaintiff authorizing Southern Pacific hospital to reveal his past medical history to the Stanford hospital, shows that Dr. Walker was actively instrumental in maliciously bringing about the proceeding under the Welfare and Institutions Code. It reads as follows: "Gentlemen: Mr. Brock, age 56, was in the Southern Pacific General Hospital from September 14, 1939 to March 26, 1940. He complained of loss of appetite and weakness, dating from February, 1939.

"On physical examination no abnormality was found. Gastro-intestinal series of X-rays taken on September 19, 1939, showed: The stomach is large, atonic, J shaped, with accentuated rugal markings; no filling defect seen in the stomach; the duodenal bulb is well outlined. The liver is slightly enlarged and somewhat dense. In the $\frac{3}{4}$ lateral view a peculiar opacity is visualized juxtaposed to the duodenal bulb. This, we are inclined to believe, represents a large diverticulum of the duodenum. There is a residue in the stomach at the end of the six hours. There is no residue in this diverticulum. There is evidence of colonic stasis at forty-eight hours. There is normal visualization of the gallbladder. Conclusion: Delayed emptying time of the stomach, possibly due to a chronic gastritis; appearance of a diverticulum of the second portion of the duodenum.

	Quantity	Free HCL	T.A.
Gastric Contents:			
1	30 cc.	0°	4
2	60 cc.	4°	20
3	65 cc.	8°	12

"Stool examinations were all negative for occult blood. The blood Wassermann &

Kahn were negative. Spinal fluid. Wasserman negative; Cells, 2 L.; Globulin O; T.T. 32; C.G. 00000/00000

"X-rays of the teeth showed very marked alveolar absorption.

"X-rays of the lumbo-sacral and lower thoracic spine showed practically no evidence of hypertrophic osteoarthritis.

"Prostate and siminal vesticles were normal.

"Vision, right 20/20; left 20/20. Media clear. Fundi and discs normal. Ears, nose and throat negative.

"Diagnosis was made of advanced psychoneurosis with neurasthenic and schizoid trends.

"This man had definite somatic delusions, especially associated with the gastro-intestinal tract. He stated that several times he vomited ½ teaspoonful of blood, but this could not be substantiated at the hospital. He further stated that his intestines were leaking material into his abdominal cavity. He was subject at times to severe periods of depression, and on several occasions he would for no reason at all start crying, and request that a minister be called because he felt that he was dying. There is a mental conflict of some sort, but the patient refused to divulge its nature. The patient was very reclusive. He kept to himself, and said very little. There were never at any time any organic neurological signs.

"We trust that the foregoing information will be of service to you in the treatment of this case. Very truly yours /s/ C. A. Walker, C. A. Walker M. D. Chief Surgeon."

[7] Plaintiff's conclusion—that this letter contains a definite misstatement of a material fact relative to plaintiff's medical history in that it failed to make any reference to the "real reason" why plaintiff was a patient in the hospital or to his claim based upon alleged malpractice while there—is not supported by the record. Although plaintiff testified that prior to his entry into the Southern Pacific hospital he had sustained an injury while in the employ of the Southern Pacific Company, the judgment against plaintiff is conclusive as to the absence of any cause of action against Southern Pacific Company therefor, and

is consistent with Dr. Walker's statement that plaintiff's complaints upon entry were "loss of appetite and weakness." With respect to "the spinal puncture", the letter gives the results of various tests, and in this connection states: "Spinal Fluid. Wasserman negatives; Cells, 2 L.; Globulin O; T. T 32; C. G. 00000/00000."

[8] Dr. Beardsley was one of two doctors selected by the superior court to examine Brock after his apprehension. Plaintiff testified that during such examination Dr. Beardsley told him that he would see to it that plaintiff would be placed where he could not sue the Southern Pacific Company again. Such statements were made subsequent to plaintiff's apprehension following the signing of the petition by Quinn. There is no evidence that Dr. Beardsley was acting as agent for the Southern Pacific hospital when, in the capacity of a regular medical examiner appointed by the superior court, he saw and talked to the plaintiff. Such statements cannot serve as the basis for fastening any liability upon the Southern Pacific Company. *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 450, 451, 159 P.2d 958; Restatement, Agency, sec. 258.

[9, 10] One act or statement on the part of the Southern Pacific Company that may have had an effect on Dr. Newman in recommending plaintiff's detention is the statement in Dr. Walker's letter that Brock was afflicted with "somatic delusions, especially associated with the gastro-intestinal tract." It is incumbent upon the party claiming to have been maliciously prosecuted to prove want of probable cause on the part of anyone alleged to have instigated the malicious prosecution. *Singleton v. Singleton*, 68 Cal.App.2d 681, 157 P.2d 886. The only witness called by plaintiff to testify as an expert was Dr. Andrew B. Stockton, who attended plaintiff in 1940 and 1941. Dr. Stockton, in reply to the question: "Did it ever occur to you that he might have delusions or halucinations?" answered "No." He further testified:

"Q. Did he have somewhat peculiar ideas as to what constituted his complaints? A. Yes, he did that.

"Q. Can you name any of those complaints that he thought he might have? A.

Well, recently his complaints have been referable to the arthritis of the spine. Previous to that, he had, as I recall, dizziness, noises in his ears, he described curious abdominal symptoms, but it wasn't the symptoms so much as it was the idea he had of his own physiology that was peculiar.

"Q. I see. Did he bring you a list of things, to you, listing things for you to go over to see if you could tell him whether or not he was suffering from those things? A. He often did, yes. * * * He brought long lists at various times that included about every known medical disease, I imagine." There was a failure on the part of the plaintiff to prove that Dr. Walker did not have probable cause to make the statement quoted from his letter.

The principal evidence upon which plaintiff bases his cause of action against the Board of Trustees of the Leland Stanford Junior University is the letter written by Dr. Newman to Quinn. It reads:

"August 29, 1941. Mr. M. A. Quinn, District Attorney's Office. * * * Re: Bert Brock. * * * Mr. Brock was seen in medical clinic on July 22nd complaining of painful back, vomiting, etc. We obtained information from Southern Pacific Hospital that he had been hospitalized there from September 14, 1939 to March 26, 1940 complaining of loss of appetite and weakness. X-rays there showed evidence of a diverticulum of the second portion of the duodenum. They report that he had definite somatic delusions, and was subject to severe periods of depression.

"In medical clinic, he was uncooperative and refused to answer questions so was transferred to the neuropsychiatric clinic, as thorough medical workup was not practicable. In the neuropsychiatric clinic it was elicited that his complaints dated from 1939 when he was struck across the abdomen by a piece of timber. Neurological examination showed certain evidence of pyramidal tract involvement, but this was inconstant. It was almost impossible to obtain a coherent story from him; he was apparently very much deteriorated intellectually and very suspicious.

"In September of 1940, he was hospitalized in San Francisco Hospital with typhoid fever. Following his hospitaliza-

tion in the isolation ward he was transferred to the psychiatric division, where a diagnosis of psychoneurosis was made. Laboratory examination, including blood, urine and blood Wassermann, were not remarkable. Bone and joint clinic found nothing remarkable.

"From our contact with the patient during repeated interviews, it is not entirely clear what exact diagnosis can be applied to Mr. Brock. We do feel, however, that he is definitely psychotic and that there is more than a suspicion that the psychosis is on the basis of organic disease of the central nervous system. It is impossible to adequately care for him in the psychiatric clinic and since he is a menace to himself and society, we feel that he should be committed to a State Hospital. Very truly yours Henry W. Newman, M.D. Neuropsychiatric Clinic."

[11] In determining whether Dr. Newman had probable cause for the statements just quoted, the medical records upon which Dr. Newman based said statements must be considered. "In actions for the malicious prosecution of lunacy proceedings probable cause has been in substance defined as such a state of facts as would lead a reasonably prudent man to believe that the plaintiff was insane. [Citing *Griswold v. Griswold*, supra.] Probable cause depends upon the facts known or available to the defendant at the time of making the accusation, and not upon the actual insanity of the plaintiff." 145 A.L.R. 716, accord *Jensen v. Leonard*, supra.

When Mr. Brock presented himself at the Stanford hospital clinic he produced the following statement: "Started Sept. 1939 S P. Co. CC S 99 Traumatic injuries and resulting sickness. Can the spine be x-rayed and fixed up? Can I get medicines and electric diathermy treatments to get relief and possibly a cure of the painful destructive inflammations, progressing to total paralysis.

"Myositis. Parasyovitis. Panarthritis. Compound rotary curvature deformity of vertebræ column. Scoliosis, joint injuries, and crushing of the viscera. Aponeurosis. Lumbar girdle pains. Contusion compression of nerves. Inco-ordination. Constant nerves—muscular twitchings. Cramps.

Atrophy of cells. Cartilage. Resilient Discs. Dysarthrosis. Neuroses. Dyspepsia. Salivary dysfunction. Dermatitis. Neurasthenia. Hyperesthesia. Necrosis. Hyperhidrosis. Amyotrophy. Damaged lymphatic and kidney functions. Incontinence of bladder and intestinal Excretions. Osteomyelitis. Paresis. Polyneuritis. Lower legs and feet painful and in bad condition. Pachy and Lepto Meningitis.

"Cerebrospinal cirus. Paraplegia. Quiver and tremor of jaw and tongue. Teeth neuralgia. Insomnia. Congestive hyperæmia. Septicæmia.

"Cerebritis. Constant gruesome sickening head achings. Occipital neuralgia. Constant sore paining eyes to blurry vision. Cortical paresis. Constant Scapalgia neck and cervical pains. The Puncture Job causes arthritis, disease, scoliosis, cortical bulbar spinal amyotrophic lateral sclerosis. Other injuries. Vomiting.

"The spinal nerves puncture and fluid drainage, etc. causes poisonings, chronic inflammations, pains, atrophy, sclerosis of brain, eyes and other matter. Leptomeningitis, paralysis, sickness. Injury to the neuroglia, fissures, 4th ventricles; Tissue membranes in head, and medulla Central cord Sympathetic—peripheral nervous system.

"Injury to the respiration apparatus—colds, bronchitis, lungs troubles. Injury to the cardiac vascular system—palpitation irregular heart action slow to very fast and thin volume. Pains.

"Injury to the throat and digestive organs system. Constant angina, septic sore throat, dry,—bitter taste and must sip lubricating fluids, day and night. Esophagitis. Impaired normal functions of liver, intestines, lymph glands, and other glandular secretations. Phthisis. Injury to the limbs. Coxalgia. Sacroiliac pains and other injuries, illness and disabilities to various organs, tissues, cells, fluids and functions of the body, the personality and mind.

"With all of them I must suffer and bear the agonies to the end of my shortened life period, days to sev. years.

"I no treatment is available to give relief and cure, and several physicians and hospitals have said there is no treatment

and cure for these injuries and illness, so refused to give treatments, or helpful aid.

"Caused by and reulting from industrial injury and puncture stabs into the central nervous system canal and other membranes and draining cerebrospinal fluids from head, causing severe pains, sickness, paralysis near death. Negligence and repeated refusal to give treatments.

"Later, kidnapped, falsely imprisoned, severely tortured, overpowered and forced typhoid germs in my body. Bert Brock."

In addition to this statement and the letter of Dr. Walker, a letter from the San Francisco County Hospital dated July 25, 1941, was also before Dr. Newman. It states that plaintiff was admitted to the San Francisco hospital on July 14, 1940, and discharged on August 27, 1940, with the final diagnosis of "Psychoneurosis, mixed" and "improved." Under the heading "Remarks", the following statements were made: "Patient was first admitted to the Isolation Hospital with a diagnosis of 'typhoid fever'; pending decision re his abnormal behavior. When he recovered he was admitted to the Psychiatric Hospital where he was for a week. At first he seemed quite definitely psychotic. He showed an agitated depression with some confusion and somatic delusions. The picture resembled Involutional Psychosis. At time of discharge to himself he was not psychotic. He displayed neurotic symptoms with considerable somatic preoccupation in the nature of hypochondriasis." The letter is signed, "L. M. Wilbor, Superintendent."

Dr. Newman testified as to the results of certain examinations which were made or Brock at the Stanford clinic. "The neurological examinations showed findings which were puzzling to us. He showed on at least two occasions a positive Romberg sign—that is, when he was requested to stand up with his feet together and shut his eyes, he would fall over. A normal person, with a normally functioning system, is able to stand up in that position. On several occasions also he showed on both sides a positive Babinski sign."

In response to the question, "what did you fear would happen if Mr. Brock were

allowed to go free, retain his liberty?" posed by plaintiff's counsel, Dr. Newman replied: "I was afraid of two things: First and primarily, that if his mental condition was due to organic brain damage and brain tumor, there was certain a prominent possibility that the optimum time for treatment and possibility of the removal of such tumor would have passed before Mr. Brock would have been in a position where he could receive such treatment. In other words, I felt that delay in ascertaining the nature, the underlying condition responsible for his mental illness, might well be very dangerous to his possibility of recovery. Secondly, I knew that he had certain paranoid delusions, feelings of persecution to the extent that he felt that his life was, had been jeopardized on numerous occasions and that he had definite ideas as to under what circumstances that had occurred, the taking of the spinal puncture, being a lumbar puncture, and his alleged, by him, inoculation of typhoid in the San Francisco hospital, and his lack of cooperation and suspicion and hostility towards the doctors in the clinic at Stanford, were indicative of the persecutory trend. He felt himself to be in a very serious condition. He was despairing of his life. Knowing that he was suffering from mental disease, I felt that there was a reasonable possibility that he would seek redress for his persecution and knowing, again, that he had, was suffering from mental illness, I had no assurance that such redress would be of an orderly or lawful type and therefore I felt that he might seek redress of a violent nature against anyone who had been involved in those persecutory delusion circumstances."

[12] It must here be said concerning Dr. Newman, what was said in *Jensen v. Leonard*, supra, 82 Cal.App.2d 340, 352, 186 P.2d 214, concerning Dr. Leonard in affirming a nonsuit: "We fail to find in the record before us sufficient evidence to have justified the jury in finding, had the question been submitted to it, that respondent Dr. Leonard did not in fact believe that appellant was 'mentally ill', as that term is defined by section 5040 of the Welfare and Institutions Code. Therefore, the

question of his belief was properly determined by the court on the basis of what, under the circumstances, was sufficient to cause a reasonable person to entertain a suspicion of the mental illness of appellant. The burden was cast upon appellant of proving the negative fact of want of probable cause and the existence of malice. * * * Appellant's denial of the truth of statements made by respondent Hood to respondent Dr. Leonard did not create any conflict in the testimony that the latter had such statements before him at the time he interviewed appellant, and that he honestly believed that such statements as to appellant's condition were confirmed by her conduct toward him at the time he personally talked with her. We are, therefore, convinced that in the record before us there is an abundance of evidence, without substantial conflict, to justify a reasonable person, situated as respondent Dr. Leonard was, in assuming there was probable cause to believe that appellant was mentally ill. Such being the case, it was for the trial court to determine, as a matter of law, whether an inference of probable cause was warranted and whether respondent Dr. Leonard did or did not in fact believe that appellant was mentally ill."

[13] There is no merit in plaintiff's contention that Dr. Newman should have consulted Dr. Stockton or Dr. Edward Hause, who as an interne at the San Francisco hospital on August 26, 1940, described plaintiff as "psychoneurotic, it may be termed, but apparently adjusted to life and able to make his way for many years." Dr. Newman was not required to exhaust all sources of information bearing upon the facts which had come to his knowledge in order to have had probable cause for making the statements contained in his letter to Quinn. *Richter v. Neilson*, 11 Cal. App.2d 503, 514, 515, 54 P.2d 54; *Murdock v. Gerth*, 65 Cal.App.2d 170, 150 P.2d 489.

Nor is there merit to plaintiff's contention that as a matter of law the evidence supports an inference "from his own testimony that the doctor regarded plaintiff as a nuisance who had insufficient funds to become a patient in the hospital, who was too uncooperative to be a satisfactory

out-patient, and who could most easily be gotten rid of by commitment to a state institution." "Whether a particular inference can be drawn from certain evidence is a question of law." *Blank v. Coffin*, supra, 20 Cal.2d 461, 126 P.2d 870; *Hicks v. Reis*, supra. Plaintiff's counsel questioned Dr. Newman concerning his statement in the letter to Quinn that plaintiff "is a menace to himself and society." He was reminded of a telephone conversation with plaintiff's counsel on October 25, 1946, and asked if he then gave as his reason for recommending commitment, "the fact he must have threatened suicide or threatened somebody at the time." Dr. Newman explained: "That was purely conjecture on my part. I didn't say that I remembered that he had. Here was something which was sprung on me over the phone after a period of five years * * *." Dr. Newman was further questioned as follows:

"Q. Now, Doctor, calling your attention again to the conversation you had with me on October 25, 1946 at about 5:30 p. m., I will ask you if this conversation took place: I asked this question: 'Because I don't want to go into this too deep, but that intrigued me—this thing about being a menace to himself and society. A. Actually, he need not have been much of a menace to himself and society. That is the current phrase used by anybody we feel needs hospital care whether he wants it or not.' Now, I ask you, if you told me that—A. I still believe he must have been a menace to himself or society. The degree of menace, I think, must be left up to the doctor to judge.

"Q. Now, Doctor, what do you mean by the fact that this is a current phrase used by anybody you feel needs hospital care? A. Because he is a danger to himself, obviously the reason he needs hospital care, not merely to get a patient into the hospital who is perfectly willing to go, but one who needs medical care for his own safety and will not do so willingly; he therefore constitutes a menace to himself and, as such, I believe should be given such care against his will.

"Q. And that, in your opinion, explains the inconsistency that exists here, does it? A. I am not aware of the inconsistency, but it explains what you have said and what I said."

Dr. Newman's good faith is evidenced in the following testimony:

"Q. I see. Now, when Mr. Brock came to Stanford hospital, he came as an out-patient, did he not? A. He did.

"Q. And that from all appearances, he had no money or funds with which to pay for proper medical care, is that right? A. I believe that is correct.

"Q. And because he was unable to pay for treatment, you couldn't take him into the hospital as an in-patient, could you? A. We could have taken him into the hospital as an in-patient, yes, even though he had no money. There are funds available for such deserving cases.

"Q. Why wasn't it done in this instance? A. Because Mr. Brock in his contact with us in the out-patient clinic, made it obvious that he would not cooperate with the doctors if we did bring him in the hospital, and therefore it would be futile to use funds to have him in the hospital, when we could not enlist his cooperation for those things which we would bring him in the hospital for.

"Q. I see. So you felt, to get around that difficulty, it would be best to send him to a State mental institution? A. I felt that the State mental institution provided the one answer to his lack of cooperation which was endangering his life."

It cannot be said in this case that "there is affirmative evidence of the actual belief of the defendant sufficient to justify a conclusion that he did not in fact suspect the plaintiff" of being in the condition described in his letter to Quinn. *Franzen v. Shenk*, supra, 192 Cal. 619, 221 P. 939.

Other contentions presented by defendants need not be considered herein.

[14] The appeal from the judgment entered on the verdict in favor of Matt Quinn and against plaintiff is affirmed. The appeal from the order granting the motions for judgment notwithstanding the

verdict, being a nonappealable order, is dismissed. Code Civ.Proc., sec. 963. The judgment notwithstanding the verdict entered in favor of Southern Pacific Company, a corporation, and the Board of Trustees of Leland Stanford Junior University, a corporation, is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.



86 Cal.App.2d 635

PERRY et al. v. FOWLER et al.
Civ. 16163.

District Court of Appeal, Second District,
Division 1, California.
July 8, 1948.

1. New trial ⇨71, 72

A motion for a new trial on ground of insufficiency of the evidence is left to the sound discretion of the trial judge, who is not bound by any conflict in the evidence, and if, in his opinion, the verdict is against the weight of the evidence, it is his duty to set it aside.

2. New trial ⇨71

In a jury trial, a party is entitled to a decision on the evidence by the jury and a decision on the evidence by the trial court on motion for new trial on ground of insufficiency of the evidence, and the trial court is not bound by a conflict in the evidence.

3. New trial ⇨72

If the trial judge conscientiously believes the verdict is against the truth of the case or is contrary to the weight of the evidence, he is bound to grant a new trial on ground of insufficiency of the evidence.

4. New trial ⇨70

In action against operators of crane which was being used to remove upright 90 foot poles, to recover for death of rigger who had ascended one of poles for purpose of attaching jib of crane to pole so that pole could be lowered to ground, when part

of boom of crane came into contact with guy-wire leading from top of pole to anchorage in ground, causing wire to part where it was spliced, and causing pole to fall, trial court did not abuse discretion in granting plaintiffs a new trial on ground of insufficiency of evidence to sustain verdict for defendants.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Ora Ethel Perry and others against A. E. Fowler and others to recover for the wrongful death of John Hubert Perry, deceased, because of the alleged negligent operation of a crane by defendants. From an order granting plaintiffs a new trial after a verdict in favor of all defendants, the defendants appeal.

Order affirmed.

Parker, Stanbury & Reese and White McGee, Jr., all of Los Angeles, for appellants.

Arthur Garrett, of Los Angeles, for respondents.

DORAN, Justice.

"This is an action for the wrongful death of John Hubert Perry and is brought by his widow and two minor children. The complaint alleges that on August 24, 1945, in the County of Los Angeles, California, the deceased, while employed as a rigger, met his death as the proximate result of the negligent operation of a crane by the defendants. The answer denies any negligence upon the part of defendants or any of them and affirmatively pleads contributory negligence as to the deceased."

The jury returned a verdict in favor of all defendants. "A motion for new trial was made upon several grounds, including insufficiency of the evidence and errors of law, and was granted upon the two grounds last named. This appeal is taken by all the defendants from the order granting the new trial."

It was stipulated that death "proximately resulted from the accident sued upon in the complaint."

The facts briefly are as follows: A "truck-crane" was being used to remove

ninety-foot poles which had supported camouflage at the plant of the Douglas Aircraft Co. The deceased was employed as a rigger. The "truck-crane", so called, consisted of a crane mounted upon a truck. "The crane was made up of a cab, boom and jib and the motor necessary to operate the boom and jib. The crane operator (pledger) was stationed at the rear of the cab, which was open. The boom was sixty feet long and the jib attached to the end of it, fifteen feet."

"Just prior to the accident the crane was being backed into position for attaching the jib to a ninety-foot pole so that the pole could be lowered to the ground. The function of the rigger was to attach the jib to the pole and to accomplish this the deceased had ascended the pole to a 'spider' or cross-arm about sixty-five feet from the ground where he was waiting for the crane to be moved into place. Before the jib could be attached to the pole, a part of the boom came into contact with a guy-wire leading from the top of the pole to its anchorage in the ground, the wire parted at a place where it was spliced and the pole fell, killing Perry."

The sole issue on appeal is whether the order appealed from was an abuse of discretion. In that regard, appellants argue, "It is our contention that the question of negligence and contributory negligence were so patently questions of fact in this case to be decided by the jury that a granting of a new trial upon insufficiency of the evidence was an arbitrary exercise of discretion by the learned trial court."

[1] Respondents, on the other hand, contend that "There was no abuse of discretion". That, "A brief review of the evidence as shown by the reporter's transcript shows that in granting the new trial there was ample evidence of the negligence of the defendants and no evidence of contributory negligence on the part of the decedent." And argue in that connection that, "A motion for a new trial upon the ground of insufficiency of the evidence is left to the sound discretion of the trial court. The judge is not bound by any conflict in the evidence and if, in the opinion of the judge, the verdict is against the weight of the evidence, it is his duty to set

it aside. In other words, parties to an action are as much entitled to the judgment of the judge as to the sufficiency of the evidence to support the verdict as they are in the first instance to a judgment of the jury."

[2,3] There appears to be substantial authority in support of respondent's contention. For example, in *Smith v. Royer*, 181 Cal. 165, 183 P. 660, 663, the court observed that "In a jury trial a party is entitled to two decisions on the evidence—one by the jury and one by the trial court, and the trial court is not bound by a conflict in the evidence." And, "If the judge conscientiously believes that the verdict is against the truth of the case, that is, contrary to the weight of the evidence, he is bound to grant a new trial * * *. Otherwise the power of the courts over verdicts is a mere mockery and delusion." *Hall v. The Emily Banning*, 33 Cal. 522, 525. See also *Green v. Soule*, 145 Cal. 96, at page 102, 78 P. 337; *Brush v. Pacific Electric Ry. Co.*, 58 Cal.App. 501, at page 506, 208 P. 997; *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 152, at page 167, 287 P. 475.

[4] An examination of the record in the light of the law in this regard reveals no reason for disturbing the trial court's judgment.

The order appealed from is affirmed.

YORK, P. J., and WHITE, J., concur.



86 Cal.App.2d 543

WOOTEN v. SUPERIOR COURT IN AND
FOR ALAMEDA COUNTY.

Civ. 13873.

District Court of Appeal, First District,
Division 2, California.

July 2, 1948.

Justices of the peace ☞ 166(2)

Failure to file notice of undertaking,
filed by party appealing to superior court

from justice's court judgment, at the time of justice's filing of other documents including undertaking constituting part of record on appeal does not toll running of statute requiring that cause be brought to trial within one year after date of filing of appeal. Code Civ.Proc. §§ 977, 981a.

Proceeding by Paul J. Wooten for a writ of mandate to require the Superior Court, in and for the County of Alameda to set for trial a cause appealed after trial in a justice's court.

Alternative writ discharged and petition denied.

Russell P. Studebaker, of Oakland, for petitioner.

Dannenbrink & Graves, of Oakland, for respondent.

NOURSE, Presiding Justice.

Petitioner seeks a writ of mandate to require the superior court to set for trial a cause appealed after trial in the justice's court.

Following an adverse judgment entered in the justice's court on April 1, 1947, petitioner herein, on April 28, 1947, gave notice of appeal to the superior court, paid the required fees, and filed the required undertaking. On May 17, 1947, the justice's court filed with the clerk of the superior court all papers and documents filed in the action, except petitioner's notice of the undertaking filed. Such notice was filed with the clerk of the superior court on June 11, 1947.

On May 26, 1948, petitioner requested the superior court to set said appeal for hearing. The request was denied and on May 28, 1948, the superior court dismissed the appeal under the provisions of section 981a of the Code of Civil Procedure, which provides that when the cause has not been brought to trial within one year "from the date of filing such appeal" the superior court "must" dismiss the appeal either on its own motion or on motion of any party interested therein.

Petitioner takes the position that because he failed to procure the filing of his notice

of filing of the undertaking at the same time the other documents were filed by the justice of the peace the "date of filing such appeal" must be fixed as of June 11, 1947, when such notice was filed with the county clerk.

This position is not sound. Section 977, Code of Civil Procedure, specifies the documents required to be filed for the purpose of an appeal to the superior court. The undertaking is made a part of this record, but the section does not require the justice to file appellant's notice of the filing of the undertaking. Such notice therefore is not a part of the record on appeal and failure to file it does not toll the running of the time for trial set in section 981a. This is the rule of *Stewart v. Superior Court*, 29 Cal.2d 63, at page 65, 172 P.2d 683, 685, where the court said: "the requirement for service of written notice of the filing of the undertaking and its identification with the respondent's right to except to the sufficiency of the sureties do not make such service a jurisdictional prerequisite. No fixed time limit is prescribed for making such service and it will not be interpolated contrary to legislative provision. *Golden Gate Title Co. v. Superior Court*, 159 Cal. 474, 483, 114 P. 978. Instead of becoming a step in perfecting the appeal, service of the specified notice appears still to remain a part of the collateral proceeding regulating the justification of the sureties. It serves to bring home to the respondent the knowledge that the appeal is already perfected * * *."

The same conclusion was reached in *Rossi v. Superior Court*, 7 Cal.App.2d 91, 45 P.2d 376, 377, 46 P.2d 1019, where the record on appeal had been returned to the justice's court by stipulation for certain changes. The District Court of Appeal held that this circumstance "does not serve to extend the time within which the case must be tried by the superior court, nor does that procedure modify the mandatory provisions of the statute above referred to."

The alternative writ is discharged and the petition is denied.

GOODELL and DOOLING, JJ., concur.

86 Cal.App.2d 593

WEAVER et al. v. CASAD et al.
Civ. 3684.

District Court of Appeal, Fourth District,
California.

July 6, 1948.

1. Escrows ⇐8(2)

Vendor and purchaser ⇐10!

Where purchaser did not comply with escrow instructions which were a part of agreement to purchase land and provided that if specified things were not done by purchaser within 90 days, escrow could be cancelled on written notice to escrow holder at any time thereafter, purchaser was not entitled to notice as a prerequisite to cancellation of escrow and forfeiture of purchaser's rights under agreement.

2. Vendor and purchaser ⇐95(1)

Refusal to grant purchaser in default under terms of escrow instructions equitable relief from forfeiture of rights under agreement to purchase land on ground that purchaser was misled by statement of vendors' agent two days before escrow was actually closed that escrow had already been closed was not error, where evidence was conflicting as to whether agent made such statement and, in any event, purchaser did not rely thereon but immediately inquired of escrow holder and was told that escrow had not been closed.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Irvin H. Weaver and wife against Roland C. Casad and others to quiet title to realty, for ejectment, and for damages for withholding possession of the property. Judgment for plaintiffs, and named defendant appeals.

Judgment affirmed.

John F. Poole, of Los Angeles, for appellant.

Lee Schwartz, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title, for ejectment, and for damages for withholding possession of the property.

The plaintiffs listed ten acres of land with a real estate agent for sale. On February 21, 1946, the defendants agreed to purchase this property for \$7500, and signed "an offer to purchase" in the ordinary form. The plaintiffs signed the usual acceptance on the same form, with an agreement to pay the agent's commission. This offer to purchase recited that \$250 had been paid to the agent, provided that the buyers should have immediate possession, and further provided that the buyers would within ninety days from that date deliver to a designated escrow holder \$3000 in cash and a trust deed and note for \$500, and would assume a trust deed for \$3750. It also provided that time was of the essence of the contract.

On the same day, these parties all signed escrow instructions with a bank which provided that the buyers would within ninety days deliver to the escrow holder \$3250 in cash, an assignment of a trust deed and note for \$500, and assume an existing trust deed for \$3750. The escrow holder was further instructed that if the conditions were not complied with within ninety days, it was to complete the escrow at the earliest possible date thereafter, unless either party gave written notice to the contrary.

\$250 was delivered to the escrow holder on March 1, and an additional \$502.08 on March 26. The \$3000 was not paid into escrow, nothing further was put into the escrow by the buyers, and on June 6, 1946, the bank received written notice from the plaintiffs instructing it to cancel the escrow which was done on that date.

This action was brought on December 3, 1946. The answer, in addition to general denials, set up the defense that the defendants had tendered \$3000 into escrow before the escrow was cancelled.

With respect to this defense defendants produced evidence that on June 4, 1946, Roland C. Casad, with another real estate agent, called on the plaintiffs' agent; that this other agent told plaintiffs' agent that he had a client who would put up the \$3000; and that plaintiffs' agent replied that it was too late, that the escrow had been closed and that nothing could be done

at that time. The defendants' agent further testified that he and Casad immediately went over to the bank; that the escrow holder told them that the escrow had not been closed; that Casad said nothing; that he went out and told his client what these parties had told him; and that his client then said that he wanted nothing further to do with it. The plaintiffs' agent testified that on this occasion Casad and his agent came to him and he told them that he could do nothing as the matter was in escrow at the bank, and it was up to the bank to handle it.

The court found in all respects in favor of the plaintiffs, quieting their title, giving them restitution and awarding them \$150 as damages for wrongfully withholding possession. From this judgment Roland C. Casad has appealed.

[1] The appellant contends that he had a contract for the purchase of this property, that this contract could not be forfeited for any default on his part without the service upon him of a notice of cancellation, and that no such notice was served. The burden here was upon the appellant. The preliminary offer to purchase and acceptance provided for an escrow and for certain things to be done by the appellant within ninety days. The escrow instructions were signed the same day and were a part of the agreement. They also provided for these things to be done within ninety days and that if not so done the escrow could be cancelled on written notice to the escrow holder at any time thereafter. These things were not done, such a written notice was given to the escrow holder, and the escrow was cancelled in accordance with its terms. No further notice was required as the escrow instructions were controlling in this regard.

[2] The appellant further contends that he was misled and prevented from closing the deal by the act of the respondents' agent in telling him that the escrow had been closed when this was not the fact; that this occurred two days before the escrow was actually closed; and that, under these circumstances, the court erred in not giving him equitable relief. The

evidence is conflicting as to whether any such statement was made to the appellant and his agent on June 4. Moreover, it clearly appears that the appellant did not rely on such a statement if it was made as he and his agent immediately went to the bank and were told that the escrow had not been closed. Having been thus informed, they still failed to comply with the terms of the escrow. Nothing further appears than that the appellant was attempting to find another purchaser to take over his contract, and being unsuccessful failed to comply with the conditions of the escrow.

The judgment is affirmed.

MARKS, J., concurs.



86 Cal.App.2d Supp. 937

PEOPLE v. ORTIZ.

Cr. 2373.

Appellate Department, Superior Court,
Los Angeles County, California.

June 17, 1948.

1. Automobiles ⇐II

Statute providing that driver of vehicle shall yield right of way to pedestrian crossing roadway within any marked crosswalk or within any marked crosswalk at an intersection requires motorist to yield right of way to pedestrian in marked crosswalk no matter where crosswalk is located. Vehicle Code, § 560(a).

2. Automobiles ⇐II

Under statute providing that driver of vehicle shall yield right of way to pedestrian crossing roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, the words "at an intersection" modify the words "within any unmarked crosswalk" and not the more remote words "within any marked crosswalk". Vehicle Code, § 560(a).

3. Statutes ☞196

In statutory construction, under doctrine of "last antecedent," relative or modifying phrases are to be applied to words immediately preceding them, and are not to be construed as extending to more remote phrases.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Antecedent".

4. Statutes ☞196

Where two sets of words in a statute are followed by a modifying phrase or clause, whether the phrase or clause modifies one or both precedent sets of words depends upon meaning that is to be given the sentence.

5. Automobiles ☞11

Purpose of Legislature in providing for crosswalks was to set aside limited portion of roadway where pedestrians can cross in comparative safety, whether the crosswalk is at an intersection or middle of block. Vehicle Code, §§ 560(a), 562(a), 563.

6. Statutes ☞184

Objective sought to be achieved by statute as well as evil to be prevented is of prime consideration in its interpretation.

7. Automobiles ☞11

Statute providing that driver of vehicle shall yield right of way to pedestrian crossing roadway within any marked crosswalk or within any unmarked crosswalk at an intersection was to be so interpreted as to effectuate purpose of providing a limited portion of roadway where pedestrians can cross in comparative safety, whether crosswalk is at an intersection or middle of block, unless such was rendered impossible by some overruling principle of interpretation. Vehicle Code, § 560(a).

8. Automobiles ☞335

Motorist who fails to yield right of way to pedestrian who is crossing roadway in crosswalk located in middle of block is guilty of a misdemeanor. Vehicle Code, §§ 85, 459.1, 560, 560(a), 562(a), 563.

Alfonso Torres Ortiz was charged with failure to yield the right of way to a pedestrian in a crosswalk. From a judgment and order dismissing the action, the People appeal.

Reversed.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for appellant.

Alfonso Torres Ortiz, in pro. per.

BISHOP, Judge.

We are called upon in this appeal to answer this decisive question: When the crosswalk is located in the middle of the block, is it a misdemeanor for a driver of a motor vehicle to fail to yield the right of way to a pedestrian who is crossing the roadway in it? The trial court, believing that a negative answer should be given, dismissed the action before trial, for the only charge made against the defendant was one embraced within the question. The People appealed from the order of dismissal and advisedly, we have concluded, for we are of the opinion that the question should be answered in the affirmative.

[1,2] As we interpret the first subdivision of section 560, Vehicle Code, it requires a motorist to yield the right of way to a pedestrian in a marked crosswalk no matter where the crosswalk is located. That is to say, we hold that the words "at an intersection" modify the words "within any unmarked crosswalk" and not the more remote words "within any marked crosswalk", as they are used in the subdivision, which reads: "(a) The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection * * *."

[3] Sufficient reason for our decision would be at hand were we content to rely upon the rule thus stated in a case cited by the People, that of City of Santa Barbara v. Maher, 1938, 25 Cal.App.2d 325, 327, 77 P.2d 306, 307:

"It is a settled rule of statutory construction that relative or modifying phrases are to be applied to the words immediately preceding them and are not to be construed

as extending to more remote phrases. (Citing cases.)

"The rule is thus accurately stated in 59 Corpus Juris, 985: 'By what is known as the doctrine of the "last antecedent", relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote.'"

[4] This simple solution of the problem presented by this appeal is denied us, however. The paragraph in Corpus Juris, from which the quotation was taken, goes on to conclude with this sentence: "Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all." This sentence came, with some changes, from Porto Rico Ry. Light & Power Co. v. Mor, 1920, 253 U.S. 345, 349, 40 S.Ct. 516, 64 L.Ed. 944, 946. The original sentence was quoted, and applied, by us in People v. Kahn, 1936, 19 Cal.App.2d Supp. 758, 762, 60 P. 596, 598, and the sentence in the setting we gave it was quoted with words of approval in Wholesale Tobacco Dealers v. National Candy & Tobacco Co., 1938, 11 Cal.2d 634, 659, 660, 82 P.2d 3, 17, 118 A.L.R. 486. We are forced to conclude, therefore, that where two sets of words are followed by a modifying phrase or clause, whether the phrase or clause modifies one or both precedent sets of words, depends upon the meaning that is to be given the sentence, a conclusion that offers no help in ascertaining the meaning.

The meaning of the statutory provision under review may be discovered by other avenues of approach, however. We note that before 1931 it had been "stated as the settled rule that the requirements as to the conduct of both the pedestrian and the driver of a vehicle are reciprocal and equal, and that neither has any right of way superior to the other." Cleveland v. Petrusich, 1931, 117 Cal.App. 71, 78, 3 P.2d 384, 387. We quote further from the case, 117 Cal.App. at page 77, 3 P.2d at page 386: "the ignorance of motorists as to the rights of pedestrians or their carelessness or indifference as to such rights led to the enactment" of section 131½ of the California Vehicle Act in 1931, providing in

part: "The driver of any vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at the end of a block * * *." St.1931, p. 2127. Why, we ask rhetorically, should the legislature give pedestrians the right of way in a crosswalk located at the end of a block, or now at an intersection, but not in a crosswalk located in the middle of the block? Why, indeed, mark a crosswalk in the middle of the block if the pedestrians who use it are given no added safeguards by it? "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." Subd. (a), sec. 562, Vehicle Code. Is it possible that a pedestrian, forced to use a crosswalk by virtue of its lying between adjacent intersections where police officers control the traffic (sec. 563, Vehicle Code) or by the terms of a city ordinance (sec. 459.1 Vehicle Code) may while in the crosswalk be compelled to yield the right of way to motorists?

[5-7] We believe the purpose of the legislature in providing for crosswalks was to set aside a limited portion of the roadway where pedestrians can cross in comparative safety, and that this is the purpose whether the crosswalk is at an intersection or in the middle of the block. "It is fundamental that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation." Rock Creek Water Dist. v. County of Calaveras, 1946, 29 Cal. 2d 7, 9, 172 P.2d 863, 865. The subdivision we have under review should be given an interpretation to effectuate the purpose we have indicated, unless that is rendered impossible by some overruling principle of interpretation.

[8] The only argument against the adoption of the construction which we favor, that has come to our attention, is the rule that statutes should be so construed, if possible, as to give effect to each word and phrase. The application of this rule depends, in this case, upon the fact that in section 85 of the Vehicle Code crosswalks are defined (we do not quote) as being (a)

that portion of a roadway lying within projected sidewalk lines at an intersection, and (b) any portion of a roadway marked for pedestrian crossing. In other words, the argument runs, the only place you find an unmarked crosswalk is at an intersection, hence there is no purpose in applying the phrase "at an intersection" to the words "any unmarked crosswalk". To this argument we reply that whether it serves any purpose or not, certainly the phrase, if it applies to any words, applies to the words "any unmarked crosswalk". Moreover, we see a purpose, for the definition, found in section 85 of the act is a long way from section 460, and the legislature may have desired to make sure that by "unmarked crosswalk" it was not referring to any place where pedestrians chose to cross, but only to the unmarked crosswalks at an intersection.

The suggestion that if the legislature meant to say what we say it did mean, it would have stated simply, "The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any crosswalk", may be countered by the observation that if it meant what the trial court held it did, it would have concluded the sentence with the words, "crossing the roadway within any crosswalk at an intersection." Words that would be eliminated under either interpretation do appear, but they do not require a construction which would give the section a meaning contrary to what it seems clear to us was the object of the legislation.

The order appealed from is reversed.

SHAW, P. J., and STEPHENS, J., concur.

32 Cal.2d 78

PEOPLE v. WILLIAMS et al.
Cr. 4844.

Supreme Court of California, in Bank.
June 15, 1948.

As Modified on Denial of Rehearing
July 8, 1948.

1. Criminal law ⇨662(1)

In murder prosecution, fact that witness, at request of prosecuting attorney, was permitted by court to sit facing the jury but with her back toward some of the spectators in the court room, for purpose of protecting the witness from intimidation by spectators, did not deprive defendants of the rights of confrontation in a public trial. Pen.Code § 686.

2. Witnesses ⇨359

In murder prosecution, wherein one of defendants was asked on cross-examination if he had ever been convicted of a felony, and he admitted he had been convicted of narcotic offense, but denied that conviction was of a felony, court properly permitted prosecution to introduce record of defendant's conviction showing that he had served a term of 23 months in a Federal reformatory, which constituted the offense a felony under Federal law. Cr.Code § 335, 18 U.S.C.A. § 541.

3. Criminal law ⇨413(1)

In murder prosecution, wherein state introduced statement made to officers by one of defendants, court did not err in denying that defendant's offer to introduce in evidence self-serving statements made by him to officers prior to time of statement introduced in evidence by the prosecution, where no legal basis or right for introduction of such statements was disclosed.

4. Criminal law ⇨1166½(1)

In murder prosecution, refusal at commencement of trial to order a daily transcript of the evidence, was not prejudicial error, where defendant's counsel did not object to ruling, and request for a daily transcript was not thereafter renewed when trial became more prolonged than was expected.

5. Criminal law ⇨709

In murder prosecution, trial court did not abuse its discretion in not requiring

195 P.2d—25½

prosecuting attorney to commence his closing argument on afternoon of July 3, when it appeared that the argument could not be completed before commencement of holiday week end.

6. Criminal law ⇨1166½(12)

In murder prosecution, various remarks of trial court such as "get down to business", "the court is not going to continue the case for years," and "Oh, let him answer" during examination of one of the defendants by his counsel, did not constitute prejudicial misconduct.

7. Homicide ⇨340(1)

In murder prosecution, instruction that if, as to either defendant, jury found some extenuating fact or circumstance, it was within jury's discretion to relieve that defendant from the extreme penalty, but that discretion should be employed only if jury was satisfied that lighter penalty should be imposed, and not unless some extenuating facts or circumstances were shown, was not prejudicial error. Pen.Code, §§ 189, 190, 1181.

CARTER, SCHAUER, and TRAYNOR, JJ., dissenting.

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Henry Williams and Maxwell Bowie were convicted of murder in the first degree without recommendation, and they appeal.

Judgments of conviction and orders denying a new trial affirmed.

Leslie C. Gillen, of San Francisco, and Joseph R. Deasy, of Oakland, for appellants.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., J. F. Coakley, Dist. Atty., and Richard H. Chamberlain, Asst. Dist. Atty., both of Oakland, and George Nye, Deputy Dist. Atty., of San Francisco, for respondent.

Morris Lavine, of Los Angeles, amicus curiae.

SHENK, Justice.

The defendants were charged in Alameda County with the murder on January 19, 1947, of Arthur C. Nichols, a taxi-cab

driver. The jury returned verdicts finding them guilty of murder of the first degree without recommendation. They appeal from the judgments imposing the death penalty and from orders denying motions for a new trial.

In December, 1946, the defendant Bowie came to California from Louisiana with Mrs. Belle Jarrett whom he had "bailed out" of jail on some charge in that state and who was married to a man in the United States Army serving overseas. They took a room together on the second floor of a rooming house on Hannah Street in Oakland. Very soon they met the defendant Williams with whom they became friendly.

Bowie and Williams were together in San Francisco on Saturday evening, January 18, 1947. To satisfy their mutual need for money they decided to "hold up" somebody. They returned to Bowie's rooming house in Oakland and Bowie obtained his .25 caliber pistol while Williams waited outside. Bowie and Williams then walked to a taxi stand and hired a Yellow Cab driven by Arthur C. Nichols, the victim. Nichols was directed to drive to a fictitious address in West Oakland. After a short ride the cab was stopped near 28th and Union Streets. Bowie, who was sitting in the back seat on the right, brandished the gun and declared it was a holdup, whereupon Williams, who was sitting to the left, reached forward and caught hold of Nichols. Nichols resisted and was struck on the head with Bowie's gun. The taxicab continued in motion. At least two shots were fired.

One bullet was imbedded in the left front door of the cab, the other entered the body of Nichols and caused his death almost immediately. The defendants fled from the scene. The uncontrolled car collided with a fire box at 30th and Union, causing the alarm to sound. The driver was found dead. The left rear door of the cab was jammed open against the side of the car.

Williams spent the rest of the night with Bowie and Mrs. Jarrett. They learned early the next morning by radio that the cab driver was dead. The defendants were arrested four days later, the gun was

recovered from a bureau drawer in Bowie's room, and Mrs. Jarrett was taken into custody as a material witness.

Williams and Bowie were interrogated separately. At first Williams denied that he had been in or near the cab, claiming that he hadn't been within eight feet of a cab for two months. He stated that he did not see Bowie at all that night, that he visited several bars in Oakland, then went home and slept until 9 o'clock Sunday morning. He changed his story when he was confronted with the fact that his fingerprints were found on the left rear door of Nichols' cab. He then said that he saw Bowie riding in the cab, that Bowie stopped the cab and that he, Williams, rode with him a few blocks, got out, and Bowie rode away. Two statements were made by Bowie which were not introduced in evidence. He made another statement after hearing in Williams' presence the reading of a statement by Williams in which the latter admitted that he told the driver to "hurry up and give me your money", but in that statement Williams sought to lay the entire blame on Bowie for the homicide. Bowie's third statement developed the facts substantially as above outlined, with the further explanation to the effect that the first bullet was discharged accidentally when he was getting out of the cab and the left rear door swung back against his right arm and knocked the gun out of his hand; that Williams who was already out of the cab picked up the gun, ran alongside and fired a shot in the direction of the driver. Bowie's testimony at the trial was substantially to the same effect. Williams testified that he was in the cab with Bowie; that he intended going to a birthday party on Adeline Street; that he didn't know Bowie had a gun; that he didn't see the gun until the time of the trial, but that he heard a shot and saw flame issuing as from a gun. It was conclusively established that the homicide occurred in the course of an attempted robbery in which both defendants participated, an unquestionable case of first degree murder (section 189, Penal Code). In fact guilt was and is conceded. The effort of each defendant was directed toward placing the blame on the other in

order to influence a recommendation of leniency for himself. The alleged errors relied on are claimed to be prejudicial in that they adversely affected the particular defendant's chance for such a recommendation.

[1] The first alleged error is concerned with the examination of the witness Belle Jarrett who, at the request of the prosecuting attorney, was permitted by the court to sit facing the jury but with her back toward some of the spectators in the court room. This appears to have been done in an effort to protect the witness from intimidation by spectators. It was represented that she had been threatened and had received a knife jab by some supposed friend of one of the defendants, stated to be Williams. It is contended that the arrangement deprived the defendants of confrontation of the witness. Defendants and their counsel moved their chairs to an oblique position from the witness. Counsel for one of the defendants accepted the offer of the prosecuting attorney to occupy the latter's chair which was almost directly in front of the witness and he cross-examined her from that position. Counsel for the other defendant also cross-examined her and made no objection to the seating arrangement. It is argued that this change in the usual arrangement affected the chances of the defendants for recommendations of leniency. Much stress is laid upon the materiality and importance of the testimony of the witness Jarrett, but the record shows that the defendants were convicted by their own admissions in prior statements and on the witness stand, and by independent evidence other than from this witness. The seating arrangement adopted should have been avoided, but it did not deprive the defendants of the rights of confrontation and a public trial. In view of the entire record, the incident should not be held to have resulted in prejudice to the defendants.

[2] On cross-examination the defendant Bowie was asked if he had ever been convicted of a felony. He admitted that he had been convicted in Oklahoma of the offense of importing marihuana in violation of federal law, but he denied that the conviction was of a felony. The court

permitted the prosecution over objection to introduce the record of conviction which showed that Bowie had served a term of twenty-three months in a federal reformatory. This constituted the offense a felony under federal law (18 U.S.C.A. § 541). It is claimed that in view of Bowie's admissions the record of conviction was unnecessary and that its introduction in evidence amounted to prejudicial error. The qualified admission was in effect a denial of the felony nature and character of the judgment and justified the introduction of the record in order to establish the effect of the prior conviction.

[3] Defendant Bowie assigns as prejudicial error the ruling of the court denying his offer to introduce in evidence his statements made to officers prior to the statement introduced in evidence by the prosecution. The legal basis or right for the introduction of these prior statements containing self-serving declarations is not disclosed. The order excluding them shows no error.

Prejudice is charged because of a delayed ruling of the court in admitting in evidence the factual background of Bowie's life. Objections to the introduction of such evidence were at first sustained. Later the court reconsidered its ruling and evidence on that subject was admitted. It does not appear that any relevant testimony offered in that connection was excluded.

[4] Prejudice is assigned because of the court's refusal at the commencement of the trial to order a daily transcript. Defendants' counsel did not object to the ruling since at first it appeared that the trial would not be prolonged. However, the trial occupied the court days between June 23rd and July 7th, and the reporter's transcript consists of 1,100 pages. The request for a daily transcript was not renewed. During his closing argument the prosecuting attorney made reference to some testimony which he appeared to be reading from a transcript. At the close of that argument counsel for Bowie called attention to that fact, but also from his own recollection or notes he supplied additional matter which he deemed material on the point. There is no showing that either a partial or a full daily transcript

was made to which the prosecution had access or which was denied the defendants. No error, misconduct or prejudice is shown in this regard.

[5] The defendant Bowie charged that he was prejudiced by the taking of a short recess during the course of his counsel's argument, and that upon completion thereof on the afternoon of July 3rd the court did not require the prosecuting attorney to commence his closing argument that day, even though it appeared that it could not be completed before the commencement of the holiday week-end. The court at first appeared to note no necessity for the usual afternoon recess, but it is reasonable to suppose that subsequently the convenience of the jury may have prompted a different conclusion. The next day, Friday, was a holiday and the case was continued to Monday, July 7th. The fact that the closing argument on behalf of the prosecution was to take place on the following Monday disclosed no undue advantage to the prosecution nor prejudice to the defendants. It was within the sound discretion of the trial court to govern the progress of the trial in conformity with the time element and no abuse of discretion is shown.

[6] Defendant Bowie claims that various remarks of the trial court during the course of the trial constituted prejudicial misconduct. Fourteen occurrences are referred to. A review of the record and of each incident complained of fails to disclose any purpose to divert the course of the trial from its orderly progress. Some involved a tilt between counsel and the court about blood pressure; another was a caution to defense counsel against bantering a witness; another was a comment on the court's failure to see anything wrong in the remark of the prosecuting attorney that the examination of the deceased's widow was painful to her; another was an admonition in view of the imminent holiday to "get down to business"; and again, "the court is not going to continue the case for years"; another, a remark that Bowie's family and father were not on trial; two instances during Bowie's examination by his counsel were rulings on objections given in the words, "Oh, let him answer"; another a ruling on an objection by the defense

couched in the language, "Well, it is a wee bit argumentative"; two instances of some possible levity where the court, after a short recess, asked "May we have the stipulation that the jurors are still here?"; and when the court asked the witness Bowie if by "Frisco" didn't he mean "West Oakland * * * We call it West Oakland." Others are of a similar nature and call for no further comment. We also include for disposition in this category the contention that the prosecution was permitted unduly to emphasize the relations between Bowie and Belle Jarrett. *People v. Hidalgo*, 78 Cal.App.2d 926, 179 P.2d 102, is relied on by defendant Bowie. Counsel representing him obtained a reversal of the judgment of conviction in that case because of prejudicial misconduct on the part of the district attorney. Considered singly and collectively the alleged acts of misconduct of the trial court or of the prosecuting attorney in this case present no instance comparable in seriousness to the misconduct which resulted in a reversal in the *Hidalgo* case.

[7] Finally it is contended that the trial court erroneously instructed the jury on the matter of punishment to the prejudice of the defendants. The jurors were told that if, as to either defendant, they found some extenuating fact or circumstance, it was within their discretion to relieve him from the extreme penalty; but that the discretion should be employed only if they were satisfied that the lighter penalty should be imposed, and not unless some extenuating facts or circumstances were shown.

The giving of the same or a similar instruction has been assigned as error and ground for reversal in many cases, but in none has it been held to be erroneous. The earlier cases beginning with *People v. Jones*, 1883, 63 Cal. 168, and *People v. Brick*, 68 Cal. 190, 8 P. 858, were reviewed and collected in *People v. Casade*, 1924, 194 Cal. 679, at pages 682, 683, 230 P. 9, 10, where this court said: "It is urged that the instruction unduly and prejudicially affected the discretion to determine the penalty which said section has exclusively reposed in the jury. But by a long line of decisions in this state it has been held that the giving of said instruction is not erroneous. In the early case of *People v. Jones*, 63

Cal. 168, it was held that the discretion vested in the jury by said section 190 was not an arbitrary one. The instruction complained of was taken word for word from *People v. Brick*, 68 Cal. 190, 8 P. 858, where it was held that the giving of the instruction was not error. This instruction was again under attack in *People v. Olsen*, 80 Cal. 122, 22 P. 125, and the same conclusion reached. Substantially the same instruction was under review in *People v. Bawden*, 90 Cal. 195, 27 P. 204, and this court following the earlier decisions declined to reopen the question. In *People v. Rogers*, 163 Cal. 476, 126 P. 143, alleged error was predicated on the giving of this instruction which is again set forth word for word [163 Cal.] on page 483, (126 P. 146), and the court, referring to the earlier cases, said: 'The law of the state thus appears to be thoroughly settled to the effect that the instruction in question is not erroneous.' It was likewise held not to be erroneous in *People v. Harris*, 169 Cal. 53, 145 P. 520, in *People v. Miller*, 177 Cal. 404, 170 P. 817, in *People v. Wolfgang*, 192 Cal. 754, 221 P. 907, and in *People v. Reid*, 193 Cal. 491, 225 P. 859. Further consideration of the contention would seem to be foreclosed." About six months after the *Casade* case, in *People v. Bollinger*, May, 1925, 196 Cal. 191, 205 et seq., 237 P. 25, this court criticized the continued use of such instructions; but after much discussion concluded at page 209 of 196 Cal., at page 31 of 237 P., as follows: "In other words, we consider as settled that the giving of such instructions is not error." Thus in that and subsequent cases, either with or without criticism, the instruction was held not to be error. *People v. Arnold*, 199 Cal. 471, 500, 250 P. 168; *People v. Smith*, 13 Cal.2d 223, 228, 88 P.2d 682; *People v. King*, 13 Cal.2d 521, 525, 90 P.2d 291; *People v. Smith*, 15 Cal.2d 640, 650, 104 P.2d 510; *People v. Kolez*, 23 Cal.2d 670, 145 P.2d 580; *People v. Lindley*, 1945, 26 Cal.2d 780, 793, 161 P. 2d 227. Lack of unanimity in these views did not appear until the determination in the *Kolez* case in 1944 where a dissent by Mr. Justice Traynor was concurred in by Mr. Justice Schauer. But in the *Lindley* case in 1945 Mr. Justice Schauer concurred in the decision which "adhered to a long line

of decisions" (at page 794 of 26 Cal.2d, at page 234 of 161 P.2d) holding that the giving of such instructions was not error. Mr. Justice Traynor concurred only in the judgment. Thus, from the time that this instruction was apparently first assigned as error in the *Jones* case in 1883 down through the years to the *Lindley* case in 1945 this court has consistently and uniformly held that the instruction was not erroneous.

By this long line of cases it has been held without deviation that the discretion conferred upon the jury by section 190 of the Penal Code should not be arbitrarily exercised for or against a defendant, but should be influenced by the evidence in the case. This application of the term "discretion" as employed in the code section is akin to that conferred by law on a court, to be exercised not arbitrarily but to be controlled by reason and justice under the facts of the particular case. The fact that this discretion, once exercised by the jury, may not as to the penalty be disturbed on appeal is because the law has always so provided. And this was true as to the degree of the crime prior to 1927, when section 1181 of the Penal Code was amended to provide in subdivision 6 that the court on appeal should have the power to reduce the degree of the crime notwithstanding the verdict of the jury to the contrary. *People v. Howard*, 211 Cal. 322, 330, 295 P. 333, 71 A.L.R. 1385.

Aside from any question of error the condition of the evidence in this case against the defendants as the perpetrators of an unquestioned and atrocious murder is so overwhelming as to render it very unlikely that the jury would have found any other verdict even if the instruction had not been given.

The defendants were ably represented by counsel who appeared to exert every effort to protect their interests. The defendants had a full and fair trial and no ruling or incident during the trial can be said to have reacted prejudicially to their rights.

The judgments of conviction and the orders denying a new trial are affirmed.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I do not agree with that portion of the majority opinion which holds that (1) there was not a denial of defendants' right of confrontation of the witness Jarrett, and (2) that what was done was not prejudicial to defendants. It is conceded that appropriate objections were made by defendants. The occurrences which constituted the denial of confrontation consist of the following stated in defendant's Bowie's brief, and not challenged by respondent: "Two prosecutors occupied the extreme left of the counsel table directly in front of the witness stand and closest to the jury. Counsel for the appellants occupied the extreme right of the counsel table farthest from the jury and the witness stand. When the witness Belle Jarrett was called by the prosecution, one of the prosecutors placed a chair at the end of the extreme left of the counsel table and facing the jury so that the witness Belle Jarrett sat facing the jury and with her back to the appellant's counsel and to the body of the court.

"A dispute arose between counsel and the prosecutor concerning this and it was suggested that the prosecutor's reason for this unusual procedure be confined to the court in chambers, which was done, the prosecutor explaining that the witness Belle Jarrett was fearful of being intimidated and did not wish to face either the men on trial or the spectators in the courtroom. Still over the objection of counsel for the appellant the aforementioned positions were resumed in the courtroom. The witness Belle Jarrett testified in a low monotone and the appellant's counsel in their position behind her was left at the decided disadvantage of not being able to hear her testimony, or see or observe her facial expressions." It should be added that defendants were likewise behind the witness. It cannot be doubted that the foregoing constituted a denial of confrontation—of a "face to face" meeting of the witness, and was certainly error.

The right of confrontation is guaranteed by statute. "In a criminal action the defendant is entitled: * * * 3. To produce witnesses on his behalf and to be confronted with the witnesses against him, * * *." Pen.Code, sec. 686. And as said

in *People v. Ward*, 105 Cal. 652, 656, 39 P. 33: "The right of the defendant in a criminal prosecution to be confronted with the witnesses against him, in the presence of the court, is one of the fundamental principles of the common law, and can be taken from him only by the provisions of some express statute. As this is a right clearly connected with his personal liberty, any statute purporting to impair the right is to be liberally construed in his favor." The chief purpose of the right of confrontation is the opportunity for cross examination but there is also the important purpose of allowing the accused to meet the witnesses "face to face". It is said: "To constitute a compliance with the constitutional right, the witnesses testifying in support of the accusation against defendant must be seen and heard by the accused. He must be permitted to be in such proximity to them that he may see them and hear their testimony. It is a violation of his rights for the court to order a defendant to take a seat so far away or in such a place that he cannot hear the testimony of a witness or see him because of intervening obstacles, or to permit the witness to turn his back toward the defendant so that his face cannot be seen." (14 Am.Jur., Criminal law, sec. 181.)

In the instant case the witness Jarrett was permitted to testify with her back toward defendants and their counsel. Counsel were not able to observe her facial expressions while testifying on either direct or cross examination. The condition was further aggravated by the explanation for permitting the foregoing, that she was afraid of attack by some cohort of one of the defendants.

Such lack of confrontation must necessarily be prejudicial. It is impossible for defendants to prove its prejudicial effect. The intangible nuances with which the confrontation is characterized are impossible for a court on appeal to grasp and interpret in terms of prejudicial or non-prejudicial error. It is a fundamental right, the deprivation of which, cannot be considered lightly. It is somewhat analogous to the right to a public trial, the denial of which is always prejudicial error, and in such a case it has been said: "The right to a public

trial, in this respect, is comparable to the rights of trial by jury and to the assistance of counsel. They stand on the same footing. All questions as to whether these rights are essential for the protection of the substantial rights of the accused were settled affirmatively by the adoption of section 13 of article I. There can be no inquiry into the matter, so far as the right to a public trial is concerned, other than in the exceptional cases of necessity heretofore mentioned." *People v. Byrnes*, 84 Cal. App.2d 72, 190 P.2d 290, 294.

It must be assumed that our constitutional and statutory provisions were wisely framed. It cannot be denied that the provision here involved constitutes an important and effective safeguard against perjury. That the audible utterances of a witness may be fully refuted by facial expression and demeanor of the witness when confronted by those who know he is testifying falsely, has been conclusively demonstrated in many instances. There can be no doubt that the right of confrontation is of equal if not greater importance to a defendant than the right to a public trial. It is patently obvious that it is impossible to measure the effect of such an error, and if such provisions are to be given any effect whatsoever, it must be held that a denial of such a right is prejudicial.

For the foregoing reason, I would reverse the judgment and remand the cause for a new trial.

SCHAUER, Justice.

I dissent. I am substantially in accord with the views expressed by Justice Carter but I am impelled to comment on another proposition appearing in the majority opinion which seems to me to more clearly show prejudice and require reversal.

The substantial prejudice, in my view, arises on the trial of the issue of penalty rather than on the issue of guilt. I might agree with Justice Shenk that on the question of guilt the manifest errors may not be prejudicial but since under his opinion

(concededly supported in a sense by the many precedents he cites) the substantive statutory law of this state is amended, as it is told to the jury, to provide for *mandatory imposition of the death penalty* in cases of first degree murder wherein there is no substantial showing of mitigating circumstances, whereas the statute as enacted by the legislature (Penal Code, § 190) and as construed by this court (*People v. Bollinger* (1925), 196 Cal. 191, 207, 237 P. 25) does not make death mandatory in any case¹ but, rather, in all cases commits the choice of penalties, as between death and life imprisonment, solely to the discretion of the jury trying the case, it is obvious that the issues and the law as to penalty are brought into confusion and errors which may bear on penalty must be scrutinized in such light.

The statute (Penal Code, § 190) reads, "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same * * *." Construing that section this court in *People v. Bollinger* (1925), *supra*, 196 Cal. 191, 207, 237 P. 25, 31, said: "We have already quoted the pertinent part of section 190 of the Penal Code. Before the amendment of that section in 1873-74 (Stats.1873-74, p. 457) it read as follows: 'Every person guilty of murder in the first degree shall suffer death. * * *' It is clear beyond question that, by the language of the amended section 'Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same; * * *' Two changes were made in the law as to the punishment for murder in the first degree—first, that the punishment may be *either* death or life imprisonment; and, second, that the discretion of determining which punishment shall be imposed was vested in the jury alone. For, as declared in the above² federal cases, the law places no restriction upon the jury's exercise of such discretion, nor does it attempt to confine its exercise to cases presenting palliating or mitigating circum-

¹ We are not discussing section 4500 of the Penal Code.

² *Winston v. United States*, *Strather v.*

United States, and *Smith v. United States*, (1898), 172 U.S. 303, 19 S.Ct. 212, 43 L. Ed. 456.

stances. * * * The Legislature has 'confided the power to affix the punishment within those two alternatives to the absolute discretion of the jury. * * *' *People v. Leary*, 105 Cal. 486, 496, 39 P. 24."

The above quoted statute, so far as applicable and pertinent in the *Bollinger* case has never been amended by the legislature; likewise, the above quoted holding of this court in the *Bollinger* case has never been overruled; on the contrary it has been reiterated. The majority opinion here does not declare that it is overruled. What then is the law? What instruction should trial courts give on the subject? Are we, the court of last resort in this state, to continue to tolerate the putting to death of defendants on the unauthorized direction to juries that death is mandatory unless mitigating circumstances be shown? Or would it be error to instruct juries that the law does not fix the penalty in any first degree murder case but in all such cases leaves entirely to the absolute and uncontrolled discretion of the jury, regardless of a total absence of mitigating circumstances, the selection of either of two penalties, death or life imprisonment? Is this court to continue to denounce prosecutors and trial judges (see *People v. Smith* (1939) 13 Cal. 2d 223, 229, 88 P.2d 682, 685) for asking and giving an instruction, "where a human life is at stake," which "interfere[s] with the discharge of that solemn duty by the jury" while at the same time rationalizing its own failure to reverse judgments based on such instruction by the flat assertion that "it is not error?" The whole subject, I think, should be re-examined, not only because we have simultaneously extant two irreconcilably conflicting lines of opinion pronouncements with attending confusion, but because also the one line of pronouncement derives from a case (*People v. Welch* (1874), 49 Cal. 174) which, whatever may have been its value once, is no longer sound law, the United States Supreme Court in the very recent case (*May*, 1948) of *Andres v. United States*, 68 S.Ct. 880, having removed such modicum of respectability as authority which may have persisted in the *Welch* case after its earlier sapping in *Winston v. United States* (1898), 172 U.S. 303, 19 S.Ct. 212, 43 L.Ed. 456, 459.

It must be manifest that we have here not a mere procedural error or error in instructions to juries as such errors are commonly understood. The instruction involved here did not merely concern procedural rules governing the jury in their deliberations, it altered the substantive statutory law of the state prescribing the penalty in first degree murder cases. The jury were told: "If the jury in this case should find either defendant guilty of murder in the first degree, and they also shall find the further fact that there are some extenuating circumstances or facts in the case as to that defendant, it is within their discretion to pronounce such a sentence as will relieve the defendant from the extreme penalty of the law. The Penal Code invests a jury in a criminal case of murder with the discretion, limited to determining which of two punishments shall be inflicted, and that discretion is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows beyond all reasonable doubt either of the defendants to be guilty of murder in the first degree, but does not show some extenuating facts or circumstances, it is the duty of the jury to find a simple verdict of murder in the first degree as to such defendant, and leave with the law the responsibility of fixing the punishment." (Italics added.)

Counsel for appellant *Bowie*, in his commendably frank and helpful brief, says, "Though a man be guilty of a heinous offense, there is no exception to the doctrine that respect for the law cannot be inspired by withholding the protection of the law, and no higher duty, no more solemn responsibility, rests upon the courts than to maintain the constitutional and statutory shields planned and inscribed to preserve liberty under law and protect each individual from oppression and wrong, from whatever source it may emanate." I am in full accord with counsel; the opinion of the majority, in my view, cannot be squared with the quoted statement. Let us look realistically at the majority holding and its basis.

The majority opinion refers to the quoted instruction and says, "The giving of the same or a similar instruction has been as-

signed as error and ground for reversal in many cases, but in none has it been held to be erroneous." The opinion then discusses cases "beginning with *People v. Jones*, 1883, 63 Cal. 168, and *People v. Brick*, 68 Cal. 190, 8 P. 858" and running down to *People v. Kolez* (1944), 23 Cal. 2d 670, 145 P.2d 580, and *People v. Lindley* (1945), 26 Cal.2d 780, 161 P.2d 227, and says, "By this long line of cases it has been held without deviation that the discretion conferred upon the jury by section 190 of the Penal Code should not be arbitrarily exercised for or against a defendant, but should be influenced by the evidence in the case. This application of the term 'discretion' as employed in the code section is akin to that conferred by law on a court, to be exercised not arbitrarily but to be controlled by reason and justice under the facts of the particular case." But in that "long line * * * without deviation," is the *Bollinger* case (and see also the cases it cites) wherein this court said that "It is clear beyond question * * * that the punishment may be *either* death or life imprisonment; and * * * that the discretion of determining which punishment shall be imposed was [by the 1874 amendment] vested in the jury alone. * * * [T]he law places no restriction upon the jury's exercise of such discretion, nor does it attempt to confine its exercise to cases presenting palliating or mitigating circumstances. * * *"

As early as 1898 the United States Supreme Court declared its views upon the effect of a liberalizing amendment to the federal law. In *Winston v. United States* (1898), 172 U.S. 303, 19 S.Ct. 212, 43 L.Ed. 456, the court said: "These were three cases of indictments * * * for murders committed since the passage of the act of * * * January 15, 1897, c. 29, by the first section of which, 'in all cases where the accused is found guilty of the crime of murder * * * the jury may qualify their verdict by adding thereto "without capital punishment;" and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment * * * for life.' 29 Stat. 487. * * *"

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"[172 U.S. 303, 19 S.Ct. 212, page 457 of 43 L.Ed.] The judge instructed the jury * * * 'That qualification cannot be added unless it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury, cases that have palliating circumstances which would seem to justify and require it.' * * *"

"[172 U.S. 303, 19 S.Ct. 212, 215, pages 459, 460 of 43 L.Ed., reversing the trial court] The right to qualify a verdict of guilty by adding the words 'without capital punishment,' is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court or the jury is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone."

In the recent case of *Andres v. United States* (1948), 68 S.Ct. 880, the United States Supreme Court considered again the same statute as was involved in the *Winston* case. A conviction bearing the death penalty was reversed because the trial court had not clearly instructed that the jury must be unanimous upon the issue of penalty as well as upon that of guilt. The

court said: "[68 S.Ct. 883] If a qualified verdict is not returned, the death penalty is mandatory. The Government argues that § 567 [18 U.S.C.A. § 567] properly construed requires that the jury first unanimously decide the guilt of the accused and, then, with the same unanimity decide whether a qualified verdict shall be returned. As the statute requires the death penalty on a verdict of guilty, the contention is that the jury acts unanimously in finding guilt and the law exacts the penalty. It follows, that if all twelve of the jurors cannot agree to add the words 'without capital punishment,' the original verdict of guilt stands and the punishment of death must be imposed. The petitioner contends that § 567 must be construed to require unanimity in respect to both guilt and punishment before a verdict can be returned. It follows that one juror can prevent a verdict which requires the death penalty, although there is unanimity in finding the accused guilty of murder in the first degree. * * * [68 S.Ct. 884] Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it. We do not think that the grant of authority to the jury by § 567 to qualify their verdict permits a procedure whereby a unanimous jury must first find guilt and then a unanimous jury alleviate its rigor. * * * This construction is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system than that presented by the Government. * * * [68 S.Ct. 885] It seems to us, * * * that where a jury is told first that their verdict must be unanimous, and later, in response to a question directed to the particular problem of qualified verdicts, that if their verdict is first-degree murder and they desire to qualify it, they must be unanimous in so doing, the jury might reasonably conclude that, if they cannot all agree to grant mercy, the verdict of guilt must stand unqualified. That reasonable men

might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused."

The substantive law of California enacted by the legislature, as above shown, provides that the penalty for murder of the first degree shall be "death, or confinement in the state prison for life, at the discretion of the jury" trying the case; the substantive law as "construed" by the majority opinion is that the penalty for murder of the first degree *shall be death* "unless some extenuating facts or circumstances" are shown, in which event, *but only in which event*, the jury may reduce the penalty to life imprisonment. Manifestly, such judicial "construction" of a statute, the language of which the same court admits is "clear beyond question" to the contrary, all to the end of sustaining death sentences in cases not authorized either by the letter or the spirit of our statute, is also directly contrary to the policy declared by the United States Supreme Court in the *Andres* case, as above quoted.

The majority opinion here, like that in *People v. Kolez* (1944), supra, 23 Cal.2d 670, 145 P.2d 580, and other cases subsequent to *Bollinger* and cited by the majority, does not squarely overrule the *Bollinger* holding in any respect; it does not squarely declare that it would be error against the state to instruct the jury in accord with the language of the statute or to refuse to give the instruction which here was given. As said by Justice Traynor, in his dissent to *Kolez* (page 674 of 23 Cal. 2d, page 582 of 145 P.2d), "For over fifty years precedents have accumulated condemning such instructions, even though the court has fallen short of reversing judgments because of them." Likewise as pointed out by Justice Traynor in the same dissent, this court has repeatedly chided prosecuting attorneys for requesting and trial courts for giving the instruction in question. In *People v. Smith* (1939), 13 Cal.2d 223, 229, 88 P.2d 682, 685, the court quoted from the *Bollinger* case the statement "And considering the numerous occasions this court has held that section 190 * * * confers on the jury alone the

discretion of determining the punishment in cases of guilt of murder in the first degree, trial courts, especially where a human life is at stake, should not interfere with the discharge of that solemn duty by the jury." The Smith case opinion then proceeds: "Just why this and similar warnings by this court have not been observed by prosecuting officers and trial courts, we are at a loss to understand." It seems to me that the explanation of that which the court then was "at a loss to understand" has become all too clear: The denounced practice has been continued *because this court has tolerated it and the evil instruction will continue in use until this court finally enforces what it has so often recognized to be the law.*

Obviously, the inconsistencies above disclosed leave the law in confusion. Why are they not cleared away? What is the answer of the majority to the questions suggested? To make the bald assertion that "it is not error" to instruct a jury that the death penalty is mandatory under some circumstances which well may be found, when the statute makes it "clear beyond question" that such penalty is only discretionary in every case, is pure legalism to which no amount of repetition can add moral verity.

The majority opinion fails to give the full history of the genesis of the error which it propagates; it goes back only as far as the Jones case (1883, 63 Cal. 168) and the Brick case (1885, 68 Cal. 190, 8 P. 858). Actually, the "error" has earlier origin; in *People v. Welch* (1874), 49 Cal. 174, its basis was laid. That case arose shortly after enactment of the previously noted 1874 amendment to section 190 of the Penal Code. Prior to that amendment the sole punishment for murder of the first degree was death; the amendment created the changes discussed in the Bollinger case; i. e., it provided that the punishment may be *either* death or life imprisonment and that the responsibility of determining which punishment shall be imposed was vested in the jury's "absolute discretion." But in the Welch case the jury returned a verdict reading, "We, the jurors, do find the defendant Welch guilty of murder in the first degree, as charged in the indictment."

The verdict was absolutely silent as to the penalty to be imposed and the jury had not been instructed that a verdict in the form quoted would mean the death penalty. (The 1874 amendment, although it had been enacted, may not have been in effect at the time of trial; it was certainly in effect when the case was determined on appeal.) The question which the court actually considered and determined was whether the jury had to determine the penalty at all.

Upon the facts above epitomized the court held (page 178 of 49 Cal.): "Section 190 of the Penal Code, as amended by the Act of March 28, 1874, reads: 'Every person guilty of murder in the first degree shall suffer death, or confinement in the State Prison for life, at the discretion of the jury trying the same * * *' [page 179 of 49 Cal.] The nature of that discretion is to be ascertained by reference to the language of the statute. In Virginia it was held, that in an action qui tam the verdict should fix the amount of damages. (Scott's case, [Commonwealth v. Scott] 5 Grat. 697.) Also, that where the duty was imposed on the jury of fixing the term of imprisonment, and the verdict did not ascertain such term, it should be set aside. (Mills' case, [Mills v. Commonwealth] 7 Leigh 751.)

"But the Act amending Section 190 of the Penal Code does not give the general discretion which juries exercised under the Virginia statute. Here their discretion is limited, at most, to determining which of two punishments shall be inflicted; and we think that it is still more restricted, and is to be employed only where the jury is satisfied that the lighter penalty should be imposed. It would seem that, in view of the apparently growing disinclination to find verdicts of murder in the first degree, when the necessary result is capital punishment, and the existence of a feeling that there were nicer distinctions in the degree of malignancy exhibited in murders than were made by the letter of the statute definitions, the Legislature intended to give to the jury, when the verdict was murder of the first degree, the power of relieving the defendant of the extreme penalty, and of substituting another punishment in its stead. A verdict fixing the punishment at impris-

onment for life is somewhat analogous to the French verdict, 'Guilty with extenuating circumstances,' and is the equivalent of the Louisiana verdict, 'Guilty without capital punishment,' held good in *State v. Rohfrischt* (12 La. Ann. 382); and authorized by the statute which provides, 'In all cases where the punishment denounced by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, "without capital punishment." And whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to hard labor for life in the State Penitentiary.' (Rev. Stat. of La. p. 163.)

"This view of the question is not unsustained by authority in California. By the Act of April 22, 1851, it was enacted: 'Every person who shall feloniously steal, etc., shall be deemed guilty of grand larceny, and upon conviction thereof, shall be punished by imprisonment in the State prison for any term, not less than one year nor more than ten years, or by death, in the discretion of the jury.' And in *The People v. Littlefield* (5 Cal. 355), this Court said: 'It would seem, from the language of the Act, that it was the intention of the Legislature that the jury should only assess the punishment when, in the exercise of their discretion, they thought that the defendant deserved the punishment of death. If they did not agree to such punishment, upon finding the defendant guilty, then they should find a general verdict.' In that case, it was evidently considered that the object of the Legislature (actuated by the circumstance that certain kinds of property—as live stock—were peculiarly exposed, in portions of this State, or by some other motive equally just) was to confer upon the juries the power of affixing, at their discretion, a more severe penalty than had previously been imposed on those guilty of grand larceny. By parity of reasoning we may say, in view of the former punishment for the crime of murder of the first degree, and the history of legislation on the subject in this State and elsewhere, that it was the purpose of the Legislature (by the amendment of section 190) to permit the jury, in a case where the facts proved brought the crime of the defendant within

the statutory definition of the higher offense, but they believed the punishment of death too severe, to declare that he should be imprisoned for life. We think, therefore, the statute should be construed as if it read: 'Shall suffer death, or (in the discretion of the jury) imprisonment in the State prison for life.' * * * [49 Cal. p. 185, on denial of petition for rehearing] It results from the construction we have given to Section 190 of the Penal Code (as amended) that a jury may—in the exercise of its discretion—declare that a defendant guilty of murder of the first degree shall be punished by confinement in the State prison for life. If a jury shall agree that a defendant is guilty of murder of the first degree, but cannot agree that the punishment shall be imprisonment for life, or shall not declare that the punishment shall be such imprisonment, it will be the duty of the Court to pronounce judgment of death. The jury need not declare that death shall be inflicted—in cases where they cannot agree on imprisonment—since, if the verdict is silent in respect to the penalty, the Court must sentence the defendant to death."

In my view no part of the Welch opinion above quoted is sound law; to me neither age nor repetition has hallowed the speciousness of the reasoning above quoted. There is nothing in the statute which authorizes holding that the jurors are not required to agree on the penalty just as they must agree on the guilt; neither is there aught in the statute which makes death mandatory unless evidence of mitigating circumstances is produced and the jury so recommend. The responsibility for making the selection of punishments is placed squarely on the jury by the legislature and the courts should leave it there. But in *People v. Brick* (1885), 68 Cal. 190, 8 P. 858, an instruction was given which is almost verbatim (and in substance identical with) that which was given here and quoted above. Relying upon the Welch case the court said (page 192 of 68 Cal., at page 859 of 8 P.): "There is in this instruction no error. The discretion given the jury by the statute is not an arbitrary one, but is to be employed, as said by this court in *People v. Welch*, 49 Cal. [174], 179, 'only where

the jury is satisfied that the lighter penalty should be imposed.' Of course the jury could only be satisfied by the facts and circumstances of the case." From the union of the errors of Welch and Brick³ has come, and still persists, that grievous error which still plagues us. Our continued tolerance of it, particularly in view of the holding of the United States Supreme Court in the Andres case, *supra*, 68 S.Ct. 880, is even more indefensible than was its genesis.

To Abraham Lincoln is ascribed the declaration, "I shall try to correct errors where shown to be errors; and I shall adopt new views as fast as they shall appear to be true views." That principle seems to me to be a good one, not alone for the chief executive of a great nation but also for a justice of a court of last resort. I think it has been shown that we have erred; at the very least that we *shall* err if we persist, after Andres, in adhering to the holdings of Welch and Brick; I think the true view is that which in Bollinger we said was "clear beyond question" and that it is our duty to enforce the true view.

As is pointed out in the majority opinion this court cannot reduce the penalty without disturbing the judgment of conviction; under the holding of the majority the jury in fixing the penalty are bound to exercise legal discretion; i. e., they must exercise their discretion only upon evidence. Certainly it should follow that they must receive and consider all evidence pertinent to that issue. It is apparent, therefore, that errors which prejudicially affect the defendant insofar as the *trial as to penalty* is concerned must result in a reversal of the judgment. Here the cumulative effect of the many errors which strike directly at the issue of penalty is so substantial that I cannot but conclude that the defendants have been prejudiced.

Hence, even though the majority persist in perpetuating the 1874 rule for mandatory death penalty in the absence of mitigating evidence, such ruling here does not justify affirmance. Rather, does that ruling, and the instruction given, aggravate to prejudicial moment the other errors noted.

The judgment should be reversed and a new trial had.

CARTER and TRAYNOR, JJ., concur.

On Petition for Rehearing.

Rehearing Denied.

SCHAUER, Justice.

I dissent from the order denying a rehearing. In addition to what is said in my dissent from the main opinion I wish to emphasize that the effect of the majority opinion is to deprive each defendant of his life without due process of law and in the taking of his life to deny to him the equal protection of the law.

It is concededly the law of California that in first degree murder cases the penalty is not mandatorily death but is, in the alternative, either life imprisonment or death, in the sole discretion of the jury trying the case. (Pen.Code, § 190; *People v. Bollinger* (1925), 196 Cal. 191, 207, 237 P. 25; *People v. Martin* (1938), 12 Cal.2d 466, 471, 85 P.2d 880; *People v. Smith* (1939), 13 Cal.2d 223, 229, 88 P. 2d 682.) The state constitution (art. I, §§ 7, 13) and the statutes (Pen.Code, §§ 190, 1042, 1157) give to a defendant charged with murder the right, where he does not waive a jury trial, to have the jury determine not only the question of his guilt or innocence and the question of the class and degree of the offense, but also, if the offense be murder of the first degree, the penalty to be imposed. The law does not give any preference to either penalty but leaves such selection solely to the jury, and it requires that the jury be unanimous in its determination of the penalty as it must be unanimous on the questions of guilt and class or degree of the crime. (*People v. Lee Gow* (1918), 38 Cal.App. 248, 250, 175 P. 917; *People v. Garcia* (1929), 98 Cal.App. 702, 704, 277 P. 747; *People v. Richardson* (1934), 138 Cal.App. 404, 32 P.2d 433.)

Pertinent in this connection is the following discussion by this court (speaking through Mr. Justice Shenk) in *People v.*

³ *People v. Jones* (1883), 63 Cal. 168, is also a contributor, an apparently somewhat similar instruction having been

there approved, but since the exact language of the instruction is not set forth it is not charged with full culpability.

Hall (1926), 199 Cal. 451, 456-458, 249 P. 859, 860 (although this court there approved, by way of dictum, the practice of permitting a jury to evade express recognition of its responsibility by instructing them that the death sentence would be imposed, and by imposing such sentence, when the verdict was silent upon the subject of penalty): "From a consideration of our decisions it appears to be the settled law of this state that in the trial on a charge of murder it is first incumbent upon the jury to determine the guilt or innocence of the accused. If he be found guilty of murder in the first degree, it is then incumbent on the jury to fix the penalty. * * * Under the law, the verdict in such a case must be the result of the unanimous agreement of the jurors, and the verdict is incomplete unless, as returned, it embraces the two necessary constituent elements: First, a finding that the accused is guilty of murder in the first degree; and, secondly, legal evidence that the jury has fixed the penalty in the exercise of its discretion. * * * It was the duty of the jury to exercise its discretion and fix the penalty. Failing to do so, no penalty was determined upon. The jury could not exercise its discretion and not exercise it in one and the same verdict. When a verdict, such as the one here under consideration [such verdict was, "We the jury * * *, find the defendant * * * guilty of the crime of murder as charged in the indictment, of the first degree. But cannot come to an unanimous agreement as to degree of punishment"], discloses on its face that such discretion was not exercised as to either penalty, it is not a verdict upon which the court is authorized to pronounce judgment of either death or life imprisonment. In receiving such a verdict and in imposing the sentence of death upon the defendant, the court usurped the function of the jury, and its judgment was a nullity. The proceeding therefore resulted in a mistrial, and the judgment must be reversed. * * * We cannot agree that the defect in the verdict was merely an error in 'matter of procedure' as contemplated by * * * section 4½ [of article VI of the state Constitution]. On the contrary, the defect

involved matter of substantial and substantive right. It was in effect the denial of a trial by jury. The amendment by which said section 4½ was added to the Constitution was not 'designed to repeal or abrogate the guarantees accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases' [citations]. Trial by jury is guaranteed to every person charged with a felony, and the denial of that right is in itself a miscarriage of justice. * * * [H]owever degraded and hardened a criminal the evidence may disclose an accused to be, he is entitled under the Constitution to trial by jury. In legal effect this right was denied to the defendant in the case at bar.' The proceedings before the trial court [which imposed the death sentence] amounted to the same as if the court had denied the defendant a trial by jury in the first instance, and, having heard the evidence and found the defendant guilty, proceeded to impose the judgment of death. Such a judgment may not stand even though there be the clearest proof of guilt."

There is no question of the power of the Legislature to provide that a defendant shall have the right to have his punishment determined by a jury in its sole discretion. But, under the holding of the majority of this court, the right is meaningless and unenforceable and can be stripped away at the whim of a trial court; a trial court can, if it so desires, arbitrarily deprive a defendant of the right to jury trial on the particular issue by informing the jury that, contrary to the legislative provision, their discretion as to choice of penalty "is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence * * * does not show some extenuating facts or circumstances, it is the duty of the jury to find a simple verdict of murder in the first degree as to such defendant, and leave with the law the responsibility of fixing the punishment." According to this instruction the jury has no responsibility for imposing the extreme penalty. If it is not satisfied *from evidence of extenuating or mitigating circumstances* that the light-

er penalty should be imposed, *it need make no determination as to punishment; it can simply arrive at a verdict of guilty, remain silent as to penalty, and leave responsibility with "the law"—the law as declared by this court, not by the Legislature.* These defendants go to their deaths without the return of any verdict of the jury unanimously, as the act of each of the twelve jurors, selecting death as the punishment to be inflicted. The penalty to be imposed upon them has been fixed, not in the manner or upon the responsibility prescribed by the Legislature, but by court-made "law" which contravenes the express provision of the Legislature.

Trial courts may instruct juries in accord with section 190 of the Penal Code (I assume that this court would not hold it error for a trial court thus to obey the legislative mandate) or they may instruct them in accord with the law as this court has declared it. Upon what whimsy shall the fatal selection of paradoxically conflicting instructions be made? Death sentences may be imposed after verdicts fixing such penalty or they may be imposed after verdicts which fix no penalty. The choice of procedure may be governed by any reason or no reason, but always by whim or caprice. It must always be by whim or caprice because there is no law enacted by the Legislature, and none has been judicially declared by this court, by which the choice of the mandatory law-imposed death penalty instruction or the discretionary life imprisonment instruction shall be selected.

In my view the processes of law are not duly administered, and equal protection of the law is not given to all within the class of persons found guilty of first degree murder, when some are sentenced to death only upon the unanimous and express decision of a jury and others are sentenced to death because of the silence of a jury and the leaving of the penalty "to the law"—"the law" as capriciously declared in the particular case by the trial court with the assured approval of this court.

CARTER, Justice (Supplemental Dissenting Opinion).

Since the filing of the majority and dissenting opinions in this cause letters have been received from the District Attorney of Alameda County and from counsel for defendant Williams calling attention to certain discrepancies in the majority opinion and in the dissenting opinion prepared by me relative to the seating arrangement of the witness Belle Jarrett and the various attorneys in the court room during the trial. Attached to the correspondence of the District Attorney is a diagram showing the seating arrangement of the various participants in the trial. The accuracy of this diagram is questioned in some minor respects by counsel for defendant Williams, but I accept the diagram as being substantially correct. The District Attorney concedes in his letter that "it is difficult, if not impossible, to glean from the Reporter's Transcript the exact relative positions of the witness and the various attorneys." For this reason, I accepted as correct and accurate the statement contained in defendant Bowie's brief, which statement was not challenged by respondent, and quoted the same verbatim in my dissenting opinion.

From the diagram now presented by the District Attorney it appears that the two prosecuting attorneys were seated at the left half of the counsel table directly in front of the jury, and counsel for defense were seated at the right half of the counsel table along side of the prosecuting attorneys, and the defendants were seated directly to the rear of their respective counsel. The witness Belle Jarrett was seated to the left rear of the prosecuting attorneys and to the extreme left of one facing the jury box. It therefore appears from this diagram that in order for counsel for defendants to see the witness it was necessary for them to turn around in their respective chairs and look in the opposite direction from the counsel table. In so doing they could see only the right side of the witness' face. Likewise, the defendants by turning to their left could see the right side of the witness' face.

CARTER and TRAYNOR, JJ., concur.

Mention is made in the correspondence of the District Attorney that counsel for defendant Bowie was offered and accepted a seat at the left end of the counsel table during the cross-examination of the witness. This would place him in a position about seven feet from and directly in front of the witness.

While the situation disclosed by the diagram submitted by the District Attorney with respect to the seating arrangement in the court room is somewhat different than that depicted in the quotation from appellant Bowie's brief contained in my dissenting opinion, I am still of the view that defendants were denied the right of confrontation as provided by section 686 of the Penal Code and that the reasoning and authorities contained in my dissenting opinion are applicable to the seating arrangement in the court room as disclosed by the diagram submitted by the District Attorney. For this reason I am not disposed to depart from the conclusion there announced.



32 Cal.2d 204

LINEMAN v. SCHMID et al.

L. A. 20486.

Supreme Court of California.

July 9, 1948.

1. Appeal and error ⇨1214

Where on defendants' appeal from judgment in action for breach of contract for purchase of flour from plaintiff, case was remanded because of absence of a finding resolving conflicting evidence as to market price of flour on date of breach, the difference between market price and contract price representing damages, and court remarked that trial court could take further testimony, but made no mandatory direction, striking out on plaintiff's motion additional evidence received subject to motion to strike out was not prejudicial as to defendants where the testimony at best

would only have created a further conflict.

2. Sales ⇨384(1)

In action for breach of contract for purchase of flour when defendant purchasers failed to instruct shipment within required time, where damages were difference between contract price and market price at time of breach, evidence as to market price sustained judgment for \$10,905.95.

3. Damages ⇨67

Under statute providing for interest when person is entitled to damages and a contract is involved, and statute authorizing interest in actions for breach of obligations not arising from contract, the interest is in the nature of damages. Civ. Code, §§ 3287, 3288.

4. Appeal and error ⇨1207(3)

On defendants' appeal from judgment in action for breach of contract for purchase of flour when defendant purchasers failed to instruct shipment within required time, where only matter under consideration was correct measure of principal loss, direction for trial court to resolve conflict on that issue in accord with declared measure of damages, neither enlarged or limited power of trial court to allow interest prior to judgment. Civ.Code, § 3287.

5. Sales ⇨384(1)

In action for breach of contract for purchase of flour when defendant purchasers failed to instruct shipment within required time, where damages were difference between contract price and market price at time of breach, interest was not allowable under statute prior to judgment where damages could not be computed except on conflicting evidence because of absence of an established or reasonably ascertainable market price or value. Civ. Code, § 3287.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke and Harry R. Archbald, Judges.

Action by H. M. Lineman, as executor of the last will and estate of Robert L. Rice, also known as R. L. Rice, deceased, against

Augusta Schmid, as administratrix of the estate of John Schmid, deceased, Anthony Marik, and others, doing business under the fictitious firm name of Eagle Bakery, for breach of contract for purchase of flour. From an adverse judgment, defendants appeal.

Judgment affirmed as modified.

Prior opinion, 186 P.2d 1009.

W. W. Wallace, of Los Angeles, for appellants.

H. M. Lineman, in pro per., Mab Copland Lineman and Benjamin Lewis, all of Los Angeles, for respondent.

SHENK, Justice.

On December 31, 1938, R. L. Rice commenced an action against several defendants to recover damages for breach of a contract to purchase flour executed on July 16, 1937. On May 20, 1946, a judgment for the plaintiff was entered awarding \$10,905.95 as damages with interest at seven per cent from December 2, 1938, the date of the breach. The defendants appealed.

At the date of the contract John Schmid operated the Eagle Bakery in Los Angeles. R. L. Rice was a jobber in flour, buying on his own account and selling to bakeries. The brands of flour covered by the contract, Ravalli, Gold Cross, and Isis, were manufactured in Montana under special formulas by the Montana Flour Mills Company. The contract specified 2000 barrels of Ravalli at \$7.10, 2750 barrels of Gold Cross at \$7.65, and 1250 barrels of Isis at \$7.15, to be shipped within 90 days on directions furnished by the buyer. The ninety day limitation meant that carrying charges would be added if not ordered under the contract until after the expiration of the specified period.

Various shipments were made in amounts as ordered by Schmid until January, 1938. In that month Schmid sold the bakery to four persons who assumed the contract and who were named in the action as defendants with Schmid. Additional shipments were subsequently ordered but the price of wheat and consequently of flour continued to drop in that year and the defendants refused to direct further ship-

ments. The seller thereupon and on December 2, 1938, terminated the contract. On that date there remained not ordered, and therefore undelivered, 688 barrels of Ravalli, 1593 barrels of Gold Cross, and 474 barrels of Isis.

There have been three trials, three judgments and three appeals in this case. In the period between the commencement of the action and the first trial, Schmid died and his widow as administratrix of his estate was substituted in his place as defendant. A claim in the amount of \$13,251.79, based on the cause of action arising from the breach of contract was filed against his estate. Prior to the third trial Rice died, and in November, 1945, the executor of his will was substituted as party plaintiff.

The first trial resulted in a judgment for the plaintiff in the sum of \$712.45 damages. That purported amount of the plaintiff's loss on the undelivered flour was based on the market price of the flour on the date the contract was executed. The plaintiff appealed and the judgment was reversed (*Rice v. Schmid*, 18 Cal.2d 382, 115 P.2d 498, 138 A.L.R. 589) on the ground that the correct measure of damages was the difference between the contract price and the market price for each brand of flour on December 2, 1938, the date of termination or breach of the contract. The trial court was directed to determine the amount of damages in accordance with the stated measure and enter judgment for the plaintiff for the amount so found.

After the filing of the remittitur on that appeal and a further hearing the court found that the plaintiff had only 200 barrels of the flour on hand on December 2, 1938, that 95 cents per barrel was the difference between the market price and the contract price, and entered judgment for \$190. The plaintiff appealed the second time on the ground that the trial court failed to follow this court's direction.

On the second appeal it was determined that the trial court was bound by the direction given, and had no authority to try any other issue or to make any other finding than as directed. However, this court refrained from estimating the amount of

the plaintiff's loss because of a conflict in the evidence as to the market price of each of the brands of flour on December 2, 1938. Because of the absence of a finding resolving the conflict, it was said to be necessary to remand the case a second time "for the purpose of ascertaining that price. The trial court may, of course, take such additional evidence as may be necessary to determine this issue." [186 P.2d 1009, 1010.] The judgment was reversed with directions "(1) to ascertain the difference, on December 2, 1938, between the market price and the contract price for each brand of flour specified in the contract; (2) to compute the amount of plaintiff's damage by multiplying the total number of undelivered barrels of each brand of flour by the difference in price so found for that brand of flour; and (3) thereafter to enter judgment in favor of plaintiff and against all defendants for the amount of such damages." *Rice v. Schmid*, 25 Cal.2d 259, 264, 153 P.2d 313, 315.

Upon the going down of the remittitur after that decision the trial court received additional evidence offered by the defendants, subject to the plaintiff's motion to strike, as to the purported market prices of the various brands of flour. Upon rendering judgment the court granted the plaintiff's motion and based its findings on the difference between the contract price and the market price of each brand of flour as shown by the conflicting evidence appearing solely from the prior record. The judgment for \$10,905.95 with interest from December 2, 1938, was thereupon entered.

On the present appeal the defendants contend that the court erred in striking the additional evidence of market price introduced by them, that the evidence does not sustain the findings as to market price, and that the plaintiff is not entitled to interest for the period prior to judgment.

[1] The court was not bound to receive or consider additional evidence on the issue of market price for the reason that there was no mandatory direction in that regard. However, the language of this court on the matter of receiving additional

evidence on that issue was a recognition that the trial court could do so if such evidence was deemed material. The granting of the plaintiff's motion to strike the additional evidence indicated the trial court's conclusion that the offered testimony of the defendants' witnesses, as is shown by the transcript thereof, was not founded on any sales of the flour, had no relation to the time of the breach, but was based solely on each witness's opinion as of times substantially unrelated to and remote from the date of the breach. Had the court considered this testimony as part of the record the most that could be said of it is that it would have created a further conflict in the evidence of market price. No prejudicial error is shown in granting the motion to strike.

The record does not show established market prices at any time for flour of the brands under contract. These brands were manufactured pursuant to special formulas for sale at wholesale under contracts with bakeries and other large consumers of flour. It was in evidence that the prices of these brands of flour varied from day to day, even on the same day and in the same area, depending on the contributing factors involved under each contract. There was no testimony of any established market price, and the witnesses, whose testimony of market price was based on factors of cost at the mill, carrying charges, and profit, were not in agreement. There was evidence that on December 2, 1938, the spread between market price based on such factors and the contract price per barrel was \$4.57 for Ravalli, \$4.89 for Gold Cross, and \$4.89 for Isis, making an aggregate loss for the amount of flour undelivered on that date of \$13,251.79. This was the amount sought by the complaint and by the claim on file in the Schmid estate. There was also testimony given by a representative of the Montana Flour Mills Co. that the cost to Rice at Los Angeles on December 2, 1938, was \$3.00 per barrel for Ravalli, \$3.55 for Gold Cross, and \$3.00 for Isis. Based on these figures and the relevant loss factors the court found that the plaintiff's loss was \$3.95 per barrel for undelivered Ravalli flour, \$3.95 for Gold Cross, and \$4.00 for Isis, making the

total of \$10,905.95 for which the judgment was entered.

[2] It is therefore apparent that the trial court followed the direction of this court to resolve the conflict in the evidence on the issue of market price, and that its findings are supported by the evidence.

The defendants support their contention that the trial court erroneously allowed interest from the date of the breach (1) on the absence of any direction therefor, and (2) because, so it is claimed, the damages were not certain or capable of being made certain by calculation within the meaning of section 3287 of the Civil Code.

[3,4] In this case the absence of a direction on the prior appeal does not preclude the allowance of interest prior to judgment if such interest be proper under section 3287. Interest in that sense if allowable is an element of damages provided by law. The Article in the Civil Code incorporating sections 3287-3290 is entitled, "Interest as Damages." Section 3287 provides for interest when a contract is involved, and section 3288 deals with interest in actions for breach of obligations not arising from contract. Such interest is in the nature of damages. *Bare v. Richman & Samuels, Inc.*, 60 Cal.App.2d 413, 419, 140 P.2d 895; *Selleck v. French*, 1 Conn. 32, 6 Am.Dec. 185, and Note; *Pearson v. Ryan*, 42 R.I. 83, 105 A. 513, 3 A.L.R. 805 and Note. The original judgment entered in December, 1939, did not provide for interest, the plaintiff on the prior appeals did not assert a right thereto, and this court did not purport to determine the question. On the prior appeals the only matter under consideration was the correct measure of the principal loss. Therefore the direction to resolve the conflict on that issue in accord with the declared correct measure of damages neither enlarged nor limited the power of the trial court to determine the interest issue in accordance with law. *Raun v. Reynolds*, 15 Cal. 459, 468; *Clutter v. Superior Court*, 140 Cal.App. 135, 138, 35 P.2d 152.

The question then is whether, as applied to the record in this case, the plaintiff is

entitled to interest prior to judgment pursuant to section 3287 of the Civil Code. The pertinent portion of that section provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day * * *."

The earliest application of the rule permitted interest only when the amount due could be ascertained from the face of the contract. *Brady v. Wilcoxson*, 1872, 44 Cal. 239, 245; *Coburn v. Goodall*, 72 Cal. 498, 509, 14 P. 190, 1 Am.St.Rep. 75. *Cox v. McLaughlin*, 76 Cal. 60, 18 P. 100, 9 Am.St.Rep. 164, modified the distinction between liquidated damages, defined by the section as those certain or capable of being made certain, and unliquidated damages, although it was recognized that there might be further exceptions. In that case liquidated damages were defined as those which were certain by computation from the face of the contract, or which might be made certain by reference to well-established market values plus computation. If damages were not susceptible of ascertainment, either by computation from the contract or from established market rates, interest was not allowable until the amount due had been determined by judicial process. On the appeal in that case the judgment was modified by striking the interest item.

The rule of section 3287 as so defined has generally been followed in this state. Some of the cases sustaining the rule are: *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 P. 853, interest disallowed by modification on appeal; *Easterbrook v. Farquharson*, 110 Cal. 311, 42 P. 811, disallowed on appeal; *Swinerton v. Argonaut Land & Development Co.*, 112 Cal. 375, 379, 44 P. 719, disallowed on appeal; *Ferrea v. Chabot*, 121 Cal. 233, 53 P. 689, 1092, disallowance upheld; *Macomber v. Bigelow*, 123 Cal. 532, 535, 56 P. 449, mechanics liens, allowance held error; *Macomber v. Bigelow*, 126 Cal. 9, 58 P. 312, same ruling where amounts incapable of ascertainment until judgment, followed in *Burnett v. Glas*, 154 Cal. 249, 260, 97 P. 423; *Erickson v. Stockton etc. R. Co.*, 148 Cal. 206, 82 P.

961, allowed on open account from time balance ascertained; *Olcovich v. Grand Trunk Ry. Co.*, 179 Cal. 332, 176 P. 459, allowance computed on depreciation of market value necessitating proof of two market values held proper, relied on in *Brandenstein v. Jackling*, 99 Cal.App. 438, 278 P. 880, upholding allowance because damages could be fixed by market value or difference between two market values; *Gray v. Bekins*, 186 Cal. 389, 399, 199 P. 767, amount admitted by answer, interest allowed from filing of answer; *California Bean Growers' Ass'n v. Rindge Land & Navigation Co.*, 199 Cal. 168, 184, 248 P. 658, 47 A.L.R. 904, upheld on amount computed under valid liquidated damage clause; *Engelberg v. Sebastiani*, 207 Cal. 727, 729, 279 P. 795, upheld on the difference between contract price and the amount realized from sale on market of rejected grapes; *Farnham v. California Safe Deposit & Trust Co.*, 8 Cal.App. 266, 273, 96 P. 788, mechanics liens, allowed on claims certain by computation or by reference to market rates; *Ellsworth v. Knowles*, 8 Cal.App. 630, 97 P. 690, disallowed on appeal; *Coghlan v. Quartararo*, 15 Cal.App. 662, 669, 115 P. 664, disallowed on appeal because changing market rates rendered damages uncertain until adjudicated; *Fairchild v. Bay Point & C. Ry. Co.*, 22 Cal.App. 328, 134 P. 338, allowance upheld only on items readily ascertainable by calculation; *Brazil v. Azevedo*, 32 Cal.App. 364, 162 P. 1049, 1050, allowance affirmed on amounts for goods sold "at certain prices or at current market value"; *Scott, Magner & Miller v. Mozzetti*, 62 Cal.App. 508, 216 P. 979, quantum valebat, allowance was error where reasonable value not ascertainable until judgment; *Continental Rubber Works v. Bernson*, 91 Cal.App. 636, 267 P. 553, quantum valebat, not allowable unless well-established market values shown, judgment modified; *Sulmock Furniture Mfg. Co. v. Spitz*, 120 Cal.App. 170, 7 P.2d 354, upheld disallowance in absence of established or reasonably well-known market value; *Bare v. Richman & Samuels, Inc.*, supra, 60 Cal.App.2d at page 420, 140 P.2d 895, interest upheld on amount based on well-

established market value definitely determined from the evidence.

The rule is stated in the Restatement of the Law of Contracts, section 337(a) as follows: "Where the defendant commits a breach of a contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value from the time performance was due, after making all the deductions to which the defendant may be entitled." (See review of the many cases cited in Restatement of Contracts, California Annotations, p. 193, et seq.) In the text of 8 Ruling Case Law, p. 533, sec. 86, it is said that there is authority to the effect that the distinction formerly existing between liquidated and unliquidated demands is practically obliterated, and that whenever a verdict liquidates a claim and fixes it as of a prior date, interest should be allowed from that date, citing *Sullivan v. McMillan*, 37 Fla. 134, 19 So. 340, 53 Am. St.Rep. 239 and Note. However, further reading in the cited section of Ruling Case Law discloses, with citation of many cases, that the general rule is almost uniformly adhered to, namely, that interest is not allowable where the damages depend upon no fixed standard and cannot be made certain except by accord, verdict or decree; but that interest will be allowed where the damages are capable of ascertainment by calculation, or where they may be determined by reference to well-established market values. (See also 15 Am.Jur. p. 583, sec. 166, citing additional Notes and cases.) A reading of the opinion in the cited Florida case indicates that in fact the court followed the general rule in determining the seller's right to interest on the damages due because of the buyer's failure to take logs under contract. The court said that the evidence was so exact and definite as to the amount of the damages that they could readily be ascertained by simple calculation. Similarly in *Gray v. Central R. Co. of New Jersey*, 157 N.Y.

483, 52 N.E. 555, the general rule was repeated and it was held that interest may be recovered when the amount of an otherwise unliquidated demand may be ascertained by computation together with a reference to well-established market value which appeared in that case.

As late as 1933 in *Hansen v. Covell*, 218 Cal. 622, 630, 24 P.2d 772, 89 A.L.R. 670, *Cox v. McLaughlin*, supra, 76 Cal. 60, 18 P. 100, 9 Am.St.Rep. 164, was recognized as the leading case determining when interest may be allowed under section 3287. In such recognition this court noted the reservation of the *Cox* case of possible exceptions to and modifications of the rule, and held that interest due on the balance of an amount ascertainable pursuant to the rule could not be defeated by setting up unliquidated claims as off-sets. A similar exception was noted in *Courteney v. Standard Box Co.*, 16 Cal.App. 600, 613, et seq., 117 P. 778 (followed in *McCowen v. Pew*, 18 Cal.App. 482, 484, 123 P. 354), where the offset of unliquidated amounts was held not to defeat the right to interest on the balance of an amount otherwise ascertainable under the rule.

[5] A review of the provisions of section 3287 and of the many decisions stating the applicable rule discloses no exception which would permit the recovery of interest in this case. The rule appears to be uniform, whether the case involved contract price or reasonable value, that interest is not allowable when damages cannot be computed except on conflicting evidence, such as in the present case, because of the absence of established or reasonably ascertainable market prices or values. In such cases, since the amount of the damages cannot be resolved except by accord, verdict or judgment, interest prior to judgment, is not allowable.

It is obvious from the decisions on the prior appeals and from the record herein that the parties were aware that there were no established market prices for these brands of flour, and for that reason they inserted a provision for liquidated damages in their contract. That provision, however, was held invalid on the first appeal

(18 Cal.2d 382, 386, 115 P.2d 498, 138 A.L.R. 589), where this court said that it was not impracticable nor extremely difficult to fix the actual damage within the meaning of section 1671 of the Civil Code, notwithstanding the fact that such damage was dependent upon the price of articles as to which no regular market existed. That there was an established market for flour generally cannot be gainsaid. But on the record in this case there was no regular market value for the particular brands of flour from which established or ascertainable prices could be found. The amount of the loss was therefore governed by the measure of damages provided by section 1784(3), Civil Code (*Rice v. Schmid*, supra), namely, the difference between the contract prices and the current prices for these brands at the date of the breach, December 2, 1938. Neither party produced evidence of established or reasonably ascertainable market values as contemplated by the general rule. The evidence introduced by the plaintiff indicated that in fact no such values or prices were readily or reasonably ascertainable. As stated the evidence is that the prices of the brands of flour involved depended on contracts that were fluctuating and varied from day to day, even on the same day, for the same brand of flour, and in the same area. The trial court's computation of the damages was therefore not based on an established market price, but on a value which it was compelled to select from conflicting evidence relating to the factors of cost, carrying charges and profit.

Thus the plaintiff has not shown facts which permit the allowance of interest pursuant to section 3287 of the Civil Code, and on the record made by the parties the conclusion must follow that the court erroneously allowed interest from December 2, 1938, or from any date prior to judgment.

The judgment is modified by striking therefrom the allowance of interest and as so modified it is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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WILCOX v. BERRY et al.

Sac. 5903.

Supreme Court of California, in Bank.

July 2, 1948.

1. Automobiles ⇨192(4)

The statute imposing liability on automobile owner for negligent operation thereof by another with owner's permission is applicable as between joint owners. Vehicle Code, § 402.

2. Automobiles ⇨192(5)

If automobile which is community property causes injury, wife cannot be held liable to party injured by husband's negligence under statute imposing liability on automobile owner for negligent operation thereof by another by owner's permission, since entire management of community property is in husband and wife has no consent to give. Civ.Code, § 164; Vehicle Code, § 402.

3. Automobiles ⇨192(4)

If husband and wife own automobile jointly, and not as community property, wife can be held liable under statute for negligent operation of automobile by husband if found that he was operating automobile with her consent, either expressed or implied. Civ.Code, § 164; Vehicle Code, § 402.

4. Husband and wife ⇨262(1)

Where husband and wife obtained title to automobile by an instrument upon which they were not described as husband and wife, no presumption existed that automobile was community property of the spouses. Civ.Code, § 164.

5. Husband and wife ⇨14(5), 264

Evidence sustained finding that automobile, which was involved in accident while being driven by husband, was not community property of husband and wife, but was owned by them jointly, so that, where husband with wife's consent was operating automobile, wife could be held liable for damages caused by husband's operation. Civ.Code, § 164; Vehicle Code, § 402.

6. Evidence ⇨239, 242(1), 249(1)

After proof of a partnership or agency, act or declaration of a partner or agent

of party, within scope of partnership or agency and during its existence, may be given on trial, and same rule applies to act or declaration of a joint owner, joint debtor or other person jointly interested with the parties.

7. Evidence ⇨248(6)

In action against wife for damages arising out of collision between plaintiff's automobile and an automobile which was owned by husband and wife, and which was driven by husband, husband's statement made to officers a short time after accident that brakes on automobile did not work properly was competent evidence against wife as an admission against interest. Code Civ.Proc. § 1870, subd. 5.

8. Appeal and error ⇨854(4)

Where it was determined that evidence had been properly received against defendant, the ground of trial court's ruling was immaterial upon appeal.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by E. H. Wilcox against Jess G. Berry and Violet A. Berry for damages resulting from automobile collision. The trial proceeded against Violet A. Berry alone. From judgment in favor of plaintiff, the defendant Violet A. Berry alone appeals.

Affirmed.

Prior opinion, 184 P.2d 939.

Van Dyke & Harris, Russell A. Harris and J. A. Montgomery, all of Sacramento, for appellant.

Sumner Mering, of Sacramento, for respondent.

EDMONDS, Justice.

E. H. Wilcox sued Jess G. Berry and Violet A. Berry for personal injuries assertedly sustained in an accident resulting from the operation of an automobile by Mr. Berry at a time when his codefendant was not present. Mr. Berry could not be found for service of summons, and Mrs. Berry's appeal from the judgment rendered against her presents only the question as to her liability for the damages suffered by the plaintiff.

Upon the trial the court received, over Mrs. Berry's objection, a statement assertedly made by Mr. Berry at the time of the accident to the effect that he could not stop the automobile because the brakes did not work properly. Other evidence showed that this automobile had been purchased by him and Mrs. Berry after their marriage with their combined earnings, except for a trade-in allowance of \$100. It was registered in the names of "Jess B. Berry and/or Violet A. Berry" and insurance policies were issued accordingly. The Berrys' agreement as to ownership of the automobile was that each of them equally should be entitled to the use of the car and that a sale of it would require their joint consent. As an adverse witness called under section 2055 of the Code of Civil Procedure, Mrs. Berry testified that Mr. Berry generally used the car, that she had no objection to his use of it and that such use was with her permission.

As justifying the reversal of the judgment against her, Mrs. Berry contends that the admission in evidence of Mr. Berry's statement constitutes prejudicial error; that the evidence is insufficient to support the finding of ownership of the automobile; and that the finding of operation of the automobile by Mr. Berry with the permission of Mrs. Berry, within the meaning of the Vehicle Code, is against law.

[1] Section 402 of the Vehicle Code provides, in part, that "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." This section has been held to apply as between joint owners (*Krum v. Malloy*, 22 Cal.2d 132, 137 P.2d 18), but Mrs. Berry argues that neither a husband nor wife operates an automobile owned by them with the permission of the other within the meaning of its provisions. She declares that "there would be no more thought of consent or necessity for con-

sent or propriety of consent in respect of the use of one of the spouses of a co-owned car than of a community owned car."

[2,3] When an automobile which is community property causes injury, the wife is not liable to a party injured by the husband's negligence because the wife has no consent to give. The entire management and control of the community property is in the husband and "no consent of the wife, express or implied, to her husband's use or operation of the community automobile could add anything as a matter of law or of fact to his rights in that respect, which are already plenary and complete." *Cox v. Kaufman*, 77 Cal.App.2d 449, 452, 175 P.2d 260, 261. But in the event that the husband and wife own the automobile jointly, and not as community property, "it is a question of fact * * * whether the operation of the automobile is with or without the consent, express or implied, of an owner who is not personally participating in such operation". *Krum v. Malloy*, supra, 22 Cal.2d page 136, 137 P.2d 20. Therefore, if the automobile which caused the injuries to Wilcox was jointly owned, the evidence sufficiently supports the finding of Mrs. Berry's permission for her husband to use it.

[4,5] But the appellant, relying upon section 164 of the Civil Code, claims that the evidence as to ownership does not satisfy the burden of proof which the law placed upon the plaintiff to overcome the presumption that the automobile was the community property of the spouses. However, the presumption specified by the statute is that property acquired by a husband and wife is community property if it is acquired by an instrument in which they are described as such persons. In the present case the uncontradicted evidence is that title to the automobile was in "Jess G. Berry and/or Violet A. Berry." The presumption is therefore not applicable and the evidence fully supports the finding of the trial court that the automobile was not community property.

[6-8] As to Mr. Berry's statement at the time of the accident, Mrs. Berry concedes that it would be competent evidence against him, as an admission against interest. Sec-

tion 1870 of the Code of Civil Procedure provides: "5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence [may be given upon a trial]. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;". The statement was therefore admissible against Mrs. Berry, as the co-owner of the car. It is therefore unnecessary to determine whether the statement was admissible within the spontaneous declaration rule, as held by the trial court. The evidence having been properly received against Mrs. Berry, the ground of the court's ruling is immaterial. *Ray v. Borgfeldt*, 169 Cal. 253, 267, 146 P. 679; *Davis v. Tanner*, 88 Cal.App. 67, 75, 262 P. 1106; *Laiblin v. San Joaquin Agr. Corp.*, 60 Cal. App. 516, 538, 213 P. 529.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.



2 Cal.2d 157

**STICKEL v. SAN DIEGO ELECTRIC
RY. CO. et al.
L. A. 20312.**

Supreme Court of California, in Bank.
July 1, 1948.

As Modified on Denial of Rehearing
July 29, 1948.

1. Trial ⚡90

Where there was no motion to strike opinion testimony of plaintiff, that testimony was to be considered in support of verdict for plaintiff.

2. Appeal and error ⚡1067

In action against owner and driver of bus to recover for death of driver of truck and for injuries sustained by occupant of truck as result of intersectional collision,

lack of instruction that evidence concerning admissions by bus driver was not binding on owner of bus was not prejudicial to owner of bus, where finding that bus driver was negligent was required to be upheld, since any negligence of bus driver was imputable to owner of bus.

3. Automobiles ⚡244(36)

Evidence was sufficient to establish that bus driver's negligent failure to watch for traffic at intersection was the legal cause of collision of bus with truck at intersection.

4. Automobiles ⚡245(80, 90)

Evidence was insufficient to establish, as a matter of law, that truck driver negligently failed to yield right of way to bus as required by Vehicle Code and that such negligence contributed to collision at intersection between bus and truck. Vehicle Code, § 552.

5. Trial ⚡45(3)

A mere general offer of proof without producing the witness or stating the evidence whereby the fact in issue is to be proved, or, if the witness be present, without putting a question to him in such form as to give opportunity for objection, is not correct trial procedure and it affords no ground for appeal.

6. Appeal and error ⚡205

Where defendants at no time made a proper offer of admissible evidence, and after several colloquies as to sufficiency of defendants' vague offers of proof and admissibility of certain evidence which defendants suggested they wished to offer, trial court said that he was not convinced that offer of proof or cross-examination was proper, and that matter would be reserved for argument, and defendants never again referred to matter, defendants could not complain on appeal that they were not permitted to introduce such evidence.

7. Witnesses ⚡344(1), 345(1)

In action by husband to recover for death of his wife and for injuries sustained in collision between bus and truck, evidence that husband had allegedly used other names and had been arrested on various charges and had been allegedly convicted

of misdemeanors under other names was not admissible.

8. Evidence ⇨471(24)

In action by husband to recover for death of wife and for injuries sustained in collision between bus and truck, evidence that police officer had made in his note book a notation that cause of the accident was that truck went through a stop sign, was inadmissible on ground that notation was but an opinion of the officer, arrived at after he had interviewed unidentified persons at scene of accident.

9. Appeal and error ⇨882(8)

Defendants had no ground to complain of admission of a written statement of defendants' witness, where defendants' counsel said when the statement was offered by plaintiff that counsel had no objection to its receipt.

10. Appeal and error ⇨1058(1)

Defendants had no ground to complain of refusal to admit a written statement of defendants' witness, for purpose of rehabilitating witness after his cross-examination, where the statement was subsequently admitted when offered by plaintiff.

11. Negligence ⇨139(1)

Instruction that a person who is exercising ordinary care has a right to assume that others will perform their duty under the law, but that there is an exception where it is reasonably apparent to one, or in exercise of ordinary care would be apparent to him, that another is not going to perform his duty, was not objectionable on ground that it might be misunderstood to impose a duty to anticipate negligence on the part of others.

12. Appeal and error ⇨1068(1)
Automobiles ⇨246(2)

Instruction that it is the duty of a driver of any vehicle using a public highway to use ordinary care at all times to avoid placing himself or others in danger and to avoid a collision was objectionable on ground that it might be misunderstood by jury to impose absolute duty to avoid a collision, but jury was not misled where jury impliedly found that truck driver was not guilty of negligence proximately contributing to collision.

13. Appeal and error ⇨1068(5)

Defendants were not prejudiced by refusal of their requested instruction that if the wife was intoxicated at time of accident and such intoxication was a proximate cause of the accident, and husband knew or should have known of such intoxication, then his riding with wife constituted negligence, and he could not recover, where jury impliedly found that the wife was not negligent and was not legally responsible for collision.

14. Automobiles ⇨246(9)

Defendants' requested instruction that it is immaterial which vehicle enters intersection first, and that vehicle entering or crossing a through highway has no preference or is given no right of way over a vehicle traveling on a through highway merely because vehicle crossing or entering through highway might have entered intersection first, was properly refused, since relative positions of vehicles before collision are material where the negligence of the respective drivers is in issue.

15. Automobiles ⇨246(20)
Trial ⇨241

Defendants' requested instruction respecting lawful speed limit for a bus or vehicle traveling south on certain through street where it intersected with a certain other street, was properly refused because incomplete, misleading, and a grammatically peculiar attempt to state codified speed laws which applied to bus. Vehicle Code, §§ 510, 511, 513.

16. Automobiles ⇨246(34)

In action by husband against owner and driver of bus for wife's death and for injuries sustained as result of collision between bus and truck driven by wife, court properly refused to give defendants' requested instruction as to the criminal responsibility of an intoxicated driver. Vehicle Code, §§ 501, 502.

17. Trial ⇨260(8)

In action by husband against owner and driver of bus for wife's death and for injuries sustained as result of collision between bus and truck driven by wife, failure to modify and give defendants' instruction concerning criminal responsibility of

an intoxicated driver did not prejudice defendants, where jury was adequately instructed in general terms as to negligence, contributory negligence, and proximate cause. Vehicle Code, §§ 501, 502.

18. New trial ⇨140(3)

Affidavits on motion for new trial allegedly showing misconduct of two jurors were insufficient, where two of affidavits by an employee of one of defendants, whose capacity was not averred, were on information and belief, and third affidavit concerning conduct of a certain woman who informed affiant that she was a juror then hearing a "death case" did not show that the woman was a juror in the case in which new trial was sought.

19. Stipulations ⇨14(12)

Defendants' contention that evidence showed an amount of damages less than that awarded for medical expenses, etc., could not be considered, where defendants stipulated that the defendants would present no question on appeal concerning amount or excessiveness of damages.

TRAYNOR, J., dissenting.

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action by Harris Stickel and others against the San Diego Electric Railway Company, a corporation, and Robert D. Amos, to recover for the death of the wife of the named plaintiff and for injuries sustained by plaintiff as result of a collision between a bus of the defendant corporation, which was driven by Robert D. Amos, and a truck in which plaintiff was a passenger and which was being driven by the deceased wife. From a judgment pursuant to a jury verdict for plaintiffs, and from an order denying defendants' motion for judgment notwithstanding the verdict, the defendants appeal.

Judgment and order affirmed, and purported appeal from verdict dismissed.

Prior opinion 181 P.2d 745.

Huntington P. Bledsoe, of San Diego, for appellants.

Edgar B. Hervey, of San Diego, and Henry F. Walker, of Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiff Harris Stickel sued to recover damages for the death of his wife and for his own personal injuries resulting from a collision between a bus of defendant railway company driven by defendant Amos, its employe, and a pickup truck in which plaintiff was a passenger and which was being driven by Mrs. Stickel. Defendants appeal from a judgment pursuant to a jury verdict for plaintiff and from an order denying their motion for judgment notwithstanding the verdict. We have concluded that their many claims of error do not justify a reversal.

[1,2] The accident occurred at about 10:40 p. m. at the intersection of Twelfth and K Streets in the city of San Diego. The bus was proceeding south on Twelfth Street. According to defendant Amos its speed was between 22 and 24 miles an hour. Mrs. Stickel was driving west on K Street. The following evidence supports the verdict: Mrs. Stickel stopped at the east curb line of the intersection, looked to her right, shifted gears, and drove into the intersection. She did not look to her right again. The truck was nearly across the intersection, traveling approximately six and not more than twelve miles an hour, when Mr. Stickel, who had not been "paying much attention" to traffic, "looked around and there were bright lights in front of our cab and that is the last thing I remember"; Mrs. Stickel "must have seen it [the bus] because she tried to step on the gas." (There was no motion to strike this opinion testimony of plaintiff; therefore it is to be considered in support of the verdict. 2 Cal.Jur. 804, § 473.) The bus driver sounded no warning. The left front of the bus struck the right door of the cab of the truck. The force of the impact was such that the bus pushed the truck nearly 170 feet from the point of impact. Two police officers arrived at the scene of the accident about ten minutes after the collision. Shortly thereafter Amos, the bus driver, told them that "he

did not see the Chevrolet [plaintiff's pickup truck] at all until after he hit it, * * * until he felt the glass in his face." (This admission by Amos was received in evidence as against both defendants without objection. Defendants' objection to other evidence of Amos' admission, on the ground that it was "hearsay," was "sustained as to the defendant * * * Railway Company and overruled as to the defendant Amos," but there was no request that the jury be instructed that the evidence was not binding on the railway company. In any event the lack of such instruction could not have prejudiced defendant company because the finding that Amos was negligent must be upheld, and any negligence of Amos is imputed to the company.)

[3, 4] The evidence above summarized is sufficient to support an inference that Amos' negligent failure to watch for traffic crossing Twelfth Street was the legal cause of the collision. It does not, as defendants urge, establish as a matter of law that Mrs. Stickel negligently failed to yield the right of way as required by section 552 of the Vehicle Code and that such negligence contributed to cause the accident. Section 552 provides, "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to

enter or cross the through highway." The jury could have decided that when Mrs. Stickel started across the intersection she reasonably believed that the bus was not an immediate hazard.

[5, 6] Defendants introduced evidence tending to show that both Mr. and Mrs. Stickel were intoxicated at the time of the accident. This evidence consists of testimony that the Stickels were in a barroom about half an hour before the accident, that Mrs. Stickel was then obviously intoxicated and Mr. Stickel was drinking, and that after the accident the odor of alcohol was on the breaths of Mr. and Mrs. Stickel. The evidence was introduced in support of the pleaded defenses that negligence of Mrs. Stickel proximately contributed to cause the accident and that plaintiff himself was negligent in riding with Mrs. Stickel when he knew or should have known that she was intoxicated and could not and would not drive with due care. Plaintiff testified on cross-examination that neither he nor his wife was in the above mentioned barroom on the day or night of the collision. He was not asked whether he or Mrs. Stickel was intoxicated or had been drinking prior to the accident. Defendants complain that the trial court refused to permit them to introduce other evidence which, they claim, would have tended to show that plaintiff and his wife were intoxicated at the time of the accident. In this respect, the record shows, defendants at no time made a proper offer of admissible evidence; after several colloquies as to the sufficiency of defendants' vague offers of proof and the admissibility of certain evidence which defendants suggested they wished to offer,* the trial court said, "I am not convinced that the

* Such colloquies were in material part as follows:

"Mr. Bledsoe [counsel for defendant]:
* * * I want to refer to numerous arrests [of plaintiff], particularly in this City of drunkenness and drunk driving. * * *

"The Court: If you are able to prove, or if you wish to make inquiry as to whether or not he had been drinking shortly prior to this occurrence, in an effort to establish his capacity for observation at the time this took place, I would say yes, but whether he had been

drinking a week before or had been arrested 50 times before for drunkenness, unless it is connected up with the physical condition at the time of the occurrence, I don't think it is impeachment.

"Mr. Bledsoe: He [plaintiff] says he was not drinking on this night and never drinks. [Plaintiff had not so testified and was not thereafter asked whether he had been drinking on the night of the accident or whether he had ever drunk intoxicating liquor.] I can show what he says is not true. * * *

offer of proof, or the cross-examination indicated, is proper. * * * We will reserve that matter for argument"; and defendants never again made an offer of proof, sought to argue, or asked a question of any witness concerning such evidence. "A mere general offer of proof without producing the witness or stating the evi-

"Mr. Hervey [counsel for plaintiff]: Whether he ever drinks or not does not make any difference.

"The Court: I think that is correct. If you have authorities for any of those contentions I want to hear them, but in the absence of any authority I am relying on my general ideas of materiality. * * *

"Mr. Hervey: * * * It is entirely immaterial whether he drank or not on any other occasions. * * *

"[Thereupon the noon recess was taken. Thereafter the following colloquy was had:]

"Mr. Bledsoe: He says in the deposition that he does not drink. [There is no evidence to this effect in the record.] I would then have to ask him some questions, to lay a foundation for impeachment, which would be as to the number of times he has been arrested for drunk driving, disorderly conduct, and the fact that he does drink and has been seen nightly in different bars in an intoxicated condition. I want to ask the questions before the jury if they are proper. * * *

"The Court: You can make your offer of proof now and we will defer ruling on it until tomorrow. * * *

"Mr. Bledsoe [made and there was discussion as to offers of proof concerning matters other than intoxication.] * * *

"The Court: What about this offer to prove the use of intoxicants, Mr. Hervey?

"Mr. Hervey: I certainly object to that * * * I would prefer that your Honor did not indicate in the record that your Honor would sustain an objection to something unless it has been stated definitely what it is going to be...If counsel will definitely state what he would ask the witness then I would like to state any objections I might have and your Honor may then rule on it if your Honor sees fit, but I don't think counsel ought to simply expect your Honor to rule on a proposition like this when counsel makes a statement that he would attempt * * * to prove that he drinks. * * * Counsel might ask this question of the witness: Had you been drinking that day or had your wife been drinking that day...but if counsel means by his offer that he would seek to prove this man's habit of using intoxicating liquors at other and unrelated times and occasions, * * * I would object on the ground that it is incompetent, irrelevant and immaterial and upon the ground that it was an at-

tempt to impeach the witness upon an immaterial matter.

"Mr. Bledsoe: The purpose in making the offer was to show...that prior to the date of the accident that plaintiff, Harris Stickel, and Essie Stickel, deceased, were addicted to the use of intoxicating liquors in excess and had been for some period of time prior thereto, for a period of years, and that the witness, when he states as he did in his deposition that he does not drink, is not telling the truth; that the use of intoxicating liquors to the extent the witnesses [unidentified] would state would, of course, be material as to the habits. * * *

"The Court: Then you wish to develop a continuous course of excessive use of intoxicating liquor? That is what your final objective is?

"Mr. Bledsoe: That is it. * * *

"The Court: * * * You didn't ask him [plaintiff] the impeaching question which might lay the foundation.

"Mr. Bledsoe: I haven't asked anything.

"The Court: Let us hear exactly what you want to ask.

"Mr. Bledsoe: I want to ask him, first, does he drink at any time. If he indicated in the deposition 'I don't drink very much, I take a beer occasionally' I am assuming that that is what he is going to testify to here. Then I would like to ask him a question to lay the foundation to impeach him, to call bartenders, and so forth, to say that what he testified to on the stand is not true. This is prior to the date of the accident, days before and months before. I also wish to show that on occasions in courts, he has been arrested twice for drunk driving, once for drunkenness, and once for drunk and disorderly conduct within—since the year 1934—here in this city. * * *

"Mr. Hervey: Well, we will object to any evidence of his being arrested for misdemeanors, and we would also object to any * * * attempt to impeach him on an immaterial matter, whether he on other unrelated occasions drank, whether to excess or otherwise.

"Mr. Bledsoe: I might say that we would also offer evidence that he pled [sic] guilty to those charges which were filed.

"The Court: * * * I am not convinced that the offer of proof * * * is proper * * * We will reserve that matter for argument."

dence whereby the fact in issue is to be proved, or, if the witness be present, without putting a question to him in such form as to give opportunity for objection, is not correct trial procedure and it affords no ground for appeal. [Citations.]” (Doulillard v. Woodd (1942), 20 Cal.2d 665, 670, 128 P.2d 6.)

[7] Defendants complain that “The court refused to permit the witness Stickel to be impeached in regard to his identity and to the date and fact of his marriage to deceased.” But defendants do not claim that plaintiff is not the man who sustained the injury in question and their answer admits that at the time of the accident deceased was the wife of plaintiff. It is apparent from colloquies of defendants’ counsel with the trial court and from their briefs that their asserted desire to inquire into plaintiff’s identity and the fact of his marriage was actually a desire to discredit plaintiff in an improper manner. Their real complaint is that they were not permitted to show that Stickel had used other names and had been arrested on various charges and convicted of misdemeanors under such other names. Such evidence was not admissible. (People v. Arlington (1899), 123 Cal. 356, 357, 55 P. 1003; People v. Mohr (1910), 157 Cal. 732, 734, 109 P. 476; People v. Fleming (1913), 166 Cal. 357, 380, 136 P. 291, Ann.Cas.1915B, 881; People v. Williams (1925), 72 Cal. App. 52, 55, 236 P. 355; People v. Adams (1926), 76 Cal.App. 178, 184-185, 244 P. 106.)

[8] On cross-examination of a police officer who had testified to the above mentioned admission of Amos that he did not see the pickup truck, defendants sought to show that at the scene of the accident the officer made in his notebook the notation, “Cause of accident: Auto ran through stop sign.” The trial court properly sustained an objection to such evidence on the ground that the notation was but an opinion of the officer arrived at after he had interviewed unidentified persons at the scene of the accident. Defendants now assert that the notation was a record of a statement made by Amos and was, therefore, admissible to impeach the officer.

The record does not support this assertion; on the contrary defendants’ counsel stated to the trial court that by evidence of such notation “I want to show at the time, *before Mr. Amos said anything*, that he [the officer] put down the cause of the accident.” (Italics added.)

Defendants assert that they were improperly curtailed in their examination of their witness Lindamood. The record reveals that after objections to several leading questions had been sustained and several answers of the witness which were not responsive or not statements of fact had been stricken, defendants abandoned the line of inquiry which they now claim was foreclosed by the court. Defendants ceased their attempts to elicit the testimony even though plaintiff’s counsel stated that he had no objection thereto.

[9,10] Defendants complain both because a written statement of Lindamood, made three days before the trial, was not received in evidence when offered by defendants for the purpose (not stated to the trial court) of rehabilitating Lindamood after his cross-examination and because such statement was subsequently received when it was offered by plaintiff “for impeachment.” The statement has no impeaching effect (see Froeming v. Stockton Electric R. R. Co. (1915) 171 Cal. 401, 408-411, 153 P. 712, Ann.Cas.1918B, 408). But defendants have no ground to complain of its admission since their counsel said, when it was offered by plaintiff, that he had no objection to its receipt. And defendants have no ground to complain of the original refusal to admit the statement, because its rehabilitory effect, if any, was the same whatever the stated purpose for which it was offered in evidence by plaintiff.

Defendants assert that the trial court, over objection, permitted plaintiff’s counsel deliberately to misread a question and answer from a deposition of defendant Amos during his cross-examination of Amos and refused to permit Amos to explain “discrepancies” between such answer in the deposition and his testimony at the trial. The record shows that plaintiff’s counsel correctly read the question and answer, that there were no “discrepancies” between the

answer as read and Amos' testimony, and that explanation of the answer was made on Amos' redirect examination.

[11] Defendants contend that the italicized portions of the following instruction are erroneous: "A person who, himself, is exercising ordinary care, has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that presumption. Thus, it is not negligence for such person to fail to anticipate injury which can come to him only from a violation of law or duty by another. *However, an exception should be noted: The rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty. One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.*" (Cal.Jury Instructions, Civil [B.A.J.I., 1943 ed.], Instruction 138. Italics defendants'.) According to defendants, the italicized portions of the instruction might be misunderstood to impose a duty to anticipate negligence on the part of others. The so-called "exception" does not impose such a duty. It is but a statement as to that common type of negligence, the unreasonable failure to observe what is going on about one, including the negligence of others. "One may not continue to assume that the law is being observed after knowing or having an opportunity, by the use of reasonable care, to know that it is not being observed." (Edlund v. Los Angeles Ry. Co. (1936), 14 Cal.App.2d 673, 675, 58 P.2d 928.)

[12] Defendants further complain of an instruction that "It is the duty of the driver or operator of any kind of vehicle using a public highway to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision." (Cal.Jury Instructions, Civil [B.A.J.I., 1943 ed.], Instruction 138-A.) They argue that the instruction might be misunderstood to impose the absolute duty "to avoid a collision"; that the jury might believe that the qualifying words, "to exercise ordinary care," relate only to the

duty "to avoid placing himself or others in danger" and not to the duty "to avoid a collision." The instruction is subject to such possible construction and, therefore, to criticism. (See Anderson v. Freis (1943), 61 Cal.App.2d 159, 164-165, 142 P.2d 330.) However, the jury did not so understand it for by their verdict for plaintiff (who, they were instructed, could not recover if they found that Mrs. Stickel was negligent and that such negligence contributed to cause the collision) they impliedly found that, although Mrs. Stickel did not "avoid a collision," she was not guilty of negligence proximately contributing to cause such collision.

[13] The court refused an instruction, proposed by defendants, to the effect that if Mrs. Stickel was intoxicated and such intoxication was a proximate cause of the accident, and plaintiff knew or should have known of such intoxication, then his riding with her constituted negligence, and he cannot recover. Defendants complain that the refusal of this instruction deprived them of consideration of their pleaded affirmative defense that plaintiff was himself contributively negligent. But the refusal could not have prejudiced defendants. Plaintiff could not have been found contributively negligent in riding with a driver who, as the jury impliedly found (since, having been instructed that negligence of Mrs. Stickel was imputed to plaintiff, they found for plaintiff), was not herself legally responsible for causing such collision.

[14] Defendants complain because the trial court refused to give the following instruction requested by them: "It is immaterial which vehicle enters the intersection first. The vehicle entering or crossing a through highway has no preference or is given no right of way over a vehicle traveling on a through highway merely because the vehicle crossing or entering the through highway might have entered the intersection first." The first sentence of the proposed instruction, standing alone, is manifestly erroneous. The relative positions of the vehicles before they collided are of course material where the negligence of the respective drivers is in issue. The jury were correctly in-

structed as to the respective rights and duties of drivers traveling on and across a through highway; it was not suggested that one crossing such a highway might have the right of way "merely because * * * [he] might have entered the intersection first"; and the trial court correctly refused to distract the jury by giving the unnecessary instruction.

[15] The trial court refused the following instruction proposed by defendants: "The lawful speed limit for a bus or vehicle traveling south on 12th Street at the place where it intersects with 'K' Street is and was at the time of the accident 25 miles per hour, unless, it has been clearly proven that such speed of 25 miles per hour was greater than was reasonable or prudent for a person operating a vehicle on 12th Street in a southerly direction at the time and place of the accident, having due regard for the traffic on, and the surface and width of the highway, and the fact that 12th Street at the time and place of the accident was an arterial, or through highway, but in no event at a speed which endangers the safety of persons or property." This instruction is an incomplete, misleading, and grammatically peculiar attempt to state the codified speed laws which applied to the bus. (Vehicle Code, § 510 [basic speed law], § 511 [prima facie speed limits], § 513 [proof of speed in excess of prima facie limit does not establish negligence as a matter of law].) Defendants argue that they were prejudiced because the jury were not told of the speed limit of 25 miles an hour. But 25 miles an hour was the "prima facie," not, as stated in the proposed instruction, the "lawful" speed limit. Nor does it appear that the jury would have been aided in their deliberation or probably would have reached a different result if the trial court had corrected the instruction and informed them of the "prima facie" speed limit, for whether defendant Amos was or was not exceeding such limit would not, under the circumstances shown, answer the question whether he was negligent.

Defendants urge that the trial court erred in refusing the following requested instruction: "Section 501 of the Vehicle

Code * * * read, in part, as follows: 'Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person, is guilty of a felony.'

"Section 502 of the Vehicle Code * * * read, in part, as follows: 'It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway.'

"If you should find from the evidence that the decedent, Essie Stickel, conducted herself in violation of Section 501 or 502 of the Vehicle Code * * *, you are instructed that such conduct constituted negligence as a matter of law, and if you further find that such violation of law by Essie Stickel contributed in some degree as a proximate cause of the accident, the plaintiffs cannot recover and your verdict must be for the defendants."

[16,17] The refusal to instruct as to the criminal responsibility of an intoxicated driver was correct. (See *Greening v. Ford* (1932), 127 Cal.App. 462, 16 P.2d 143, where, after injection into a civil action of the question of criminal responsibility, the jury brought in a verdict of "for the defendant Not Guilty"; on this ground a new trial was granted.) An instruction specifically directed to drunken driving as negligence could have been given but, in the circumstances, the failure of the court to modify and give defendants' proposed instruction does not appear to have prejudiced them. The jury were adequately instructed in general terms as to negligence, contributory negligence and proximate cause. To assume that they did not consider the question of Mrs. Stickel's asserted intoxication under these general instructions would be to attribute to the jury a lack of ordinary intelligence or deliberate violation of duty.

Defendants are mistaken in their assertion that other instructions requested by them are not fully covered by the instructions given.

Defendants assert that the manner in which plaintiff's counsel cross-examined

certain of defendants' witnesses amounted to prejudicial misconduct. Such cross-examination was searching and even rigorous but we cannot agree that it was conducted in a manner which prejudiced defendants' substantial rights.

[18] On motion for new trial defendants presented three affidavits which, they claim, show misconduct on the part of two jurors; i. e., that such jurors made certain personal investigations which influenced the verdict. Two of the affidavits, by an employe of defendant company whose capacity is not averred, are upon information and belief. The third, by a bus operator of defendant company, concerns the conduct of "a gray-haired woman of about fifty years of age wearing a gray suit and hat [who] informed affiant that she was a juror then hearing a 'death case'"; it is not shown that this woman was a juror in the present case. Therefore, the affidavits were insufficient for the purpose for which they were offered. (*People v. Findley* (1901), 132 Cal. 301, 308, 64 P. 472; *Gay v. Torrance* (1904), 145 Cal. 144, 152, 78 P. 540; *Kimic v. San Jose-Los Gatos, etc., Ry. Co.* (1909), 156 Cal. 379, 396, 104 P. 986.)

[19] Defendants' contention that the evidence shows an amount of damages less than that awarded for medical expenses, etc., cannot be considered since they stipulated "that defendants will present no question on said appeal concerning the amount or the excessiveness of the damages."

For the reasons above stated the judgment and order appealed from are affirmed. Defendants' purported appeal from the verdict is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent.

In my opinion the verdict is not supported by the evidence. The bus driver proceeding on a through highway had the right to assume that Mrs. Stickel would yield the right of way. (Vehicle Code, section 552; *Ambra v. Woolsey*, 55 Cal.App.2d

104, 106, 130 P.2d 152; *Zwerin v. Riverside Cement Co.*, 52 Cal.App.2d 715, 718, 719, 126 P.2d 920; *Gritsch v. Pickwick Stages System*, 131 Cal.App. 774, 780, 22 P.2d 554; *Inouye v. McCall*, 35 Cal.App. 2d 634, 638, 96 P.2d 386; *Silva v. Market Street Ry. Co.*, 50 Cal.App.2d 796, 800, 123 P.2d 904; see *Lindenbaum v. Barbour*, 213 Cal. 277, 285, 286, 2 P.2d 161.) I find nothing in the evidence from which an inference could be drawn that the bus was not so close to the intersection as to constitute an immediate hazard and therefore cannot agree that Mrs. Stickel could reasonably believe that there was not such a hazard.

Even if it is assumed that the jury could determine that the bus driver was negligent when he entered the intersection, Mrs. Stickel was guilty of contributory negligence as a matter of law, if she was under the influence of intoxicating liquor while driving the truck, and the trial court's refusal to give defendants' instruction to that effect was prejudicial error.

Defendants called several witnesses, who testified that Mr. and Mrs. Stickel were intoxicated on the evening of the collision, which occurred at about 10:40 p. m. Harry Walker testified that he was on duty as bartender at the Last Roundup Cafe at Encanto on that evening; that the Stickels entered the bar sometime between 9:00 and 10:00 p. m.; that they came directly to the bar and asked for a drink; that Mrs. Stickel "was hilarious and in a happy frame of mind and a little bit on the staggering side"; that he therefore refused to serve her liquor and instructed the waitresses not to serve her; that Mrs. Stickel said "she would get a drink anyway" and mingled with other customers; and that the Stickels left the bar twenty or thirty minutes after their arrival. Leon Cesmat testified that he was employed at the Last Roundup Cafe and that his duties included keeping order in the cafe; that on the night of the accident between 9:00 and 10:00 p. m. he saw Mrs. Stickel in the cafe talking to two sailors; that Mrs. Stickel was "pretty well intoxicated" and that he ordered her out upon instructions of the proprietress. Sandra Slayton testified that she was part owner and manager

of the Last Roundup Cafe; that on the night of the accident she saw the Stickels at the cafe shortly before 10:00 p. m.; that Mrs. Stickel was intoxicated; that Mr. Stickel's condition "wasn't so bad"; that Mrs. Stickel "was walking from table to table picking up drinks and drinking them"; that Mrs. Stickel did not leave the cafe when the witness asked her to and that she therefore asked the doorman to make her leave. George F. Evans testified that he went with an ambulance to the scene of the accident in line of duty as a police officer; that there was a slight odor of alcohol at the scene of the accident, and a more noticeable one in the ambulance; and that he smelled alcohol on Mrs. Stickel's breath. Harry Kemp, another police officer, testified that he drove the ambulance to the hospital while Evans sat in the back with the Stickels; that he helped carry them out of the ambulance and at that time smelled alcohol on both of them.

The trial court refused to give the following instruction requested by defendants: "Section 501 of the Vehicle Code of the State of California in force and effect at the time of the accident reads, in part, as follows: 'Any person who, while under the influence of intoxicating liquor drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person is guilty of a felony * * *.' Section 502 of the Vehicle Code of the State of California in force and effect at the time of the accident reads, in part, as follows: 'It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway.' If you should find from the evidence that the decedent, Essie Stickel, conducted herself in violation of Section 501 or 502 of the Vehicle Code of the State of California, just read to you, you are instructed that such conduct constituted

negligence as a matter of law, and if you further find that such violation of law by Essie Stickel contributed in some degree as a proximate cause to the accident, the plaintiffs cannot recover and your verdict must be for the defendants."¹

The majority opinion holds that the failure to give this instruction could not have prejudiced defendants, on the grounds that the jury were adequately instructed in general terms as to negligence, contributory negligence, and proximate cause, and that they impliedly found that Mrs. Stickel was not legally responsible for causing the collision. "To assume that they did not consider the question of Mrs. Stickel's asserted intoxication under these general instructions would be to attribute to the jury a lack of ordinary intelligence or deliberate violation of duty."

Although the jury may have considered the question of Mrs. Stickel's alleged intoxication, they were not instructed as to the legal effect of such intoxication on her responsibility for the accident. The general instructions left them free to formulate their own standard of conduct and to approve conduct that the Legislature has declared so hazardous as to call for criminal punishment. They were bound to conclude from these instructions that Mrs. Stickel's alleged intoxication was only one circumstance to be considered in determining whether her conduct contributed to the injuries complained of. In the absence of a statute like section 502 such instructions might have been adequate. (*Coakley v. Ajuria*, 209 Cal. 745, 752, 290 P. 33; *Emery v. Los Angeles Ry. Co.*, 61 Cal.App.2d 455, 461, 143 P.2d 112; see 4 *Sherman & Redfield on Negligence*, Rev. Ed. sec. 700.) Section 502, however, prohibits persons from engaging in the ultra-hazardous activity of driving a motor vehicle on a highway while under the influence of intoxicating liquor, thereby setting a statutory standard of conduct. If that standard is applicable, a violation

¹ Section 501 is violated by anyone who engages in negligent conduct in addition to driving a motor vehicle while under the influence of intoxicating liquor, but such driving is in itself a violation of section 502. Reference to section 501 was therefore superfluous, but it was not er-

roneous. If the jury had found that Mrs. Stickel violated section 502, they would necessarily have determined that plaintiffs could not recover, and it would be immaterial whether she also violated section 501.

thereof constitutes negligence as a matter of law. "An act or failure to act below the statutory standard is negligence per se, or negligence as a matter of law."² (Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 588, 177 P.2d 279, 283, and cases there cited.) In determining whether the statutory standard is applicable, the court must determine whether the persons injured were within a class that the statute was designed to protect, and whether the injury arose from a hazard of the kind the statute was designed to guard against. (De Haen v. Rockwood Sprinkler Co., 258 N.Y. 350, 179 N.E. 764; Restatement, Torts, sec. 286; Prosser, Torts, 269.)

Mr. and Mrs. Stickel as users of the highway were clearly within the class of persons for whose protection section 502 of the Vehicle Code was enacted. It is likewise clear that their injuries arose from a type of hazard against which the statute is directed. In Johnston v. Brewer, 40 Cal.App.2d 583, 587, 105 P.2d 365, 368, it was held that the jury was correctly instructed that a pedestrian, who was struck by an automobile, "was guilty of negligence as a matter of law" in being on a street or highway while intoxicated in violation of a municipal ordinance. "It is common knowledge that one whose senses have been dulled by intoxicants is unable to control his bodily movements in a normal manner and as a result the presence of such person upon the public streets and highways is dangerous not only to themselves but to others who are lawfully using the streets and highways. It is evident that the ordinance was enacted in the interests of the general welfare for the dual purpose of protecting intoxicated persons from the results of their own folly and of protecting the general public from the dangers and other evils attendant upon the presence of such persons upon the streets and highways * * *." Certainly the statute involved in this case has the same purpose, for the dangers attendant

upon the presence of an intoxicated person on a highway, particularly at an intersection, are multiplied if he is operating a motor vehicle. (Packard v. O'Neil, 45 Idaho 427, 262 P. 881, 56 A.L.R. 317; Wise v. Schneider, 205 Ala. 537, 88 So. 662; Lincoln Taxicab Co. v. Smith, 88 Misc. 9, 150 N.Y.S. 86.)

Section 502, however, does not deprive an intoxicated driver of all protection against the wrongful act of another. If the disabilities of the driver arising from intoxication, such as impairment of his perception and his reactions to the dangers of the road, did not expose him to a foreseeable risk of injury through such a wrongful act, section 502 does not govern his civil responsibilities. Certainly in the present case, if Mrs. Stickel was intoxicated, the consequent impairment of her driving ability exposed her to a foreseeable risk of injury through the negligence of defendants' bus driver. It cannot reasonably be said that the possibility that other vehicles approaching on the through highway would negligently enter the intersection was so remote that it could not be regarded as part of the risk. Anyone operating a motor vehicle on a highway must realize that he cannot drive blindly into an intersection in the confidence that other vehicles will yield the right of way. (Donat v. Dillon, 192 Cal. 426, 429, 221 P. 193; see Prosser, Torts, 245 and cases there cited.) Clearly, if Mrs. Stickel was intoxicated, her belief as to the chances she could take cannot serve to justify her conduct. Whatever the extent of the right of a driver of a motor vehicle to assume that others will use due care, an intoxicated driver, who has impaired his ability to appreciate the dangers of the road, particularly of an intersection, is engaged in an ultra-hazardous activity that necessarily involves a risk of serious harm to himself as well as to others. A motor vehicle operated by an intoxicated person is an instrument of death and destruction, and it is a matter

²The holding in the majority opinion in that case that the jury can determine from the evidence whether deviation from a statutory standard is excused by the extraordinary circumstances of a par-

ticular case is not involved in the present case. There is no evidence of any justification for Mrs. Stickel's driving the automobile while under the influence of intoxicating liquor.

of chance when or whether an accident will occur and to whom, and how serious it will be. Even if momentarily the operator's reactions are those of a sober person, he is likely to revert to the erratic reactions of those who are not. His momentary seizure of sober behaviour may in itself be erratic and is certainly dangerous in lulling others into believing that he has full possession of his senses. Conduct involving undue risk of harm to one's self as well as to others, including conduct prohibited by statute, constitutes contributory negligence. (*Meincke v. Oakland Garage Inc.*, 11 Cal.2d 255, 256, 79 P.2d 91; *Koeppel v. Daluiso*, 118 Cal.App. 442, 446, 5 P.2d 457; see Restatement, Torts, sections 469, 475.)

It is contended, however, that the judgment must be affirmed on the ground that the jury has impliedly found that Mrs. Stickel was not legally responsible for causing the collision, in other words, that her conduct was not a "proximate" cause thereof. This contention may mean (1) that Mrs. Stickel's conduct was not in fact a cause of the collision, or (2) that the harm therefrom does not fall within the limits of her legal responsibility for the consequences of her conduct. That her driving the truck into the intersection was a substantial factor in bringing about the collision and therefore in fact contributed to the accident there can be no doubt. (See Restatement, Torts, sec. 431.) With that determined, the question of causation is settled. It remains only to determine whether the injury falls within the limits of her responsibility for the consequences of her conduct. (See *Prosser, Torts*, pp. 311-313.) In my opinion, that determination is made once it is established that her conduct was wrongful with respect to her own safety and that of others on the highway; for the risk reasonably to be foreseen not only creates the responsibility but defines its limits. (See concurring opinion in *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 220, 157 P.2d 372, 158 A.L.R. 872 and authorities there cited.) A decision, therefore, that Mrs. Stickel was not legally responsible for causing the collision or that her conduct was not the proximate cause thereof means only that she

was not negligent. If she was driving while intoxicated, she was guilty of negligence as a matter of law, and the jury should have been so instructed.

Rehearing denied; TRAYNOR, J., dissenting.



32 Cal.2d 176

KIRCHER v. ATCHISON, T. & S. F. RY. CO.
L. A. 20357.

Supreme Court of California, in Bank.
July 1, 1948.

As Modified on Denial of Rehearing
July 29, 1948.

1. Evidence ⇨265(10)

In action against railroad for loss of hand of aviation cadet by falling under defendant's train at station, fact that plaintiff might have stated in written statement prepared by defendant's claim adjuster based on questions propounded two weeks after accident that he thought he had stumbled over a rock would not necessarily be binding on jury in light of other circumstances shown by record.

2. Trial ⇨140(1), 143

Conflicts in the evidence and question of credibility of witnesses were for determination of jury.

3. Appeal and error ⇨994(2), 1003

Although appellate court will not uphold a verdict or judgment based upon evidence inherently improbable, determination of questions of fact and of credibility of witnesses are so largely a matter for trial court that unless appellate court can say that plaintiff's version of accident was wholly unacceptable to reasonable minds, appellate court cannot set aside jury's implied acceptance of it.

4. Appeal and error ⇨1003

In action against railroad for loss of plaintiff's hand under a train at station, plaintiff's testimony that he came to station

to meet friends, that he started to jog on station platform toward rear of train looking through windows, that his left foot went into a hole in pavement and that he stumbled and hit his head against a blunt object being rendered unconscious, and that he was unable to explain with certainty the manner in which his left hand came to be placed on rail at a distance of 13 feet from where he allegedly stumbled would not be held as a matter of law such as to contravene laws of nature so as to render jury's acceptance of it, unreasonable.

5. Railroads ⇨282(8)

In action for loss of plaintiff's hand under defendant's train at station, plaintiff's testimony that he was hurrying along platform and looking in windows of coaches of train in effort to find friends when he stumbled in hole and fell unconscious did not establish as matter of law that plaintiff was guilty of contributory negligence.

6. Railroads ⇨274(2)

Members of public who go to railway depot for purpose of meeting persons arriving or departing on trains are "business visitors".

See Words and Phrases, Permanent Edition, for all other definitions of "Business Visitor".

7. Railroads ⇨274(2)

In determining railroad's liability for loss of plaintiff's hand under a train at station, plaintiff who was at station for purpose of meeting friends whom he was expecting to arrive on train was an "invitee", notwithstanding that friends did not arrive as expected.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

8. Damages ⇨166(1), 185(1)

In determination of amount of damages in personal injury action, jury was entitled to take into consideration plaintiff's youth, background and all other relevant circumstances, including fact that his admission into branch of military service into which he had been inducted indicated an excellent physical condition preceding the accident.

9. Appeal and error ⇨1004(1)

Allowance of damages in personal injury action is primarily a factual matter, and a reviewing court will not interfere with an award, although it may seem large, unless allowance is so grossly disproportionate to a sum reasonably warranted by facts as to shock sense of justice and raise presumption that it was result of passion and prejudice.

10. Evidence ⇨18

It is common knowledge, and of which judicial knowledge may be taken, that purchasing power of dollar has decreased to approximately one half what it was prior to present inflationary spiral.

11. Damages ⇨127

In determining amount of damages necessary to compensate an injured person for loss sustained as result of injuries suffered, trier of fact should take into consideration fact that purchasing power of dollar has decreased to approximately one half of what it was prior to present inflationary spiral.

12. Damages ⇨132(12)

\$60,000 for loss of hand to 23 year old aviation cadet, who had studied to become a physical education instructor, was not excessive.

13. New trial ⇨99

The granting or denial of a new trial on ground of newly discovered evidence is a matter on which trial court has a wide discretion.

14. New trial ⇨105

A motion for new trial on ground of newly discovered evidence is properly denied if it is shown that newly discovered evidence was to be merely used for impeachment or if it is merely cumulative.

15. Appeal and error ⇨981

Unless there is a clear showing of abuse of discretion, trial court's denial of motion for new trial on ground of newly discovered evidence will not be interfered with on appeal, particularly where counter affidavits are filed.

16. New trial ⇨108(2)

In action against railroad for loss of hand of aviation cadet by falling under de-

defendant's train, denial of defendant's motion for new trial on ground that newly discovered evidence consisting of hospital records, plaintiff's military record, and an affidavit of plaintiff setting forth facts relating to injury was not an abuse of discretion.

SHENK and TRAYNOR, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by Kenneth E. Kircher against the Atchison, Topeka & Santa Fe Railway Company to recover for loss of plaintiff's left hand under defendant's train at its station. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 183 P.2d 105.

Robert W. Walker, William F. Brooks and Wallace L. Ware, all of Los Angeles, for appellant.

Max Fink, Jerry Rolston, Cyrus Levinthal and Leon E. Kent, all of Los Angeles, for respondent.

CARTER, Justice.

Defendant railway company appeals from a judgment in favor of plaintiff in the sum of \$60,000 for damages for physical injuries sustained by plaintiff at defendant's railway station in Santa Ana, California.

The accident occurred in the early morning of November 14, 1943, when plaintiff's left hand was run over and practically severed by defendant's train No. 70.

Defendant's depot consisted of a row of buildings, including an inside and outside waiting room, which ran in a northerly and southerly direction. East of the row of buildings and parallel thereto were five of defendant's railroad tracks lying about fifteen feet apart. The ground immediately east of the depot was paved with asphalt, and two of the tracks referred to ran through this pavement, flush with the surface. Three or four feet beyond the easterly rail of these tracks the asphalt ended and was adjoined by a brick pavement

nine feet wide (which was referred to by the witnesses as a "platform" or "walk"). Two feet east of the brick pavement was the westerly rail of the main line track, on which train No. 70 travelled. There was no pavement east of the main line track, and the other tracks paralleling it farther east projected above the ties about seven inches. Passengers were not permitted to enter or leave trains on the east side of the main line track, the brick pavement on the westerly side being used for that purpose. A few feet farther east of the five tracks just described there was a small private park maintained by the defendant railway company.

On the day prior to the accident plaintiff, a young aviation cadet, stationed at an air base near Santa Ana, went to Los Angeles with his fellow-cadet, Harper. While there they encountered another cadet from the same air base, and the three young men shopped about the city and dined together that night. They separated about 9:00 o'clock, and plaintiff returned to Santa Ana on the Pacific Electric Railway, arriving there about 12:15 a. m., on November 14th. He went to the defendant's depot a few blocks away to await the return of the other two cadets, whom he believed might return that night on defendant's train No. 70, which was due to arrive about 2:00 a. m. It was plaintiff's intention to share a taxi-cab with these friends in returning to the air base a few miles away.

After arriving at the depot plaintiff left a handbag and parcel with the attendant at the check room. He then walked about the station premises, passing over to the private park across a sidewalk at an intersection several feet to the north, thereafter recrossing to the depot where he was standing when train No. 70 came in. The train arrived from the north and was comprised of about eleven coaches. According to plaintiff, when it stopped he and several other persons walked easterly across the brick pavement toward the head coach, from which persons alighted at Santa Ana. Failing to find his friends in that car he proceeded to look for them in the remaining coaches. To do this he "jogged" or "trotted" northerly along the west side of the train, looking in the coach windows as

he proceeded. He testified that while so doing his left foot went into a hole or depression in the pavement (described as being two or three feet wide and several inches deep). This caused him to stumble forward and hit his head against something blunt, which he believed was the side of one of the coaches. The blow rendered him unconscious, or substantially so, and he testified that he must have then rolled under the coach, where he remained until the train pulled out (which was about ten minutes later). As it was leaving, one of the train crew in the rear of the last coach heard calls for help, and looking out he saw plaintiff in the middle of the main line tracks signalling for assistance. Plaintiff's hand was found to have been practically severed, and it was amputated shortly thereafter.

Three of defendant's employees and a policeman testified that after the accident they found blood and particles of flesh on the easterly rail of the main line track. One of the employees and the policeman testified to having found a long fresh "scuff" mark about an inch deep, beginning near the place on the rail where the blood was found.

There were no eyewitnesses to the accident, and there are conflicts in the evidence and inferences arising therefrom as to the manner in which plaintiff may have sustained his injuries.

As grounds of appeal defendant urges (a) insufficiency of the evidence to support the judgment; (b) contributory negligence on the part of plaintiff; (c) plaintiff was a mere licensee, and the evidence did not show active negligence of the defendant, nor did it show that defendant was negligent in the maintenance of its premises; (d) a new trial should have been granted on the ground of newly discovered evidence; and (e) the award of damages was excessive.

Under the first point urged defendant contends that the only reasonable explanation of the accident is that when plaintiff went to defendant's park he did not recross to the westerly side of the main line tracks but remained there until the train was about to pull out; that at that time he ran toward it, tripped over one of the rails projecting

from the ties, making the "scuff" mark by the toe of his shoe, thence falling near the easterly rail of the main line track so that his left hand came to rest on that rail where the particles of flesh and blood were found. Although this explanation of the accident as offered by the defendant would not be outside the realm of reason, it was not the version given by plaintiff nor the one adopted by the jury, which was the sole judge of the facts. In rejecting this theory the jury had before it positive statements by plaintiff that he merely walked through the park, remained in it a short time, thereafter recrossing to the west side of the brick platform, and that he "recalled distinctly" that he fell on the station platform "between the train and the station."

In furtherance of the claim that the evidence was insufficient to support the verdict, defendant points out that after the accident and prior to trial plaintiff made the statement that he had stumbled against a rock, and it is urged that there was no showing that a hole such as plaintiff described at the trial was in existence at the time of the accident. It is also urged that plaintiff's version of the accident is contrary to the physical facts in that the distance between the hole referred to and a coach standing on the main line track would have been thirteen feet—a distance too far for plaintiff to have stumbled in the manner described; and that since the particles of flesh and blood on the east rail of the main line track indicated that the accident had occurred at that point, which apparently was some feet north of the hole on the west side of the track, it would have been physically impossible for plaintiff to have fallen on the west side of the train so that his *left* wrist rested on the *east* rail. Finally, defendant urges, equipment attached beneath the coaches would have rendered it impossible for plaintiff's body to have remained under the train without having been crushed by its movement.

[1] The fact that previous to the trial plaintiff may have stated that he thought he had stumbled over a rock would not necessarily be binding on the jury in the light of other circumstances shown by the record. In a written statement prepared by defendant's claim adjuster based on ques-

tions propounded two weeks after the accident, and while he was still in the hospital, plaintiff made such an assertion, but the entire document shows that he was not making it as a positive statement. So far as pertinent here the document reads: "The platform was not very well lighted and I had passed several cars when my foot caught against a rock or some other object, causing me to lose my balance and fall. I had been around over most of the station platform while waiting for train and I did not at that time notice any rocks or other objects on it to cause a person to stumble or fall, and *I do not know what it was that I stumbled over.*" Plaintiff's assertion that his foot "caught against a rock or some other object" must be read in the light of the statement that he had not noticed any rocks or other objects and he did not know what he had stumbled over. Moreover, the record shows that throughout the trial and on appeal plaintiff contended that he stepped into a hole with his left foot and that this was what caused him to stumble. His evidence included photographs taken some four weeks after the accident, which showed a large hole about two feet square in the asphalt pavement immediately west of the brick walk and about thirteen feet west of a coach standing on the main line track. This is the hole plaintiff claims he stepped into. The photographs also showed several smaller holes in the paved portion of the depot grounds east of the station ranging from two to four inches deep, and places where the pavement had been patched. The pictures were taken by a photographer who resided in Santa Ana and who testified he had frequently been at defendant's depot, was familiar with its surroundings and that the photographs correctly reflected the general condition of the railroad station grounds during November, 1943.

Evidence given by plaintiff in substantiation of his theory of the happening of the accident includes the following: In response to a query as to how close he was to the train while trotting along, plaintiff (who was five feet four and one-half inches tall) replied, "Well, I was far enough away from the train so I could look in the windows, being short as I am, I couldn't look

in the windows if I were close * * * I recall that * * * as one of my feet hit the ground, I felt it going down and it was a hole that caused me to fall.

"Q. A hole? A. A hole or depression—a hole." He further stated, "A. After I fell, I pitched forward and in trying to regain my footing, I stumbled—I don't know how far a distance, and in trying to right myself, I had forward speed there—and hit my head on some object and that is the last I know until I was picked up.

"Q. So, that after stepping into this hole and being on the run, your momentum was such that it threw you forward and was that the way you fell? A. Well—yes, I fell in a pitched position, you might say. I struck something in a pitched position, would be more correct.

"Q. Head first? A. That is right * * * I don't recall exactly what I did after I hit my head." Plaintiff was then asked whether he saw the hole, and replied, "No, sir, or else I wouldn't have stepped into it. * * * I mean I wouldn't have purposely done that.

"Q. Now, this hole I take it, was in the [brick] platform was it? A. I don't think it was in the platform itself,—not what you would call the platform, it was a little off of the platform, you might say * * * I don't know how wide those platforms are, but I had to step back in order to see in those windows and in doing so, probably overran the platform edge. * * *

"Q. Do you believe that you got over on the asphalt paving portion off the brick platform? A. Yes, sir, I must have."

Plaintiff's attention was called to the fact that while he claimed he fell under the train on the west side of the main line track the evidence indicated that his left hand was run over on the easterly rail of that track. He was then asked: "Do you have any way of accounting for that? A. None other than as I said, that I was in my subconscious state of mind and trying to get out from under the train knowing that there was some danger there, I crawled in the opposite direction.

"Q. Well, by that, do you mean that you might have crawled after having fallen

under the train to the opposite side of the train? A. That is right, yes, sir.

"Q. You are sure you weren't on that track when the train pulled in? A. Oh no, sir, I was on the station—right there—I wasn't on the track. * * *

"Q. After you had struck your head against the object that rendered you unconscious did you have a sensation or realization that the train was later traveling out or over you? A. No, sir; I just recall trying to avoid a danger that I knew the train presented.

"Q. I see. That is, while you were in that subconscious, or semi-conscious state, you had a sensation of being in danger and trying to crawl from under the train, is that right. A. That is right, yes, sir. * * *

"Q. You had a sensation of crawling under the train trying to reach safety, is that right? A. Yes sir * * *

There was nothing to show that the "scuff" mark described by the two witnesses was made by plaintiff. Moreover, these witnesses gave varying descriptions of the mark. One of them testified that it ran in an easterly direction and was "approximately 16 to 18 inches long * * * perhaps an inch or an inch and a half wide." Asked to state the location of the mark with reference to the blood stains on the rail he replied, "It would be approximately due east of the blood stains * * *

"Q. For what distance from the rail? A. I don't recall exactly, I would say it was a matter of two or three feet." The other witness, defendant's employee, stated that the mark was only a few inches east of the rail and that it ran *southward*, for approximately three feet. He was asked, "Could you tell from the mark itself whether it started from an easterly direction. A. Well, it appeared to start from a northerly direction.

"Q. And its course was—? A. South * * * as far as I remember, almost parallel with the track."

There were other conflicts in the evidence in addition to those heretofore referred to. One of these related to the question whether the window shades of

train No. 70 were drawn during the time the train remained in the station on the morning of November 14. Defendant adduced evidence to show that at the time in question it was subject to certain orders made by military authorities which necessitated the lowering of window shades in coaches of trains during the nighttime, and that these rulings were obeyed. Other evidence indicated that some of defendant's train crews had not been diligent in enforcing these orders, and plaintiff repeatedly testified that on the morning of the accident the shades were up in the coaches and he looked in the windows and saw people standing and walking in the aisles.

The evidence was also conflicting on the question whether the equipment attached under the coaches of train No. 70 would have crushed plaintiff's body had it been under the train when it was moving. The witnesses gave varying estimates of the size and depth of this equipment. No useful purpose would be here served by detailing these estimates, and it is sufficient to say that one of defendant's employees testified that (except for the air hose connection) there was sufficient space underneath the coaches for a box 18 inches high and 4 feet 7 inches long to lie between the rails. Another of defendant's employees testified that the lowest part of the air hose connection was approximately 14 inches above the ground. Plaintiff was of small stature and it was not shown that his body could not have rested in a prone position between the rails without having been crushed by the equipment while the train was in motion.

[2, 3] Under well-settled rules the several conflicts in the evidence were for the determination of the jury. This is likewise true as to the question of credibility of the witnesses (*Hicks v. Reis*, 21 Cal.2d 654, 658, 134 P.2d 788; *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868), including plaintiff. Although an appellate court will not uphold a verdict or judgment based upon evidence inherently improbable (*People v. Huston*, 21 Cal.2d 690, 696, 134 P.2d 758), the determination of questions of fact, and of the credibility of the witnesses is so largely a matter for the trial court that un-

less we can say that plaintiff's version of the accident was wholly unacceptable to reasonable minds, we cannot set aside the jury's implied acceptance of it. See, Neilson v. Houle, 200 Cal. 726, 729, 254 P. 891; Hughes v. Quackenbush, 1 Cal.App.2d 349, 354-356, 37 P.2d 99; Austin v. Newton, 46 Cal.App. 493, 498, 189 P. 471; People v. Meyers, 62 Cal.App.2d 24, 28, 144 P.2d 60.

[4] It is true, that as related by plaintiff, the manner in which the accident happened appears to have been most extraordinary. But as stated in Neilson v. Houle, supra [200 Cal. 726, 254 P. 892], "Common experience and observation teach us that strange and astonishing things sometimes happen in the world of physical phenomena, and accidents sometimes appear to happen in manner unaccountable." In the light of all the circumstances of the present case it cannot be held as a matter of law, that plaintiff's version was such as to contravene the laws of nature, or as to render the jury's acceptance of it unreasonable. Plaintiff was a young athlete, trained in the control of the body, and it does not appear entirely unreasonable to us that he stumbled a distance of thirteen feet while endeavoring to prevent his body from falling to the ground. Although he stated quite frankly that he was unable to explain with certainty the manner in which his left hand came to be placed on the east rail of the main line track, the jury had before it evidence indicating that on the night of the accident there was a hole in the depot platform such as plaintiff asserted he stepped into precipitating his fall, and the ultimate fact that defendant's train ran over his hand at the time and place in question. In these circumstances the jury was not compelled to find against him because he could not with certainty relate the exact manner in which his left hand came to be on the east rail. It could reasonably have inferred that his failure to explain this circumstance was due to the fact that in the critical few minutes he was under the train he was unconscious, or substantially so, from the blow on his head as the outcome of stepping into the hole. As stated in Neilson v. Houle, supra, quoting from Hughes v. Quackenbush, supra, "It is not to be sup-

posed that witnesses to an accident that happens in the twinkling of an eye should accurately observe all the details. Much less is it probable that one who is injured in the accident, and rendered unconscious, should be able to give a correct account of all the quickly happening events. It cannot be laid down as a rule of law that a plaintiff in a personal injury case cannot recover unless the court can see that *every detail* of the accident, as testified to by the plaintiff and his witnesses, is consistent with admitted physical facts and the laws of science. * * *"[Emphasis added.] In the light of the evidence here adduced the jury could reasonably have concluded that plaintiff's hand had been placed on the east rail as he was attempting to crawl to safety while in a dazed or semi-conscious condition, or that while he was unconscious and the train was in motion, some of the equipment had altered his position causing his left hand to rest on the east rail.

[5] As to the claim of contributory negligence, under the circumstances of this case the fact that plaintiff was hurrying along the platform and looking in the windows of the coaches would not necessarily show a violation of his duty to exercise ordinary care for his own safety. As before noted, he stated that while he was waiting for the train to come in he had been over most of the station platform and had not noticed anything that would cause a person to stumble or fall. He further stated that after the train arrived he saw no objects in his path as he trotted along the platform; and that the general impression he received from looking at the floor of the platform was that it was "smooth," and "appeared level." And although there was evidence to the contrary, he also stated that the station was dimly lighted. He was in a place maintained by the defendant for travellers and other members of the public who might come to the station to meet incoming trains and was therefore entitled to assume that the area in question was maintained by defendant in a reasonably safe condition. Under all the circumstances, the question whether he should be held to have had knowledge of any holes in the pavement, or other unsafe condition, dis-

coverable in the exercise of ordinary care, was a matter for the determination of the jury. *DeGraf v. Anglo California Nat. Bank*, 14 Cal.2d 87, 98, 92 P.2d 899; *Oles v. Kahn Bros.*, 81 Cal.App. 76, 81, 253 P. 158.

[6, 7] Defendant's contention that plaintiff was only a licensee on its premises and hence defendant was at most only liable for active negligence cannot be upheld. It is claimed that plaintiff was a mere licensee because he was not on defendant's premises pursuant to any business with the defendant, nor was he occupying the status of one going to a railroad station to meet friends, because he had no assurance that his friends would return that night. However, the record shows that the two cadets whom plaintiff had been with in Los Angeles had been promised a room that night in a private home in Los Angeles providing they telephoned the owner before a certain time, which they had failed to do. Due to the fact that in 1943, while the second world war was in progress, it was exceedingly difficult to secure hotel accommodations in the large coastal cities unless under prearrangement, the three young men had parted in Los Angeles with the tacit understanding that the other two cadets would return to Santa Ana that night. Although there are cases to the contrary, the weight of authority supports the rule that members of the public who go to a railway depot for the purpose of meeting persons arriving or departing on trains are business visitors, since it is a part of the business of a railway company to afford its passengers such conveniences. *McCann v. Anchor Line*, 2 Cir., 79 F.2d 338; *Louisville & N. R. Co. v. Richard*, 31 Ala.App. 197, 14 So.2d 561, 563; *Chesapeake & Ohio R. Co. v. Mathews*, 114 Va. 173, 76 S.E. 288; *Holdaway v. Lusk*, Mo.App., 194 S.W. 891; *Chicago etc. Ry. Co. v. Amedon*, 161 Ark. 310, 256 S.W. 52; see also: *Jackson v. Hines*, 137 Md. 621, 113 A. 129, 131; *Sims v. Warren*, 248 Ala. 391, 27 So.2d 803; *Rest. Torts*, Comment d, sec. 332; 10 Am.Jur. p. 80; 13 C.J.S., *Carriers*, page 1351, § 722; 92 A.L.R. 615. It follows from the foregoing that plaintiff was an invitee to whom defendant owed the duty of keeping its rail-

way premises in a reasonably safe condition.

[8, 9] As to the claim that the award of damages was excessive, the evidence shows the following: at the time this accident occurred plaintiff was twenty-three years old. Prior to his entry into the army he had attended Jefferson College and Missouri University, studying to become a physical education instructor. He had worked as a recreation leader in the parks of St. Louis during summer vacations, instructing in swimming and playing ball. He had hoped to remain in the army if he succeeded in obtaining a sufficiently high rank. There was evidence before the jury indicating that plaintiff's choice of occupation without a left hand would be greatly restricted. After his injury he worked a few weeks for an engineering firm, where he was required to do drawing, receiving \$45 a week. He found himself unable to do this work and later took a position as attendant at public tennis courts at \$35 a week. Permanent impairment of earning capacity was therefore a prime factor in the award of damages. The jury was also entitled to take into consideration plaintiff's youth, background, and all other relevant circumstances (*Roedder v. Lindsley*, 28 Cal.2d 820, 172 P.2d 353), including the fact that his admission into the branch of military service into which he had been inducted, indicated an excellent physical condition preceding the accident. An allowance of damages is primarily a factual matter (*Crane v. Smith*, 23 Cal.2d 288, 144 P.2d 356), and it is well settled that even though the award may seem large to a reviewing court, it will not interfere unless the allowance is so grossly disproportionate to a sum reasonably warranted by the facts as to shock the sense of justice and raise a presumption that it was the result of passion and prejudice. *Johnston v. Long*, 30 Cal. 2d 54, 76, 181 P.2d 645.

[10, 11] It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one half what it was prior to the present inflationary spiral (*Autry v. Republic Pro-*

ductions, Inc., 30 Cal.2d 144, 154, 180 P.2d 888; Nason v. Leth-Nissen, 82 Cal.App. 70, 75, 185 P.2d 880; Freeman v. Nickerson, 77 Cal.App.2d 40, 52, 174 P.2d 688; Estrada v. Orwitz, 75 Cal.App.2d 54, 60, 170 P.2d 43; Butler v. Allen, 73 Cal.App.2d 866, 870, 167 P.2d 488), and the trier of fact should take this factor into consideration in determining the amount of damages necessary to compensate an injured person for the loss sustained as the result of the injuries suffered.

[12] We find nothing in the present record warranting an interference with the allowance, in the light of the rules referred to.

[13-16] The granting or denial of a new trial on the ground of newly discovered evidence is a matter on which the trial court has a wide discretion. The alleged new evidence here sought to be shown consisted of hospital records, plaintiff's military record, and an affidavit by plaintiff setting forth the facts relating to the injury. The hospital records were sought to refute plaintiff's testimony that he suffered a blow on his head at the time of the accident. A counter affidavit of plaintiff's counsel states that this record "does not purport to be a complete medical and hospital record of the care, treatment and injuries sustained by plaintiff"; and that the documents "do not tend to prove or show that plaintiff failed to receive a head injury, and in truth and in fact, [they] clearly show that at the time of the accident, plaintiff was rendered unconscious by reason of the injury." This affidavit further recites that the records sought to be shown "are merely cumulative and entirely consistent with testimony given at the trial." A motion for new trial on the ground here claimed is properly denied if it is shown that the newly discovered evidence is to be used for impeachment purposes, or if it is merely cumulative. Unless there is a clear showing of an abuse of discretion the trial court's denial of the motion on the ground here urged will not be interefered with by an appellate court, particularly where counter-affidavits are filed. Ginn v. Podesta, 8 Cal.2d 233, 237, 64 P.2d 1090; Cooper v. Kellogg, 2 Cal.2d

504, 512, 42 P.2d 59; Waer v. Waer, 189 Cal. 178, 181, 182, 207 P. 891; Atherley v. Market St. Ry. Co., 42 Cal.App.2d 354, 363, 108 P.2d 927. We find no abuse of discretion in the trial court's ruling.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, SCHAUER and SPENCE, JJ. concur.

SHENK, Justice.

I dissent.

I am convinced that the plaintiff's version of how the accident happened is contrary to the laws of nature and inherently improbable. To be expected to believe that the plaintiff could have stumbled over a shallow depression thirteen feet from the westerly rail of the track and been pitched forward and under the train on that track so that his hand was crushed on the easterly rail and his body not injured while under the moving train, taxes credulity to the breaking point. On the other hand, there were reasonable inferences from sufficient credible evidence, some of it introduced by the plaintiff, that he proceeded from the park on the easterly side of the tracks as the train was moving in front of the station; that he tripped on a rail on the easterly side of the train where he had no right to be, and fell, whereupon his hand was caught on the easterly rail under the moving train. To my mind this was the only factual situation on which to base a conclusion and with no resulting liability on the defendant. It should lie uneasy on the conscience of a court to permit a jury's verdict to stand which must necessarily be based on the incredible theory of the facts advanced by the plaintiff.

Furthermore I cannot agree with the conclusion that the jury's verdict of \$60,000 is not so grossly disproportionate to a sum reasonably warranted by the facts as to shock the sense of justice. In my opinion the size of the verdict, notwithstanding a deflated purchasing power of the dollar, and the youth and marital status of the plaintiff, is so disproportionate to the loss of a hand as to raise a presumption that it was the result of passion and prejudice.

TRAYNOR, Justice (dissenting).

It is my opinion that although the accident as described by plaintiff is not outside the realm of possibility, his version, which is that of an interested and impeached witness, involves so extraordinary and improbable a sequence of events that without corroboration it does not warrant belief by a reasonable jury. I cannot agree, therefore, that a reasonable jury could find it more probable than not that plaintiff sustained his injury as a result of defendant's negligence.

Rehearing denied; SHENK and TRAYNOR, JJ., dissenting.



86 Cal.App.2d 833

ERIKSON v. SULLIVAN.

Civ. 3655.

District Court of Appeal, Fourth District,
California.

July 21, 1948.

Rehearing Denied Aug. 12, 1948.

Hearing Denied Sept. 13, 1948.

I. Appeal and error ⇐1071(1)

Where parties to mining lease and option intended it to cover a particular parcel of land located on the ground by concrete monuments and lessee had been in possession of such parcel for years, any error in description used in lease or in trial court's finding as to correct legal description of the parcel was not prejudicial to lessee.

2. Appeal and error ⇐672

On appeal on judgment roll, solely upon clerk's transcript and exhibits comprising official government maps and notes, record was insufficient to establish that lessee, who had taken and held possession of particular parcel of land which parties to mining lease and option intended it to cover, was entitled to possession of an entirely different tract under description in lease.

Action by Carl E. Erikson against J. F. Sullivan for a declaration of rights under mining lease and option, reimbursement for taxes paid and possession of land described in lease, wherein defendant filed a cross complaint. From portion of judgment determining location of property covered by lease and option, plaintiff appeals.

Judgment affirmed.

Arthur Vandersyde, of San Diego, for appellant.

George A. Malette, of San Diego, for respondent.

BARNARD, Presiding Justice.

The defendant owned what was known as the Golden Chariot mine which was located in February, 1871, in an unsurveyed mountain area in San Diego County. The location notice described it as extending 100 feet on each side of a line running 500 feet northerly and 700 feet southerly from the discovery hole.

In October, 1940, the defendant leased this mine to the plaintiff with an option to purchase. This lease described the premises as Mining Lot No. 39 in the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of a certain section 14, and known as the Golden Chariot mine. In 1945, this description was changed to read Mining Lot 39 in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, of this section, and known as the Golden Chariot mine.

Later, apparently in 1946, plaintiff brought this action to recover certain moneys advanced in connection with this lease and option. The defendant filed an answer and cross-complaint for declaratory relief and unlawful detainer, alleging that the plaintiff had failed to comply with the lease agreement, that notice of cancellation had been given, and praying for restitution and possession of the premises, with certain damages. The plaintiff answered the cross-complaint denying that he had been given possession of all of the premises described in the lease, alleging that he had complied with the lease insofar as was possible, claiming that he was entitled to possession of the Golden Chariot claim, otherwise known as Lot 39, and praying that the cross-complainant take nothing. The plain-

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

tiff also filed an amended complaint alleging that the defendant had failed to deliver to him possession of any portion of the true location of the premises described in the lease, that he had paid certain delinquent taxes on the property, and praying for a declaration of his rights under the lease and option, for the amount of taxes paid, and for possession of the land described in the lease or in the alternative for damages. In an amended answer to the defendant's cross-complaint the plaintiff prayed that it be adjudged that he was not in default on this lease and option and that the defendant has failed to give him possession of the Golden Chariot mine, known as Lot 39.

After a six-day trial the court found that the Golden Chariot mine was located prior to 1874; that in May, 1874, the United States Surveyor General for California surveyed certain mining claims in this area and then made a map which was then known as a Mineral Survey Map; that this map showed the Golden Chariot mine and Lot 39 as covering the same parcel and located said mine in what was later to be known as the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of this section 14; that on December 31, 1874, the United States Government issued a patent to said mining claim to the defendant's predecessor, describing the land substantially the same as that described in this mineral survey map; that in 1881, the United States Surveyor General made another survey in this locality and issued another map designating the Golden Chariot mine, also known as Lot 39, as being in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of this section; that extensive mining operations were conducted on this mine between 1874 and 1940; and that some time prior to 1940, the defendant acquired title and possession to the Golden Chariot mine and prior to 1940 erected six concrete monuments designating the boundaries of this mine as shown by said mineral survey map.

It was then found that in October, 1940, the parties hereto entered into this lease and option; that they then understood that the Golden Chariot mine, Lot 39 in said section, and the area bounded by the six concrete monuments all covered substantially the same parcel of land and that said

parcel was in the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section; that the lease erroneously described the claim as being in the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section; that later, the parties agreed to correct this description in the manner in which it now appears in the lease; that the plaintiff took possession of said mining claim as described in said mineral survey map and as outlined by the six concrete monuments, and still continues in such possession; that neither the plaintiff nor the defendant at the time of entering into this lease believed that the boundaries of said Golden Chariot mine or Lot 39 covered any area not included within the parcel outlined by the six cement monuments; that the plaintiff has paid certain delinquent taxes previously accrued, for which the defendant is indebted to him; that plaintiff has performed his agreements under the lease; and that the defendant's statement of alleged violations of the lease are untrue and he is not entitled to have the lease and option cancelled.

A judgment was entered which, as modified, awarded the plaintiff \$528.90 in reimbursement for taxes paid, and adjudging that the lease and option is in full force and effect and that by reason thereof the plaintiff is entitled to continue in possession of the Golden Chariot mine, also known as Lot 39, located in the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of this section and being a parcel 1,200 feet long and 200 feet wide, the boundaries of which are indicated by six concrete monuments.

The plaintiff appealed from that portion of this judgment which adjudicates that the property covered by this lease and option is located in the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of this section 14. He gave notice to the clerk to prepare a transcript of the judgment roll, together with a narrative statement to be thereafter settled. This narrative statement was never settled or filed. The defendant also filed notice of appeal from the entire judgment but made no request for a transcript, and his appeal was thereafter dismissed for lack of a record. *Erikson v. Sullivan*, 81 Cal.App.2d 790, 185 P.2d 31.

The plaintiff's appeal is now before us. As he states, "This appeal is taken upon the

Judgment roll, solely upon the Clerk's Transcript and such marked Exhibits are shown upon their face to be official government maps and notes." The only record before us consists of the clerk's transcript and certain original exhibits which have been transferred, including the map prepared in 1881, as mentioned in the findings, and certain later maps including one showing a re-survey and approved by the United States Surveyor General's office in 1911. The mineral survey map made in 1874, referred to in the findings, while apparently introduced in evidence as defendant's "Exhibit Y", is not before us.

This claim was located in 1871 in mountainous territory which had not then been surveyed and it was described by giving various distances from the discovery hole. Extensive mining operations were carried on and there would seem little room for question as to where the claim was as it lay on the ground. Originally, the location with respect to government survey lines could not have been known. Apparently, some confusion still exists with respect to different surveys and it rather clearly appears that the actual and correct description, under subsequent surveys, was not known to the parties at the time the lease and option agreement was entered into. It was called Lot 39 when it was surveyed in 1874 but the map then made did not put in the section lines in that area, which was then described as too mountainous for that purpose. There is no question that the original claim was known as Lot 39 but there is a question where that lot would lie under a correct sectional survey. The court found that under a map prepared under a survey in 1874 it lies within the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of this section, and this map is not before us. This appellant contends that the map made in 1881 is correct and shows that this mine actually lies in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of this section except for a very small portion which lies in the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of this section. There seems to be no question that the claim as outlined by the concrete markers is situated in the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of this section, and the appellant states in his brief that the respondent erected these monuments in 1922. The appellant's con-

tention is not merely that the legal description of the property, as found by the court, is wrong but that he has since 1940 been in possession of the wrong property and that he is entitled, under the lease, to possession of an entirely different parcel of ground, situated mainly in a different sectional subdivision.

It may be first observed that it cannot be certainly determined from the record before us that this land, patented as Lot 39, is in a different sectional subdivision than as found by the court, or that the description given in the lease after it was amended is actually a correct description of the land originally known as Lot 39. While some of the maps in evidence support the appellant's contention we have no way of knowing what other evidence was before the court.

[1,2] The appellant argues that in amending the description in this lease and option the parties must have relied on and followed the description given in the map prepared in 1881 rather than on an earlier map, and that by consenting to this amended description the respondent must be held to have conceded that the land was located mainly in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of this section. Such record as is before us indicates that the parties did not know the correct description of the land at the time the lease was entered into, and the court clearly found that the parties understood at the time that the lease covered the area bounded by the six concrete markers, that neither then believed that the boundaries of the Golden Chariot mine, or Lot 39, covered any land which was not included within the parcel outlined by these six markers, and that the plaintiff took possession of the land outlined by these markers and continued in possession of that property until the trial of the action. It must be assumed that these findings are supported by the evidence, and there is nothing to in any way indicate the contrary. It thus appears that the parties intended this lease to cover a certain parcel of land, there is no dispute as to where the parcel outlined by these six markers lies on the ground, and the appellant has been in possession thereof for years. Regardless of whether or not this is the correct legal description, or whether

or not the court erred in finding that this piece of land lies in the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of this section, the appellant is not prejudiced by any possible variance between the description as used by the court and what may be the correct description in accordance with the official surveys. Since the parties intended the lease to cover a particular area as it lies on the ground and since with that understanding the appellant took and held possession of that particular land, he cannot successfully maintain, upon the record before us, that he was entitled to be given possession of an entirely different tract of land by the court.

The judgment is affirmed.

MARKS, J., concurs.



86 Cal.App.2d 778

PEOPLE v. PALACIO et al.
Cr. 593.

District Court of Appeal, Fourth District,
California.

July 14, 1948.

1. Abduction ☞1

A person may be guilty of taking a woman against her will and by force, menace and duress compelling her to be defiled, even though the actual defilement is accomplished by another. Pen.Code, § 265.

2. Criminal law ☞29

Where each of several defendants after taking girl by force from parked automobile and driving her several miles away, not only defiled her himself but assisted in compelling her to be defiled by each of the others, each defendant was guilty of rape and of taking of a woman against her will and by force, menace, and duress compelling her to be defiled, as against contention rape charge included defilement charge and that only one crime was committed by each defendant. Pen.Code, §§ 261, subd. 4, 265.

3. Criminal law ☞991(1)

Whether sentences for rape and for taking a woman against her will and by force, menace and duress compelling her to be defiled, should run consecutively or concurrently was for determination of trial judge and was discretionary. Pen.Code, §§ 261, subd. 4, 265, 669.

4. Criminal law ☞991(1)

Trial court did not abuse discretion in ordering sentence for rape and for taking a woman against her will to be defiled to run consecutively rather than concurrently. Pen.Code, §§ 261, subd. 4, 265, 669.

Appeal from Superior Court, Tulare County; Frederick E. Stone, Judge.

James F. Palacio, Henry C. Moreno, Rosendo S. Arrellano, Thomas R. Munoz and Louis Lopez were convicted of rape and of taking a woman against her will and by force, menace and duress compelling her to be defiled, and they appeal.

Judgment affirmed as to each defendant.

J. M. Lopez, of Visalia, for appellants.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were jointly charged with a violation of section 265 of the Penal Code in that on February 27, 1948, they had unlawfully taken the complaining witness against her will and had by force, menace and duress compelled her to be defiled. In a second count they were charged, under subd. 4 of section 261, with raping the same girl.

About 10:00 P.M. on February 28, 1948, the complaining witness, with her boy friend, was in an automobile which was parked on a country road about three miles from Tulare. The car was a convertible with a canvas top. The five defendants, in another car, passed the parked car and then turned around and returned. The defendants then attempted to get the complaining witness out of the convertible, which was locked from the inside. When the occu-

pants of the convertible refused to unlock the door, the defendants succeeded in cutting a hole in the canvas top which enabled one of them to reach in and unlock the door. One of the defendants then entered the convertible, and put one arm around the complaining witness while holding his knife at her throat. She was pulled from that car and taken over and placed in the rear seat of the defendants' car with three of the defendants while the two other defendants occupied the front seat. She was then blindfolded and that car was driven a distance of about four miles, at which point each of the five defendants accomplished an act of sexual intercourse with her. On the way back to Tulare they were met by two officers.

Each of the defendants separately admitted the facts to an investigating officer. Each entered a plea of not guilty and later withdrew it and entered a plea of guilty. In pronouncing judgment the court sentenced each defendant to San Quentin for the term prescribed by law on each count, the respective sentences to run consecutively. A motion for an order directing that these sentences be made to run concurrently, rather than consecutively, was made and denied. The defendants have appealed "from the sentence imposed on the second count of the information, and from the order of the court that the sentence run consecutively."

The appellants request that the judgment be affirmed as to the first count, and that as to the second count it "be set aside and dismissed, or in any event that said sentence run concurrently and not consecutively."

It is argued that the essential element under the first count was the defilement; that this defilement was the same act of sexual intercourse which was the main ele-

ment under the second count; that it was all one transaction; that the criminal offense in the second count was one which was included within the one charged in the first count; and that it follows that only one crime was committed by each defendant.

[1,2] There are elements involved in the crime denounced by section 265 which are not necessarily a part of the crime covered by section 261, and a conviction under both of these sections has been sustained in this state. *People v. Neal*, 65 Cal.App.2d 160, 150 P.2d 13. A clear distinction in this regard here appears. Under the wording of section 265 a person may be guilty of the offense there denounced even though the actual defilement is accomplished by another. In the instant case, each of the appellants not only defiled the complaining witness himself but also assisted in compelling her to be defiled by each of the others. Apart from this activity in support of the others, each also committed a rape. Each of the appellants was thus guilty of several separate and distinct offenses, as charged in the information.

[3,4] Aside from the contention that only one offense was committed by each, no reason is advanced for the claim that the court erred in ordering that the respective sentences run consecutively instead of concurrently. This was a matter to be determined by the trial judge (Penal Code sec. 669), and was one within the discretion of the trial court. *People v. Hirschbein*, 16 Cal.App.2d 458, 60 P.2d 532. No abuse of that discretion here appears. *People v. Albori*, 97 Cal.App. 537, 275 P. 1017.

The judgment as to each defendant is affirmed.

MARKS, J., concurs.

86 Cal.App.2d 772

FWLER v. VAUGHAN et al.

Civ. 3905.

District Court of Appeal, Fourth District,
 California.

July 14, 1948.

1. Sales 477(1)

Where leased office space and equipment were sold by plaintiff lessee to defendant under conditional sales contract providing for deferred payments, consent of plaintiff to a loan to defendant to enable defendant to make first payment to plaintiff, as security for which loan defendant gave a chattel mortgage on office space and equipment did not pass full title in office space and equipment to defendant or authorize a subsequent mortgage by defendant to another.

2. Contracts 322(3)

Evidence sustained finding that seller by reentering business in same building within two years from execution of sales contract did not breach the contract.

3. Action 6

In action by seller of leased office space and equipment to defendant under conditional sales contract, for declaration of priority of seller's rights over claims of mortgagee to whom defendant had mortgaged space and equipment as security for loan for partial payment on purchase price, and for possession, evidence sustained finding that defendant had refused to make payments to seller under the contract, other than of the money acquired under the loan.

4. Equity 65(2)

In action by seller of leased office space and equipment to defendant under conditional sales contract, for declaration of priority of seller's rights over claim of mortgagee to whom defendant had mortgaged space and equipment as security for loan for partial payment on purchase price, and for possession, evidence did not establish that seller had surreptitiously entered defendant's office and removed documents and materials, and, therefore, did not come into court with clean hands.

5. Sales 479(2)

In action by seller of leased office space and equipment to defendant under conditional sales contract, for declaration of priority of seller's rights over claims of mortgagee to whom defendant had mortgaged space and equipment as security for loan for partial payment on purchase price, and for possession, where defendant refused to make required payments on purchase price, and consistently denied his obligation to pay, and asserted full ownership of space and equipment and that seller had no rights, trial court properly refused to allow defendant a reasonable time in which to make up the delinquent payments. Civ.Code, § 3275.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Paul C. Fowler against J. Trescott Vaughan and C. E. Keiffer for a declaration that plaintiff's rights under a conditional sales contract for sale of a lease of office space and equipment were prior to claims of defendant Keiffer under chattel mortgage given to defendant Keiffer by defendant Vaughan as purchaser under the conditional sales contract, and for possession. From an adverse judgment, defendant Vaughan appeals.

Affirmed.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellant.

Ruel Liggett and Roy M. Cleator, both of San Diego, for respondent.

BARNARD, Presiding Justice.

The plaintiff and the defendant Vaughan are chiropractic physicians. On September 1, 1946, they entered into a conditional sales contract under which Dr. Fowler agreed to sell his lease to seven rooms in a certain building to Dr. Vaughan, together with the furniture and equipment therein, and with the right to retain Dr. Fowler's name on the door for two years and to continue professional relations with his "present patients." The purchase price was \$10,000, payable \$3000 in cash and \$300 monthly until fully paid. The agreement provided that title was to re-

main in Dr. Fowler until full payment of the purchase price, with the right to re-occupy and repossess the property if not paid in accordance with the agreement.

On February 1, 1947, Dr. Fowler opened a new office in one room on another floor of the same building, limiting his practice to one matter. On March 3, 1947, Dr. Vaughan gave a chattel mortgage to the defendant Keiffer covering these same properties, in which he stated that he was the sole owner thereof and that there were no other liens or encumbrances thereon. On April 9, 1947, Dr. Vaughan gave to Dr. Fowler a written statement admitting that \$4525.00 was still due under the conditional sales contract whereby he was purchasing these properties.

This action was filed on May 7, 1947. The complaint alleged that the defendant Keiffer claimed that this chattel mortgage was superior to the rights of the plaintiff, and that a dispute had arisen between the parties in this regard, and prayed that plaintiff's rights under the conditional sales contract be declared to be superior and prior to any claims under the chattel mortgage. On May 29, 1947, the defendants answered alleging that the defendant Vaughan had become the sole owner of the property through the payment of the unpaid balance under the conditional sales contract, and that the chattel mortgage held by the defendant Keiffer was superior and prior to the rights of the plaintiff.

On June 30, 1947, Dr. Vaughan told the plaintiff that he would make no further payment on the contract and that he would not give him another dime until and unless he was ordered to do so by the court. On August 14, 1947, the plaintiff filed an amended and supplementary complaint in which, after referring to his previous complaint, he alleged that since those transactions had taken place the defendant had refused to make further payments on the original contract, had denied any liability thereunder, was now in default, and had failed after demand to return the property. The prayer was for the relief prayed for in the original complaint and in addition thereto that the plaintiff be awarded possession of the property. On September 6, the defendant Vaughan filed

an amended answer and an answer to the supplementary complaint. He alleged therein that the plaintiff had violated the original contract by reopening an office in the same building, by removing certain files from the office of this defendant, and by contacting several former patients; that this defendant had offered to pay to the plaintiff \$3000 less than the amount called for by the contract; and that the actions of the plaintiff had damaged this defendant in the amount of \$6000. The prayer was that the plaintiff take nothing, that the court declare the contract paid in full, and that this defendant have judgment for \$6000.

[1] At the trial, the defendants attempted to sustain the validity of the chattel mortgage held by Keiffer by contending that Dr. Fowler had turned over full title to the properties to Dr. Vaughan at the time the original contract was entered into, by consenting to another chattel mortgage given by Dr. Vaughan to the California Chiropractic Association, in order to secure funds which were used to make the first \$3000 payment, and which mortgage had been paid off in the meantime. The court properly held that Dr. Fowler had consented to the making of that loan, whether or not he knew that a mortgage was given, but that such consent did not pass full title to Dr. Vaughan or in any way authorize or justify his subsequent mortgaging of the property to Keiffer.

The defendant Vaughan further attempted to prove that Dr. Fowler had breached the contract by reentering business in the same building within two years. While there was some conflict in the evidence in this regard there was ample evidence that this was done for a limited purpose only, that it was done with the full knowledge and consent of Dr. Vaughan and at his suggestion and request, and that there was no interference whatever with Dr. Vaughan's business. Moreover, the original contract contained no agreement that Dr. Fowler would not reenter business within two years and, as stated by the trial court, Dr. Vaughan had with full knowledge and without objection continued making monthly payments, and had thereafter signed the statement admitting that

the original contract was in full force and that the remaining balance was unpaid.

The court found in all respects in favor of the plaintiff finding, among other things, that in the chattel mortgage to Keiffer the defendant Vaughan had stated that he was the owner of the chattels listed therein; that the plaintiff was in fact the owner of said chattels in accordance with the conditional sales contract; that the claim of Keiffer was inferior to that of the plaintiff; that it was not true that the plaintiff had relinquished title to these chattels to the California Chiropractic Association or that Dr. Vaughan became the sole owner thereof when the mortgage to that association was paid; that the defendant Vaughan had refused to make further payments on the contract; that he had failed to return the property after demand made therefor; that it was not true that the defendant Vaughan offered to pay the amount due on the contract or the amount which he claimed was all that was due; that it was not true that the plaintiff violated any of the conditions or covenants of the conditional sales agreement; and that it was not true that the defendant Vaughan had been damaged through the actions of the plaintiff in the sum of \$6000 or in any other amount. Judgment was entered decreeing that the plaintiff's title is superior to that of the defendant Keiffer under his purported chattel mortgage and awarding the plaintiff, as against the defendant Vaughan, restitution and possession of the premises and properties. From this judgment the defendant Vaughan has appealed.

[2] The appellant first contends that the document signed by him on April 9, 1947, admitting that a balance of \$4525 remained due on the conditional sales contract, did not constitute a waiver of the respondent's breach of the contract by re-entering business. The court remarked at the conclusion of the case that if there was a breach of the contract on the part of the respondent this document, with certain other evidence, would sufficiently disclose a waiver. There can be no question that the evidence fully sustains this conclusion. However, the court found that no such breach had occurred, and this finding is

not questioned and could not well be questioned in view of the ample supporting evidence in the record.

[3] It is next contended that the court erred in stating that the appellant had refused to make further payments on the contract. It is argued that the appellant had merely stated that he would pay nothing further until or unless he was ordered to do so by the court, and that since the action was pending he was under no obligation to make any payments until the case was decided. In his answer to the original complaint the appellant alleged that the balance due under the conditional sales contract had been fully paid, and that he had become the sole owner of the property and all thereof. After the amended and supplementary complaint was filed the appellant again answered and denied that anything was due and asked for a judgment declaring that all amounts called for by the original contract had been paid in full. The appellant not only discontinued making payments but told the respondent he would pay nothing further. That was appellant's position throughout the trial and at all times until after the case had been decided by the court. The court's statement and finding are fully supported by the evidence.

[4] Appellant's final contention is that "plaintiff did not come into court with clean hands." It is also argued in this connection that under its equitable powers the court had the authority to allow the appellant a reasonable time within which to bring the payments on the contract up to date. It is argued that the respondent did not come to court with clean hands because he surreptitiously entered the appellant's office and removed certain documents and materials. While there is some evidence to this effect there is an abundance of evidence to the contrary. The appellant's own position under this equitable rule is much more questionable. His claim to full ownership of the property, that the remaining balance of the contract had been fully paid, that he had a right to mortgage the property, and his belated and unsupportable claim that the respondent had breached the original contract,

all considered in the light of the evidence produced, strongly suggest a different application of this equitable rule.

[5] With respect to the contention that the court should have permitted the appellant to make up the delinquent payments within a reasonable time, section 3275 of the Civil Code provides that this may be done except, among other things, where a failure to comply with the contract has been willful. As the court pointed out on motion for a new trial, there was no question that appellant's failure here in this regard was willful. Instead of merely failing to pay he refused to pay and consistently maintained that he was under no obligation to pay, that he had full ownership of the property, and that the respondent had no rights whatever. No abuse of discretion on the part of the trial court appears. *Parsons v. Smilie*, 97 Cal. 647, 32 P. 702; *Shaw v. Guaranty Liquidating Corp.*, 67 Cal.App.2d 660, 155 P.2d 53; *Crowell v. City of Riverside*, 26 Cal.App.2d 566, 80 P.2d 120; *Phillips v. Bruce*, 41 Cal.App.2d 404, 106 P.2d 922.

The judgment is affirmed.

MARKS, J., concurs.



86 Cal.App.2d 571

GORDON et al. v. NICHOLS.

Civ. 16232.

District Court of Appeal, Second District,
Division 1, California.

July 6, 1948.

Hearing Denied Aug. 30, 1948.

1. Descent and distribution ⚡87

Wills ⚡744

Repeal in 1941 of 1939 statutes making right to enforce assignment of interest in estate subject to approval of probate court had effect of restoring assignee's right to its former status, under which probate court had no authority to pass upon validi-

ty of such assignment. Probate Code, § 1020.1.

2. Descent and distribution ⚡87

Wills ⚡744

Repeal in 1941 of 1939 statutes governing assignments of interests in estates did not affect rights acquired under assignment of interest in estate executed in January, 1941. Probate Code, § 1020.1.

3. Witnesses ⚡1

Courts have power to compel attendance of witnesses by subpoena as prescribed by law. Code Civ.Proc. § 1870.

4. Evidence ⚡577

Party who did not take advantage of right to compel attendance of absent witness could not complain of exclusion of testimony of such witness given in former action. Code Civ.Proc. § 1870.

5. Partition ⚡62, 74

Rights between plaintiff in partition action and third person who was not a party thereto could not be adjudicated, and hence defendant could not complain of exclusion of proof that third person paid consideration for assignment to plaintiff so as to create a resulting trust in third person's favor.

6. Appeal and error ⚡1071(5)

Defendant in partition action was not prejudiced by finding that defendant had been collecting rentals, where evidence fully justified interlocutory judgment ordering sale of the property, which merely provided that referee should determine what rents, issues and profits had accrued and were owing to parties, since defendant could show in the accounting that she had collected no rents.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Chloe M. Gordon and another against Evalyn N. Nichols for accounting, partition and sale of realty. From an interlocutory judgment for plaintiff, defendant appeals.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellant.

Connelly & Angelillo, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from an interlocutory judgment in favor of plaintiff Gordon ordering the accounting, partition and sale of real property owned by said plaintiff and defendant as tenants in common.

The complaint alleges that upon the death of Laura L. Dickinson on September 18, 1940, the property here involved descended to appellant Evalyn M. Nichols and to Jean Louise Hayward Black in equal shares; that said Black assigned 10% of her interest to plaintiff Durkee, and 40% of her interest to the respondent Gordon, and that the probate court made distribution on February 24, 1944 to the said parties as follows: 50% to appellant Nichols, 40% to respondent Gordon and 10% to Durkee. It is also alleged that appellant as the duly appointed administratrix of the estate of Laura L. Dickinson, deceased, collected certain rents, issues and profits for which she accounted in said probate proceedings, and that although a demand had been made upon appellant for an accounting, she has failed and refused to do so since the entry of the decree of distribution in said estate.

Appellant answered, denying generally and specifically each and every allegation of the complaint and for a separate defense alleged herself to be the sole owner of the property in question.

The court found it to be true (1) that the property in question descended to appellant Nichols and to Black, as alleged; (2) that Black by assignments transferred her one-half interest in said property to Durkee, as to a 10% interest, and to respondent Gordon, as to a 40% interest; (3) that the decree of final distribution distributed the property accordingly; (4) that appellant Nichols as administratrix collected the rents, issues and profits from such property, made certain expenditures as set forth in her accounts rendered in the probate proceeding, and continues to collect the rentals on said property.

The court further found that an action was commenced in the Superior Court in and for the County of Los Angeles, entitled Jack Edwin Reed (also known as Jerre Ed-

win Nichols) by Evalyn M. Nichols, his guardian, plaintiff, vs. Jean Louise Hayward (Black); Chloe Gordon (now Cly); Monte Cly; P. E. Durkee, et al, defendants, and that a notice of attachment dated March 31, 1944 was recorded; that execution issued therein in the sum of \$57.42; that thereafter the interest of P. E. Durkee in the property described was sold on the 27th day of April, 1944, to one Max Weidner for \$84.74; that on May 8, 1945, said Weidner transferred to A. T. Nichols the certificate of sale and conveyed to said Nichols the property therein described; and that said A. T. Nichols on May 19, 1945, by grant deed conveyed to appellant Evalyn M. Nichols all of his interest in the described property. The court found that by reason of the foregoing that the ten per cent interest of Paul E. Durkee, in and to said property and the rents, issues and profits thereof, is now owned by appellant Evalyn M. Nichols. Further, that a partition could not be made without great prejudice to the owners and that a sale is necessary; that an accounting should be made of all rents, issues and profits from the realty described which have accrued and are due and owing to respondent Gordon as to a 40% interest and to appellant Nichols as to a 60% interest.

The interlocutory judgment accordingly decrees that appellant owns a 60% interest in the property and respondent 40% thereof, orders appellant to render an accounting, and orders that the property be sold and the proceeds be divided between the parties in proportion to their respective interests.

Adverting to the decree of distribution in the Estate of Dickinson, the assignments by Black to Durkee and respondent Gordon were inferentially approved, since the property was distributed to them as their respective interests appeared in such assignments, said decree further providing:

"(5) That no determination is made by this decree as to the relative rights, priorities, or other effects of the action commenced by Jack Edwin Reed or his filing of lis pendens therein, or the attachment or judgment in favor of A. T. Nichols, * * * or the rights, priorities, or effects of any attaching, judgment, or other lien claimant against the interest in this estate which de-

scended to Jean Black, as against said Jean Black, P. E. Durkee, Monte Cly, or Chloe M. Gordon, but all such matters are expressly reserved and relegated to other forums for determination."

During the trial herein a certified copy of such decree of distribution was introduced in evidence as Plaintiff's Exhibit One, at which time the trial court commented with reference to clause 5 thereof, above quoted, as follows: "I take it that one of the purposes of this action is to have the court make such a determination."

It is here asserted by appellant that the finding of the trial court that respondent Gordon is the owner of a 40% interest in the realty here involved is unsupported by the evidence.

This 40% interest is claimed by respondent under the assignment heretofore mentioned, which was approved by the probate court and made part of its decree of distribution. However, between the time the assignment was executed and its approval by the court, sections 530 and 530.1 of the Probate Code were repealed and section 1020.1 was enacted.

Appellant takes the position that the repeal of sections 530 and 530.1, *supra*, terminated any right that respondent acquired under such assignment, and that, since statutes operate prospectively, unless otherwise provided, respondent could not take advantage of the new section 1020.1, *supra*. In other words, that any right respondent had under the assignment expired with the repeal of said sections 530 and 530.1. and therefore appellant takes the entire interest of Black by virtue of the judgment in favor of A. T. Nichols.

On January 18, 1941, when the assignment to respondent Gordon was executed, sections 530 and 530.1 of the Probate Code, (effective Sept. 19, 1939) provided that such assignments were wholly unenforceable, unless filed in the probate proceedings and approved by the court after hearing of special petitions presented therefor, and further that such assignments were not entitled to recordation until so approved.

These two sections were effectively repealed and a new section 1020.1 enacted as of September 13, 1941.

In *re Estate of Lund*, 65 Cal.App.2d 151, 153, 150 P.2d 211, 212, points out that section 1020.1 and the former section 530.1 "appear to have been enacted in an attempt by the legislature to give the probate court some control, at least for the purpose of distribution over agreements providing compensation for services of so-called 'heir-hunters'." * * * Prior to the enactment of said section (1020.1) and its forerunner (530.1) the probate court had no jurisdiction to determine the issue of the validity of an assignment upon the distribution of an estate. In *re Estate of Howe*, 161 Cal. 152, 118 P. 515." It is further stated by the court at page 155 of 65 Cal. App.2d, at page 24 of 150 P.2d: "As we read section 1020.1 of the Probate Code, it does not purport to grant to the probate court general jurisdiction to 'set aside' an assignment in its entirety and for all purposes. It merely purports to grant to the probate court the limited jurisdiction, under certain circumstances, to ignore the assignment in whole or in part for the purposes of the distribution of the estate."

In *Re Estate of Cazaurang*, 75 Cal.App. 2d 217, 223, 170 P.2d 694, 697, the court after analyzing sections 530, 530.1, 1201a and 1020.1 of the Probate Code, continues: "It becomes apparent that if the jurisdiction of the Probate Court, previous to the enactment of those sections, was limited, and it was not authorized by law to determine the validity of an assignment in the probate proceedings, as suggested in *Re Estate of Howe*, 161 Cal. 152, 118 P. 515, and other decisions cited by appellant, the Legislature has specifically conferred upon such courts the power and jurisdiction to hear and determine the issues specifically permitted in the above sections, and has provided a method of proceeding in such cases. In *re Burton*, 93 Cal. 459, 462, 29 P. 36; Cal. Const., art. VI, sec. 5. See, also, *In re Estate of Cohen*, 66 Cal.App.2d 450, 458, 152 P.2d 485, hearing denied by the Supreme Court."

In 23 Cal.Jur. 714, sec. 97, the following appears: "As a general rule, the repeal of a statute takes away all remedies given by such statute, and defeats all actions pending under it at the time of its repeal, especially where the repealed statute created a

cause of action and provided a remedy not known to the common law, or conferred jurisdiction where it did not previously exist." See, also, *Callet v. Alioto*, 210 Cal. 65, 67, 290 P. 438.

[1,2] It is obvious from the foregoing that before the enactment of sections 530 and 530.1, *supra*, the probate court had no authority to pass upon the validity of an assignment made by an heir, legatee or devisee of an interest in an estate; that after their enactment the right of an assignee to enforce such an assignment was subjected to the approval of the probate court; and that upon their repeal this restriction as to approval was removed, and the right of such assignee to take under the assignment was restored to its former status. Consequently, such repeal had no effect upon the right acquired by respondent Gordon under the assignment to her by Jean Louise Hayward Black.

Appellant assigns as error the sustaining of an objection to an offer of testimony adduced at a hearing in the Probate Court with respect to the assignment to respondent Gordon. Appellant claimed that respondent was bound by such evidence for the reason that she failed to make any denial thereto.

Section 1870, Code of Civil Procedure, provides that evidence may be given upon a trial of the following facts: "8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter."

In construing this section, the court in *Meyer v. Roth*, 51 Cal. 582, held that if a witness is within this state so that process may compel him to testify, although out of the county where the case is tried, he is not out of the jurisdiction within the meaning of the said section, so as to permit his testimony given on a former trial to be admitted in evidence. In this connection, appellant also assigns as error the ruling of the trial court sustaining an objection to appellant's questions addressed to a witness with respect to the present whereabouts of respondent Gordon.

[3,4] Appellant had at her disposal the compulsory process of the court, and it is

within the power of courts to compel the attendance of witnesses in the manner prescribed by law (*Wood v. Silvers*, 35 Cal. App.2d 604, 96 P.2d 366, 97 P.2d 265), to wit: by subpoena (*In re Claasen*, 36 Cal. App.2d 155, 97 P.2d 254). Having failed to take advantage of the privileges afforded, appellant has no cause to complain.

[5] Appellant also assigns as error the sustaining of objections to an offer of proof that Monte Cly paid the consideration for the assignment to respondent Gordon, and therefore that a resulting trust in his favor should be presumed. Since Cly was not a party to the instant action, any rights existing between him and respondent cannot be adjudicated herein. *Los Angeles v. Knapp*, 22 Cal.App.2d 211, 70 P.2d 643.

Appellant urges that it was error to admit in evidence the entire file in the probate case, or any portion thereof, without actually extracting it, or preparing and filing copies, or reading the desired portions into the record. As a matter of fact, the first and second accounts and the assignment from Black to respondent were admitted into evidence by reference, in order to assist the referee appointed to make the accounting. As to this latter order, appellant urges that "all prior accounts must have been approved" and "there was no proof whatsoever of her (appellant) collecting any rents, issues or profits after that estate was closed." Nevertheless, the court found that appellant during the course of administration "collected the rents, issues and profits from said realty and in addition thereto, made certain expenditures as set forth in accounts rendered during the course of such probate proceedings; that since said time said defendant Evalyn M. Nichols has been, and now is, collecting the rentals on said property."

[6] Appellant was not prejudiced by such finding, because the evidence fully justifies that portion of the judgment ordering a sale of the property in question. And the judgment simply provides that the referee appointed by the court shall determine what, if any, "rents, issues and profits from the above-described realty which have accrued and are due and owing" to the parties as their respective interests may appear.

If, as appellant contends, she has collected no rents from said property after distribution was ordered in the probate proceeding, the accounting will so disclose.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.



86 Cal.App.2d 672

LYNCH v. RHEINSCHILD et al.

Civ. 16402.

District Court of Appeal, Second District,
Division 2, California.

July 9, 1948.

Hearing Denied Aug. 30, 1948.

1. Appeal and error ⇐863

On appeal from a judgment dismissing a complaint after a general demurrer has been sustained thereto, an appellate court is confined to a consideration of whether complaint states sufficient facts to constitute a cause of action. Code Civ. Proc. § 581.

2. Conspiracy ⇐4

A conspiracy is not actionable unless the alleged combination results in the perpetration of an unlawful act or some injurious act by unlawful means.

3. Conspiracy ⇐18

In action based upon failure of administrator to include plaintiff's name in notice to creditors alleging a fraudulent endeavor to probate only part of deceased's property under a different name and thereby deprive plaintiff and other real parties in interest of their rightful share and fraudulently divert it to alleged heirs, complaint alleging that leasing agreements, contract rights, personal property and business name of plaintiff were interfered with to plaintiff's damage under theory of conspiracy was demurrable for failure to allege any unlawful act or injurious act by unlawful means.

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by H. L. Lynch, individually, and H. L. Lynch, trustee for Motor Fuel Association of Arizona, against Philip A. Rheinschild, individually, and others, for alleged conspiracy to defraud, interference, and damages. From an order granting defendant's motion to dismiss, plaintiffs appeal.

Judgment affirmed.

H. L. Lynch, in pro. per.

William G. Condron, of Los Angeles, for respondents.

McCOMB, Justice.

These appeals are from an order granting defendants' motion to dismiss an action, for alleged conspiracy to defraud, after plaintiffs failed to amend their complaint within ten days as allowed by the trial court upon sustaining defendants' demurrer to the complaint.

Facts

(1) September 14, 1946, H. L. Lynch, individually, and as trustee of the Motor Fuel Association of Arizona, filed a complaint against defendants which purported to allege a cause of action for conspiracy to defraud, interference, and damages.

(2) June 9, 1947, defendants filed a general demurrer to the complaint which on June 25, 1947 was sustained, and plaintiffs were allowed ten days within which to amend.

(3) August 1, 1947, plaintiffs having failed to amend their complaint, on defendants' motion a judgment of dismissal was entered pursuant to the provisions of section 581, Code of Civil Procedure.

(4) September 29, 1947, plaintiffs' motion on numerous grounds to vacate the judgment of dismissal entered August 1, 1947, was dismissed.

[1] Preliminarily, it is to be noted that plaintiffs have not appealed from the order of September 29, 1947, denying the motion to vacate the judgment of dismissal. Therefore, there are no questions before this court relative to the propriety of such.

order. The only questions here for consideration are those which may be reviewed upon appeal from the order of August 1, 1947, dismissing the action, which presents the correctness of the trial court's action in sustaining defendants' demurrer to the complaint. The rule is established that on appeal from a judgment dismissing a complaint after a general demurrer has been sustained thereto, an appellate court is confined to a consideration of whether the complaint states sufficient facts to constitute a cause of action. (Lynch v. Watson, 78 Cal.App.2d 96, 101, 177 P.2d 657; Genuser v. Ocean Acc. & Guarantee Corp., 42 Cal.App.2d 673, 675, 109 P.2d 753).

The material allegations of the complaint are these:

"That a conspiracy to defraud the plaintiffs herein now exists, and has existed at all times mentioned in this Complaint, and that the defendants above named have all joined in, favored, approved of, and furthered said conspiracy; that they so joined in, favored, approved of and furthered said conspiracy knowingly, wickedly and maliciously and with intent and design to injure said plaintiffs; that by and through said conspiracy the plaintiffs herein have been damnified and have suffered great injury;

"That the said conspiracy consisted in part of circulating false reports and making untruthful statements concerning said plaintiffs and their business operations and integrity, and business connections, with intent and design to blacken their business name and reputation and injure them; and consisted in part in actual interference with, injury to, and destruction, or carrying away, of the personal property and Contractual rights of said plaintiffs, and interference with the titles to their personal property, contracts and other papers, mail box, mail, and strong box containing documents;

"That on the 28th day of March, 1938, plaintiff herein, H. L. Lynch, entered into a written contract with James T. Dunn and Jessie W. Dunn, his wife, at San Fernando, Los Angeles County, California, in which

contract the said Dunn and wife agreed to sell to Lynch, his order or his assignee, all of their right, title and interest in and to all lots, and *rights* in the Townsite of Howard, County of Los Angeles, State of California, as per map recorded in Book 22, pages 59 to 62, Miscellaneous Records of said County; that said contract is assignable in whole or in part and is recorded in Book 15849, at page 184, Official Records of said Los Angeles County;

"That on or about the 31st day of March, 1938, the said H. L. Lynch assigned to C. A. Trathen, as trustee for Motor Fuel Association, of Arizona, and as trustee for American Motor Fuel Committee, (one half to each), certain rights secured, or to be secured, under the said contract with James T. Dunn and Jessie W. Dunn, his wife, in and to the Dunn lots, (description of property);

"That on or about the 1st day of April, 1938, the said Lynch assigned to C. A. Trathen, individually, certain rights, (under said Contract with Dunn and wife), in and to the Dunn interests in lots in blocks 57 and 63 of the said Townsite of Howard, all the lots so assigned, individually, or as trustee, to go into a series of leases with the Dunn-Kendrick and Holmstrand lots in block "H" (description of lots) under various lease agreements made by the owners of said property, and including property owned or controlled by H. L. Lynch and H. L. Lynch, Trustee; that said conspiracy has interfered with and prevented the said contracts being fulfilled;

"That the name C. A. Trathen does not appear in the notice to creditors of the Estate of Corinne Agnes Trathem, Deceased, proceeding No. 249039 in the Probate Court; that owing to said name not appearing in *that notice*, no notice has been given to the creditors of C. A. Trathen, or to any other person in regard to the probating of the Estate of C. A. Trathen;

"That the title to the property listed in the inventory of the Estate of Corinne Agnes Trathem with a legal description attached, does not stand in the name of C. A. Trathem, but, excepting one parcel which was owned personally by C. A.

Trathen, it stood in the name of C. A. Trathen, *Trustee*, and is not the property of C. A. Trathem or of the Estate of Corinne Agnes Trathem;

"That the fact that the said property, (and other property ambiguously listed in the inventory), were included in a trust, does not appear any where in the said probate proceeding;

"That there is considerable property belonging to C. A. Trathen and C. A. Trathen, *Trustee*, not listed or included in the said probate proceeding; that lots 4 and 5 of Block 78 of the said Townsite of Howard are two of said parcels which were conveyed to the said C. A. Trathen, *Trustee*, but are not included in the inventory of said estate; that they were included in the trust with (description of lots), at the time of the creation of said trust; that there is other property in said Townsite of Howard, and elsewhere, belonging either to the said C. A. Trathen, individually, or as trustee, and not listed in the inventory of said estate;

"That by a distribution of the property belonging to C. A. Trathen, *Trustee*, in the Estate of Corinne Agnes Trathem, the beneficiaries, and creditors of the said C. A. Trathen, *Trustee*, would be defrauded, having received no notice to creditors; that a false administration and distribution would be effected, leaving considerable of the property of C. A. Trathen, *Trustee*, unadministered, unaccounted for, and in jeopardy;

"That the inventory of the said estate, probate No. 249039, is ambiguous, uncertain and incomplete, and is not a truthful statement;

"That the administrator is, by this proceeding, endeavoring to probate only a part of the known property of C. A. Trathen, under a different name, and by said means seeking to deprive the trust, and real parties in interest of their rightful share and to fraudulently divert it to the alleged heirs to the said property, and leave the rest of the property unadministered;

"That Philip A. Rheinschild, acting as administrator of the Estate of Corinne Agnes Trathem, and individually, joined

in and furthered said conspiracy to defraud the plaintiffs herein;

"That P. H. Leavitt, defendant herein, joined in and furthered said conspiracy to defraud the plaintiffs in this action;

"That E. Eastland, defendant herein, joined in and furthered said conspiracy to defraud the plaintiffs in this action;

"That each and every one of the other defendants herein, named after E. Eastland, joined in and furthered said conspiracy to defraud plaintiffs in this action;

"That because of and through the said conspiracy the plaintiffs herein have suffered damage in the sum of Fifteen Hundred (\$1500.00) Dollars.

"For a second and separate cause of action herein, plaintiffs re-allege paragraphs I to XII, both inclusive, of this complaint the same as though here set out in full, and further allege as follows:

"That by and through said conspiracy, the leasing agreements, other contracts, rights, personal property and business name and reputation of plaintiffs herein has been interfered with by each and every one of said defendants, and said plaintiffs have been damnified thereby and injured in the sum of Fifteen Hundred (\$1500.00) Dollars."

Law

[2] A conspiracy is not actionable unless the alleged combination results in the perpetration of an unlawful act or some injurious act by unlawful means. (*Rose v. Ames*, 53 Cal.App.2d 583, 588, 128 P.2d 65; *Harris v. Hirschfeld*, 13 Cal.App.2d 204, 206, 56 P.2d 1252; *Orloff v. Metropolitan Trust Co.*, 17 Cal.2d 484, 488, 110 P.2d 396.)

[3] In the present complaint there is a total absence of any allegation of any unlawful act or an injurious act by unlawful means. Hence, the demurrer was properly sustained, and plaintiffs having failed to amend within the time allowed by the trial court it was correct to enter a judgment of dismissal of the action.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

86 Cal.App.2d 542

**JONES et al. v. SUPERIOR COURT IN
AND FOR CITY AND COUNTY
OF SAN FRANCISCO.**

Civ. 13845.

District Court of Appeal, First District,
Division 2, California.

July 2, 1948.

1. Mandamus ☞164(3)

Where there was no return to application for writ of mandate, verified pleading of the applicant must be taken as true.

2. Dismissal and nonsuit ☞60(2)

A motion to set cause for trial within five-year period does not toll statute making it mandatory to dismiss an action which has not been brought to trial within five years after filing of the action, and where there was no stipulation in writing extending the time and the five-year period has elapsed action must be dismissed. Code Civ. Proc. § 583.

Application by Roy A. Jones and Merriitt Peck, doing business as Luxor Cab Company, for a writ of mandate addressed to the Superior Court of the State of California in and for the City and County of San Francisco, to compel the respondent to dismiss an action pending against the applicants.

Writ granted.

Robert L. Lamb and Theodore Tamba, both of San Francisco, for petitioner.

NOURSE, Presiding Justice.

[1] To this application for a writ of mandate no return has been made by respondent. The application rests on the verified pleadings which must be taken as admitted for failure of respondent to controvert them.

[2] An action was commenced in the superior court against these petitioners on September 30, 1942. Their verified answer was filed on November 13, 1942. On March 4, 1947, the plaintiff in the action filed his memorandum of motion to set the

cause for trial. Whether the cause was set does not appear, but no trial was had, and on April 9, 1948, these petitioners filed their notice of motion to dismiss on the ground that the cause had not been brought to trial within five years of the filing of the complaint. This motion was denied.

The motion should have been granted and the statute and the authorities leave no alternative. Section 583 of the Code of Civil Procedure makes it mandatory to dismiss an action which has not been brought to trial "within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended." Here it is alleged that no such stipulation was made. A motion to set the cause for trial made within the five year period does not toll the running of the statute. 9 Cal. Jur. 543.

Writ granted.

GOODELL and DOOLING, JJ., concur.



86 Cal.App.2d 556

HOAG v. JENAN et al.

Civ. 16290.

District Court of Appeal, Second District,
Division 1, California.

July 2, 1948.

Hearing Denied Aug. 26, 1948.

1. Damages ☞40(1)

Damages may be recovered for loss of prospective or future profits. Civ.Code, § 3300.

2. Damages ☞40(2)

Where prospective profits are the natural and direct consequences of a breach of contract, they may be recovered; and he who breaks the contract cannot wholly escape because of the difficulty which his own wrong has produced of devising a perfect measure of damages. Civ.Code, § 3300.

3. Damages ⇨40(3)

Where loss of prospective profits is from an established business, the loss is ordinarily recoverable as damages for the reason that the working experience of the business affords a reasonable method of determining loss, and in such cases the damages occasioned by the loss are not speculative and uncertain. Civ.Code, § 3300.

4. Landlord and tenant ⇨154(4)

Where landlord breached lease agreement to build addition to garage to enable tenant to expand repair business, damages by way of loss of profits because of lack of space in which to operate an existing and established business were properly recoverable under evidence that past experience had demonstrated success of the enterprise and provided a reasonably certain basis for ascertainment of probable loss consequent upon breach of the contract to complete the annex within time specified. Civ.Code, § 3300.

5. Landlord and tenant ⇨154(4)

Award of \$15,000 for loss of future profits resulting from landlord's failure to build addition to tenant's garage in time specified to permit expanded repair business was proper.

6. Landlord and tenant ⇨154(3)

Evidence sustained finding that tenant operating garage business had exercised reasonable care to avoid loss or minimize damages upon landlord's failure to extend business premises within specified time as agreed to enable tenant to expand garage repair business.

Appeal from Superior Court, Los Angeles County; R. R. Sischo, Judge.

Action by B. L. Hoag against Vincent L. Jenan and Frances B. Jenan, his wife, for damages for alleged breach of a supplemental leasing agreement. From the judgment, defendant appeals.

Affirmed.

Riccardi, Webster & Donohue, and Rinehart, Merriam, Parker & Berg, all of Pasadena, for appellants.

Robert M. Holstein, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from that portion of the judgment herein rendered awarding plaintiff the sum of \$15,000 as damages for the alleged breach of a supplemental leasing agreement, by the terms of which defendants covenanted to build an addition to and make certain alterations in an existing garage building then occupied by plaintiff as defendants' lessee.

The award of damages was predicated upon the following findings of the trial court:

"That it is true that on the 21st day of July, 1944, the plaintiff and defendants entered into a written building lease agreement, whereby the defendants, among other things, agreed to build an addition to the premises occupied by plaintiff under the terms of said lease;

"That it is true that on the 25th day of September, 1945, plaintiff and defendants entered into a written amendment to said building lease agreement, wherein said plaintiff and defendants agreed that the defendants would commence the construction of an addition within ten days from the date of said amendment to said building lease agreement, and that said defendants further agreed to substantially complete the annex within seventy-five days from the date of commencement of said work;

"That it is true that the defendants failed to substantially complete the annex until the 13th day of August, 1946.

"That it is true that the plaintiff, prior to the execution of the original agreement and up to the date of the trial of this action was engaged in the motor vehicle repair business and in the business of selling both new and used motor vehicles, with his principal place of business located on the premises covered in said building lease agreement and said amendment to said building lease agreement; * * *

"That it is true that by reason of the defendants' failure to substantially complete the addition within the time prescribed by the amendment to the building lease agreement the plaintiff was prevented from ex-

panding his repair service in his said business, and he has thereby suffered loss of profits, and has been damaged in the sum of fifteen thousand dollars (\$15,000);
* * *

In addition to that part of the judgment awarding damages to plaintiff, from which this appeal is taken, the judgment also decreed that appellants should receive from respondent the sum of \$10 per month additional rent from August 13, 1946, to the date of expiration of the amended lease.

The evidence presented at the trial herein established that respondent had been the factory representative for Plymouth and De Soto automobiles in the city of Alhambra since 1932 and that appellants were the owners of a garage building in that city; that on the 21st of July, 1944, appellants leased said building to respondent for a period of five years; that the building consisted of a showroom for new cars, office space, parts department, and in the rear a service repair department. At the time the lease was executed, respondent was devoting his entire operations in the building to the repair of used cars, as no new cars were then being manufactured for sale. The floor space in the service department was not large enough to accommodate the business that was being offered to the repair department, and the lease provided that appellants would commence building an annex to the repair shop "as soon as the materials necessary therefor were available to them", and would complete the building "as soon as reasonably practical under existing conditions." For some fourteen months after the execution of said lease nothing was accomplished in the way of commencement of such building operation, although the parties had many discussions with respect to the delay appellants claiming the building materials were not available to them, and respondent contending that he was in need of additional space to carry on the expansion of his repair work. At the end of this period and prior to September 25, 1945, the parties commenced negotiating for an amendment to the lease for the purpose of fixing a definite time within which respondent could be assured that the annex would be constructed. As a result of such negotiations, an amendment

to the lease was executed on September 25, 1945, whereby appellants agreed to commence the construction of the annex within ten days from the date of such amendment and to complete the same within seventy-five days from the commencement of the work, to wit: by the 20th of December, 1945.

The annex was not completed until August 13, 1946, or approximately eight months after the date agreed upon. In the meanwhile, on March 7, 1946, respondent filed the instant suit for damages for loss of profits that he would have realized had the annex been constructed within the time prescribed.

Respondent's complaint alleged two causes of action: (1) damages for loss of profits based upon a breach of the original lease with respect to the time of performance of the remodeling provisions thereof; and (2) damages predicated upon a breach of the lease, as amended. At the beginning of the trial, respondent waived any claim for damages under the first cause of action, and the cause was tried upon the theory that the respondent would have doubled his net profits in his service and repair department if appellants had not breached the lease, as amended.

Appellants here urge that the "award of \$15,000 in damages is made because of respondent's alleged inability to expand his automobile repair service, and not because of any act or omission of appellants which resulted in any interference or interruption of the existing business of respondent."

To this respondent replies: "Respondent has consistently contended, and this case was tried upon the theory that he was prevented from increasing his business volume by the omission of appellants to provide him with the necessary space in which to expand his operations."

There was testimony presented to the effect that from the date of the execution of the amendment to the lease, i. e. September 25, 1945, to the date of completion of the annex, i. e. August 13, 1946, respondent "rejected more than half, possibly three times the work that was offered to us." Also, that from January of 1946 through August of 1946, "there was a lot more re-

pair work than we were able to take care of. * * * We made no effort to get any business at all, because we were getting more business than we could do as it was"; that during this period there were four service stalls in the old shop, which were being overworked because "a mechanic is supposed to have a stall and a half to do efficient work. Three men were working in four stalls, which would be crowding the area for three mechanics. * * * two men working an area should have one space of their own and the area to do work on while the car he is working on is being tied up. In other words, you might take a part out of a car, and it takes a little while to get it from—it is like fitting pistons and so on. That is a job that is done away from the car some place by somebody else. A mechanic don't do that. * * * They were objecting all of the time to the area we were working them in. * * * Too crowded. There was too much confusion getting cars in and out for them to work on. * * * they (mechanics) can make plenty of money, so, if you don't give him working conditions he can go and get a job some place else." At all times before the annex was completed there were three first-line mechanics working at full capacity and there was no room for more.

Respondent's certified public accountant testified that he made a joint survey with appellants' accountant of the books of respondent to determine the net profit of the parts and service department from January 1, 1946, through August, 1946; that this survey was based upon the Chrysler Motor method which was in keeping with the system of bookkeeping then used by respondent pursuant to instructions from the factory. It was stipulated that respondent's Exhibit 6, the worksheet of the accountant, correctly reflected the books of respondent. This worksheet disclosed that the gross sales of parts and labor in the repair shop from January 1, 1946, to August 31, 1946, were \$64,447.48, and that the net profit for this period was \$11,295.29.

When the annex and remodeling work agreed upon in the lease, as amended, was completed, the additional floor space provided room for nine working stalls for

mechanics, instead of four, an additional stall for a front-end machine for front end adjusting of vehicles, two stalls for grease hoists, and a stall for a wash rack. A short time before the annex was completed, respondent hired three additional first-line mechanics, who went to work immediately upon the completion of the annex.

Respondent's profits were derived primarily from the sale of automobile parts used in repair work and from the profit realized from charges made for mechanics' labor in installing these parts. They are referred to as sales of parts and sales of labor. Based upon the assumption that the sales of parts and labor would have doubled in the parts and service department of the repair shop had the annex been available to respondents from January 1, 1946, to August 21, 1946 (the approximate period of default), respondent's accountant testified that the assumed net profit would have been in the sum of \$34,002.84. In answer to the question: "What would have been the increase over the original operation, that is, the operation assuming that the sales had not doubled?", the witness stated: "There would have been a net then of \$22,707.55. * * * That is the difference between the assumed net profit and the actual net profit. * * * on the basis of these assumptions, the net difference would have been \$2,838.44 per month."

Appellants presented evidence to the effect that before they entered into the amended agreement they had the assurance of their contractors, the Sierra Construction Company, that they had available or could obtain all of the necessary materials to complete the job, but owing to the inability of the company to obtain certain critical building materials, to wit: mainly brick, which was the material appellants preferred to use, the work was not completed in time. Opposed to this, there was testimony that concrete blocks were available in the particular locality in sufficient numbers to construct the proposed annex during the period from August to December, 1945, and that this material was used in the construction of several buildings proposed to be used for commercial purposes in the city of Alhambra during this time.

[1,2] While appellants urge that no award of damages in any amount should have been made herein, there is respectable authority sustaining awards of damages resulting from the loss of prospective or future profits. In the case of *Shoemaker v. Acker*, 116 Cal. 239, 244, 48 P. 62, 64, it is stated: "'Prospective profits,' as damages, present one of the most difficult subjects with which courts have to deal. It is not the law, however, that they can never be recovered. Our own Code states the rule to be that the measure of damages for the breach of a contract is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.' Civ.Code, § 3300. An examination of the authorities will show that the cases in which future profits were rejected as 'speculative' or 'too remote' were cases where the asserted future profits were entirely collateral to the subject-matter of the contract, and not consequences flowing in a direct line from the breach of such contract. Familiar instances of profits which are thus speculative and remote are those which might have been realized on a new contract with a third person, which could have been consummated with the proceeds of the contract sued on if the latter had not been broken; for in such a case the profits on the new contract are wholly collateral to the one broken, do not directly flow from it, and are not stipulated for or contemplated by the parties to the contract sued on. But, where the prospective profits are the natural and direct consequences of the breach of the contract, they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages. *Sutherland on Damages*, 2d Ed. §§ 64, 72, 107, 120; *Masterson v. Mayor*, 7 Hill, 61 [42 Am.Dec. 38]; *United States v. Behan*, 110 U.S. [338], 344, 4 S.Ct. 81 [28 L.Ed. 168]; *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. 501; *Hale v. Trout*, 35 Cal. 229; *Stoddard v. Treadwell*, 26 Cal. [294], 308; *Cederberg v. Robinson*, 100 Cal. 98, 99, 34 P. 625; *Tahoe Ice Co. v. Union Ice*

Co., 109 Cal. 242, 41 P. 1020. In *Sutherland on Damages*, § 64, the author, after speaking of profits which are too remote, says (quoting from a decided case): 'But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement.'"

[3] The instant case involves the loss of prospective profits from an established business, and in such cases the authorities unanimously hold that the loss of prospective profits are ordinarily recoverable, for the reason that the working experience of the business affords a reasonable method of determining the loss, and that in such cases the damages occasioned by the loss are not speculative and uncertain. See *Jegen v. Berger*, 77 Cal.App.2d 1, 16, 174 P.2d 489, 498, where it is stated: "In the instant case respondent had been in the laundry business 11 years; it could reasonably be inferred therefrom that he knew the ratio of his operating expenses to his gross volume of business handled. The jury would be justified in believing his testimony that when the new mangle was installed in April, 1942, his then operating volume was only 25 per cent of what that mangle could actually produce. His testimony that he had to turn business away—coupled with the fact that it was common knowledge that all laundries during the war years could get about as much business as they thought they might handle—would give some reasonable basis for his estimate that his business would have increased 10 per cent per month until the mangle's capacity was reached in December, 1942."

Appellants also urge that "the trial court has misconceived the measure of damages applicable to building and lease contracts,

and has erroneously applied to the case at bar a measure of damages only applicable in tort cases or in cases involving breach of warranties." In support of this argument, appellants cite, among others, the case of *Weiss v. Revenue Building & Loan Association*, 116 N.J.L. 208, 182 A. 891, 892, 104 A.L.R. 129, which involved a claim for damages because of respondent's inability to extend his apartment house operations into an adjoining area which had been leased to respondent by appellant. In that case the following rule was enunciated:

"Where a lessor has prevented the lessee from entering and occupying the leased premises, or where an owner of property has broken his agreement to give a lease thereof to a prospective tenant, the measure of damages in an action for this breach of contract, if no rent has been paid, and if nothing further appears, is the difference between the actual value of the leasehold estate that should have been enjoyed and the agreed rental that was to have been paid therefor.' But, in the ascertainment of the value of the term, the apposite rule, in the absence of special circumstances, is the difference between the actual rental value and the rent reserved."

It should be observed that the court in the cited case commented as follows: 116 N.J.L. at page 212, 182 A. at page 893, 104 A.L.R. at page 131. "There is a well-established distinction, in respect of the ascertainment of future probable profits, between a new business or venture and one in actual operation. In the first, the prospective profits are too remote, contingent, and speculative to meet the legal standards of reasonable certainty; while in the second, the provable data furnished by actual experience provides the basis for an estimation of the quantum of such profits with a satisfactory degree of definiteness. (Citation of authorities.) In the one case, the success of the business usually depends upon a variety of circumstances, and the outcome is therefore too uncertain to provide a tangible basis for computation; while in the other, past experience has demonstrated the success of the enterprise and provides a reasonably certain basis for the calculation of plaintiff's probable loss

consequent upon the breach of the contract to lease.

"The instant case falls into the former category."

Applying the rule last above quoted, the case at bar falls into the second category mentioned in that the business here is in actual operation, its past experience has demonstrated the success of the enterprise, and provides a reasonably certain basis for the ascertainment of the probable loss consequent upon the breach of contract to complete the annex within the time specified.

See, *Grupe v. Glick*, 26 Cal.2d 680, 160 P.2d 832 and also 104 A.L.R. p. 157, where it is stated: "The earlier decisions both in England and in this country generally excluded profits altogether as an element of recoverable damages in both actions for breach of contract and for tort. But this rule, under more modern practice, has been generally abandoned in both classes of actions, and, as a result, the right to recover profits is now generally determined by the same rules as govern the recovery of other damages. It may therefore be said that lost profits are a proper element of damages, when such loss is the direct and necessary result of the defendant's acts, or where the loss of profits may reasonably be supposed to have been within the contemplation of the parties when the contract was made, as the probable result of its violation, and where such profits can be shown with a reasonable degree of certainty. 8 R.C.L. p. 501."

[4] In the case here before this court, the damages awarded were within the contemplation of the parties at the time the amended agreement was made. The only purpose of the amendment was to reassure respondent that the additional space would be supplied him in the immediate future so that he should not suffer any more damage by way of loss of profits because of lack of space in which to operate an existing and established business.

[5] The evidence presented herein amply supports the findings and the judgment awarding \$15,000 damages.

[6] Appellants finally urge that respondent failed to avail himself of his le-

gal remedies to complete the proposed annex at the expense of appellants, or to rent or construct other suitable garage space. With respect to this phase of the case appellants at no time refused to construct the annex, but repeatedly assured respondent that they would commence building within a week or so; that they would build as soon as they could get the necessary materials, and although respondent was under no duty to do so, he interviewed other contractors who stated they had the materials and offered to build the annex, and he so advised appellants. Moreover, in February, 1946, respondent commenced the erection of a Quonset Hut on adjoining property in order to take care of the overflow of work, and completed this structure in April, 1946. Under the amended agreement, respondent had no right to build at appellants' expense, and he was under no obligation to do so. As a result, the evidence is sufficient to support an implied finding that respondent exercised reasonable care to avoid loss or minimize damages.

For the reasons stated, that portion of the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.



86 Cal.App.2d 581

SMITH et al. v. MINNESOTA MUT. LIFE
INS. CO. et al.

Civ. 3673.

District Court of Appeal, Fourth District,
California.

July 6, 1948.

1. Insurance ☞130(4)

Named beneficiary in application for life policy does not have right of action against insurance company for damages for alleged unreasonable delay in acting upon application, where applicant died before issuance of policy.

195 P.2d—29½

2. Action ☞16

Cause of action is to be distinguished from the "remedy," which is a means by which an obligation or the corresponding action is effectuated, and also from the relief sought.

See Words and Phrases, Permanent Edition, for all other definitions of "Remedy".

3. Action ☞61

The term "accrue" as applied to cause of action means to arrive, to commence, to come into existence, to become a present enforceable demand.

See Words and Phrases, Permanent Edition, for all other definitions of "Accrue".

4. Action ☞61

A cause of action "accrues" at the moment when the party owning it is entitled to begin and prosecute an action thereon.

5. Abatement and revival ☞52

Cause of action by applicant for life policy for damages for negligence because of unreasonable delay in acting upon application survived to the administrator of the estate of applicant dying before delivery of policy. Political Code, § 4468; Probate Code, § 574.

6. Husband and wife ☞273(12)

Cause of action by widow as named beneficiary in application for life policy based on alleged negligence of insurance company in failing to act on application within reasonable time on theory that widow had some community property right in policy if issued because of payment of first premium was subject to demurrer in absence of allegation that the amount paid was from community funds. Probate Code, §§ 201, 201.5; Civ.Code, §§ 161a, 163, 164, 687.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Ann Morris Smith and Josephine Irving, administratrix of the estate of Julius H. Smith, deceased, against the Minnesota Mutual Life Insurance Company and another, to recover damages for

alleged negligence of defendants in unreasonable delay in acting upon application of deceased for a policy of life insurance. Judgment of dismissal, and plaintiffs appeal.

Reversed.

Gray, Cary, Ames & Driscoll, of San Diego, for appellants.

Luce, Forward, Lee & Kunzel, of San Diego, for respondents.

GRIFFIN, Justice.

From a judgment of dismissal after order sustaining a demurrer without leave to amend as to two causes of action set forth in the complaint, plaintiffs appeal.

Each cause of action is based upon the same alleged derelictions and negligence of defendants in their claimed unreasonable delay in acting upon an application of the deceased, Julius H. Smith, for a policy of life insurance.

In the first count, the widow, Ann Morris Smith, was plaintiff and alleged to be the beneficiary named in the application. In the second count, Josephine Irving, as administratrix of the estate of deceased, appeared as party plaintiff.

The complaint alleges generally that on December 17, 1945, the deceased, prior to his death, made written application to defendant company, through its agent, defendant Nunn, upon a form provided by it, for a policy of life insurance in the sum of \$10,000; that he then paid the agent \$21.20 as first premium and a receipt therefor, on a form provided and pleaded in the complaint, was issued. It recited, in part, that the policy would not take effect unless and until its delivery to the applicant and that the company would have until delivery of the policy to consider the question of the applicant's insurability. It then alleged that on December 2, 1945, the applicant was examined by a physician engaged by the company; that he had signed a statement concerning his physical condition; that in January, 1946, he received an inquiry requesting the name of the doctor who had operated on him in the spring of 1945; that the applicant was led to believe, by the defendants, and did believe, that the application would be accepted and

the policy issued in accordance therewith within a reasonable time, or that in the event the application was not accepted, it would be rejected and he would be notified of the rejection within a reasonable time; that defendants negligently, carelessly and wrongfully failed to take action on the application within such time and failed either to issue or deliver a policy in accordance with the application or to give the applicant, or anyone, notice of the action, if any, on the application for insurance; that the delay continued until April 19, 1946; that on March 21, 1946, the applicant died; that his wife gave prompt notice of his death to defendant and demanded payment to her of the sum of \$10,000, which would have been payable to her under the policy applied for and that defendant refused to pay said sum; that on April 19, 1946, plaintiff wife was informed by defendant company, for the first time, that it contended that negotiations between the applicant and defendants had not been completed at the time of his death and that they would not pay said sum payable under the policy but would only return to her the premium thus paid; that the beneficiary, the applicant's wife, and his minor daughter, were his sole heirs. Then follows an allegation that deceased, at the time of the application, was in good health and was an insurable risk and would have been able to obtain a policy elsewhere but for the negligence of defendant; that defendant company issued a policy of life insurance for \$10,000 "without the waiver of premium benefit" and with an additional premium charged for the first two years, which policy was never delivered to the applicant.

Plaintiffs and appellants first argue that a cause of action for negligently failing to act on the application did exist and cite many cases from other jurisdictions so holding, as well as some decisions of other states opposed to them. It appears that the question as to the right of the insured himself, under an accident policy, to bring such an action has been sustained in this state. *Stark v. Pioneer Casualty Co.*, 139 Cal.App. 577, 580, 34 P.2d 731 (hearing denied by the Supreme Court); *Linnastruth v. Mutual Benefit Health & Acc. Ass'n*, 22 Cal.2d 216, 219, 137 P.2d 833.

In the Stark case it was stated at page 580 of 139 Cal.App., at page 732 of 34 P.2d: "An insurance company having solicited and obtained applications for insurance and having received payment of the fees or premium exacted, they are bound either to furnish the indemnity the state has authorized them to furnish or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon." * * * It has been said that an applicant having paid the premium to an agent, and the company having received its share thereof and assumed the *duty of returning the same on rejection* of the application, the applicant did all required of him, and having received no notice of adverse action on his application, he might assume after several months that it had been accepted." (Citing cases.) That "Mere delay in passing upon an application cannot be construed as an acceptance which will support an action *ex contractu*"; that the insurance company "may be held liable for actual damage not exceeding the amount of insurance purchased if it be shown to have delayed notice of rejection * * *." (Citing authorities.) (Italics ours.)

Duffy v. Bankers' Life Ass'n, of Des Moines, 160 Iowa 19, 139 N.W. 1087, 46 L.R.A.,N.S., 25 (cited with approval many times), was an action by the representative to recover against the insurance company for failure to pass upon a life insurance policy within a reasonable time. It was there held that the wife, as beneficiary, had no right of action but such right extended to the representative of the estate of the applicant. The question of the survivorship of the cause of action apparently was not raised, discussed or passed upon by that court.

In Linnastruth v. Mutual Benefit Health & Acc. Ass'n, supra, involving an accident policy, it was held that mere delay in passing upon an application for insurance is not sufficient to create a contract of insurance, and no liability may be imposed upon an insurer prior to the issuance of a policy where no facts are presented which would justify a finding of negligence on the part of the insurer, and it was likewise held that an interval of 16 days between the date of the application and the issuance of the

policy was reasonable. In that case the action was by the beneficiary and based upon the *policy issued*. The injury was prior to the issuance thereof but death resulted from such injury after the issuance of the policy. It was held, by a divided court, that there had been no acceptance of the application by the company prior to the *accident* and that there was no liability since there was no finding or evidence of negligence on the part of the insured.

Defendants state in their brief that while the courts of other jurisdictions are in disagreement as to whether an action in tort, in any case, lies against an insurance company for negligent delay in acting upon an application for insurance, that it has been held in California that an insurance company, involving an action arising out of an accident policy, may be liable upon this theory *when the applicant himself brings the suit*, citing the Stark case; that the appellate courts of California have not passed upon the question whether such negligence involving a life insurance policy gives rise to a cause of action in one other than the applicant; and, specifically, whether such a cause of action, if any, survives and may be brought by either the proposed beneficiary or the personal representative of the deceased applicant; and that this is the sole issue presented by this appeal.

[1] Plaintiffs seem to concede in their brief that with two or three exceptions (Thornton v. National Council Junior Order United American Mechanics, 110 W. Va. 412, 158 S.E. 507; Bekken v. Equitable Life Assurance Soc., 70 N.D. 122, 293 N.W. 200; and Brown v. Missouri State Life Insurance Co., 124 Okl. 155, 254 P. 7), it has been universally held that a cause of action, under circumstances such as here related, may lie in favor of the representative of the estate, but not in favor of the named beneficiary merely by reason of being the beneficiary named in the application. See Forck v. Prudential Insurance Company, 228 Mo.App. 316, 66 S.W.2d 983; Griffith v. New York Life Insurance Co., 101 Cal. 627, 36 P. 113, 40 Am.St.Rep. 96; and Duffy v. Bankers' Life Ass'n, supra. These cases, in effect, hold that negligence is a positive wrong, a breach of duty, and no person may recover damages because of

the wrong save the one to whom the duty was owing. It therefore must be held that the mere fact that the plaintiff wife is named as a beneficiary in the application, in itself, would not give her a right of action against the defendants.

It is argued here, however, that the wife was the beneficiary and also one of the heirs of her husband's estate; that if the beneficiary had a community property interest in the policy or its proceeds and was to be, to that extent, an owner thereof, she would be the person injured, and would be the person who ought to recover, citing *Brown v. Missouri State Life Ins. Co.*, supra; *Grimm v. Grimm*, 26 Cal.2d 173, 157 P.2d 841; *Union Mutual Life Ins. Co. v. Broderick*, 196 Cal. 497, 238 P. 1034; *Modern Woodmen of America v. Gray*, 113 Cal.App. 729, 299 P. 754; and Civ.Code sec. 161a; that under section 574 of the Probate Code on the question of survival of a cause of action, our Supreme Court has held that administrators may maintain an action against any person who has taken or converted to his own use, the property of their intestate, in his lifetime, even though the statute does not use the express words of "survival"; that the section affords the right to maintain actions after the death of those who could have been plaintiffs or defendants if they had lived, *in cases of injury to property*, and to that extent has created a departure from the common law rule that actions *ex delicto* do not survive; that said case specifically holds "that wherever a party has sustained an injury to his estate, whether *in being* or *expectancy*, as distinguished from an injury to his person, such injury is an injury to property within the meaning of that word in the present statute"; and that if it were an injury to the estate, the action survives and the administratrix is authorized to recover in her representative capacity in behalf of the estate.

Defendants and respondents argue that deceased had no cause of action in his lifetime as he suffered no compensable damage to his property or otherwise by reason of any tort of the insurance company during such period, and therefore no right of action existed to survive to his personal representative, citing *Thornton v. National*

Council Junior Order United American Mechanics, 110 W.Va. 412, 158 S.E. 507; that even though the \$21.20 premium paid the agent may have been community property, that money never would have become the property of the company until the policy was issued; that the widow never acquired any community interest in the policy because the application was never accepted; that the action was in tort and not based upon the policy; that under the common law rule an action in tort does not survive the death of the person wronged; that we must look to the statutes for any exception to that rule and the statutes referred to by plaintiffs do not modify the common law rule under the facts here related.

The common law rule, as set forth in *Hunt v. Authier*, 28 Cal.2d 288, at page 290, 169 P.2d 913, at page 915, 171 A.L.R. 1379, is as follows:

"At common law the maxim, *Actio personalis moritur cum persona*, persisted to effect the abatement of all actions and rights of action in trespass. All actions or causes *ex delicto* died with the person by whom or to whom the wrong was done, with the possible exception of the survival of the injured person's estate in cases of asportation of and damage to chattels * * *, and against the tortfeasor's estate for wrongs whereby the latter was benefited. This was apparently the state of the law until 1833 * * *, when by the statute * * * causes of action for injuries to real estate survived to the personal representative of the deceased owner, and causes for injuries to real and personal property survived against the representatives of the deceased tortfeasor. So that what remained of the substance of the common law rule was the nonsurvivability of causes of action for damages to the person as distinguished from damages to property. * * *

"The common law rule that tort actions did not survive has been looked upon with disfavor by the courts. * * *

"Thus the legislative tendency may be said to enlarge rather than to restrict the causes of rights of action which will survive."

Section 4468 of the Political Code provides that the "common law of England so

far as it is not repugnant to or inconsistent with the constitution * * * or laws of this state, is the rule of decision in all of the courts of this state."

Several cases have been cited holding that such a cause of action as here pleaded does survive. See, *Columbian National Life Insurance Co. v. Lemmons*, 96 Okl. 228, 222 P. 255. In that case there was a statute providing that all actions survived which survived at common law, as well as all actions founded on contract, and such an action may be brought by the administrator, notwithstanding the death of the person entitled to the same. In holding that such an action survived, the reasoning is adhered to by the court that there was an implied contract on the part of the company to act upon the application within a reasonable time and that such contract was the basis of the cause of action although it sounded in tort. See, also, *Schouler on Wills*, 6th Ed., Vol. 3, page 2191.

In *Dyer v. Missouri State Life Insurance Co.*, 132 Wash. 378, 232 P. 346, in construing the statute of that state, it was held that the cause of action survived to the administrator. A dissenting justice claimed that the cause of action did not come into existence until the death had occurred and therefore no cause of action accrued to the deceased during his lifetime.

In this state, in *Evans v. Gibson*, 220 Cal. 476, 31 P.2d 389, arising out of a transaction involving an exchange of property, it was held that a cause of action for damages for deceit survived against the tortfeasor's estate; and in *Ponsonby v. Sacramento Suburban Fruit Lands Co.*, 210 Cal. 229, 232, 291 P. 167, it was said that damage resulting from fraud and deceit was an injury "to property" considered in the sense of a lessening or diminution of plaintiff's estate.

In a fraud case, *Vraghizan v. Savings Union Bank & Trust Co.*, 31 Cal.App. 709, 161 P. 507 (hearing denied by the Supreme Court), the question of the survival of the cause of action was discussed at length. It was there said at page 712 of 31 Cal.App., at page 508 of 161 P.: "When the action arises out of a tort, unconnected with contract, and which affects the person only,

and not the estate—such as assault and battery, false imprisonment, malicious prosecution, personal injuries—the action is purely personal, and abates with the death of the wrongdoer. But when the action is *virtually founded upon contract*, though nominally in tort, it survives against the tortfeasor's legal representatives. * * * And in the case of a tort resulting in the wrongful acquisition of personal property, the law imposing on the wrongdoer the duty of returning that property to the owner, the obligation at common law might be treated as quasi contractual, and the neglect to perform it a breach of such contract, * * * in determining the question of survival at common law the substantial cause of action might properly be treated as founded in contract."

Munger v. Equitable Life Assur. Soc. of U. S., D.C., 2 F.Supp. 914, involved an action factually similar to the instant case. Therein many authorities relied upon by plaintiff here are cited and discussed. It was there definitely held that the nature of the action was one in tort and not ex contractu, and it was pointed out that the court would not there discuss the decisions of other jurisdictions because those decisions turned upon the statutes of those particular states in reference to survivorship, and definitely held that under the statutes of Missouri, no recovery could be had because such a tort did not survive the death of the person wronged.

In *Bradley v. Federal Life Ins. Co.*, 295 Ill. 381, 129 N.E. 171, 15 A.L.R. 1021, 1026 and *Stray v. Western States Life Ins. Co.*, 163 Wash. 329, 300 P. 1046, 75 A.L.R. 950, 952, and cases cited thereunder, it appears that the weight of authority is to the effect that mere delay in passing on an application for insurance does not *create a contract of insurance*. *Lucas v. Metropolitan Life Ins. Co.*, 14 Cal.App.2d 676, 58 P.2d 934; *K. C. Working Chemical Co. v. Eureka-Security etc. Ins. Co.*, 82 Cal.App.2d 120, 132, 185 P.2d 832; 1 Cal.Jur. 319 et seq., secs. 12 and 13.

In *Bradley v. Federal Life Ins. Co.*, 295 Ill. 381, 129 N.E. 171, 15 A.L.R. 1021, the court disposed of the case in holding that no right of action survived the death of the

applicant, since *it was admitted* by the parties to the proceeding that no cause of action accrued to the applicant until his death, and neither he nor his estate sustained any injury until that time; that since the death was not caused by the negligence of the defendant and the action was for damages to his estate for failing to pass on his application, and since no cause of action accrued to the applicant in his lifetime, no cause of action survived to his administrator. *Duffy v. Bankers' Life Ass'n of Des Moines*, supra; *Boyer v. State Farmers' Mutual Hail Insurance Company*, 86 Kan. 442, 121 P. 329, 40 L.R.A.,N.S., 164, Ann. Cas.1915A, 671; and other cases are discussed and it is remarked that in the *Duffy* case the question of the action accruing or surviving to the plaintiff did not appear to have been raised; that in the *Boyer* case, involving hail insurance, the insured himself was the party plaintiff.

In *Savage v. Prudential Life Insurance Company*, 154 Miss. 89, 121 So. 487, the administrator of the deceased applicant brought suit alleging negligent delay in acting upon the application. The court held there was no cause of action.

Section 574 of the Probate Code authorizes the administrator to maintain an action against any person who has taken the property of the testator *in his lifetime*. If the applicant did have a cause of action against defendants during his lifetime, even if sounding in tort, but connected with contract, either express or implied, said cause of action survives to the administratrix of the estate.

[2] A cause of action has been defined as the obligation from which the action springs, and quoting from *Pomeroy, Remedies and Remedial Rights*, sec. 452 et seq.: " * * * a cause of action arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests." Of these elements, the primary right and duty and the delict or wrong constitute the cause of action in the legal sense of the term and as it is used in the code states. *McKee v. Dodd*, 152 Cal. 637, 93 P. 854, 14 L.R.A., N.S., 780, 125 Am.St.Rep. 82; 1 Cal.Jur.

p. 307, sec. 2. The cause of action is to be distinguished from the remedy which is the means by which the obligation or the corresponding action is effectuated, and also from the relief sought. *Frost v. Witter*, 132 Cal. 421, 64 P. 705, 84 Am.St.Rep. 53; *Lemon v. Hubbard*, 10 Cal.App. 471, 102 P. 554; *Hurwitz v. Gross*, 5 Cal.App. 614, 91 P. 109.

[3, 4] The term "accrue", as applied to a cause of action, means to arrive; to commence; to come into existence; to become a present enforceable demand. A cause of action accrues at the moment when the party owning it is entitled to begin and prosecute an action thereon. *Los Angeles County v. Metropolitan Casualty Insurance Company*, 135 Cal.App. 26, 26 P.2d 699.

The reasoning applied in the case of *Columbian National Life Insurance Company v. Lemmons*, supra, seems quite appropriate to a proper disposition of this case. There it was said, 222 P. at page 258:

" * * * The cause of action would survive to the administrator if founded on a contract. The same rule applies in actions on implied or quasi contracts, although founded upon a tort. * * *

"Was the cause of action founded on contract? We think it may well be held that there was an implied contract if not a legal contract * * * on the part of the insurance company to act on the application within a reasonable time; that is, either to accept the application and issue the policy, or reject the same, so that the applicant could secure insurance elsewhere, and that the consideration for said contract was the making of the application at the solicitation of the agent, the submission by the applicant at the request of the agent to an examination by the examining physician for said company, and the payment of the premium for the first one-half year, which the receipt provided was for insurance from the date of said payment in case the policy was issued.

"Does the applicant acquire no rights by making an application, submitting to an examination, making a deposit, and forbearing to obtain other insurance, on the faith induced by the agent and the company that the application would be duly

forwarded and acted upon? May the company with impunity receive an application and deposit, and take no action whatever? Those engaged in the insurance business need no reminding of the importance of prompt action in such matters. The applicant in the instant case had done all she could do, and had met all the requirements of the company in connection with an application for insurance, and then can it be said the company owed her no duty at all? We think not. * * * the insurance company was bound by the receipt it issued * * * to act within a reasonable time upon said application, and its alleged failure so to do is the basis of the plaintiff's cause of action, and, although said action sounds in tort, it was based primarily upon said contract" and under the statutes of Oklahoma "the action therefore survived to and was properly brought by the administrator of the applicant's estate."

In *Hunt v. Authier*, supra, 28 Cal.2d at page 296, 169 P.2d at page 918, the majority opinion cites and adopts the definition of property under 50 Corpus Juris, p. 736, sec. 7, as being "Generally, the subjects of property comprise all valuable rights or interests protected by law * * *." and states: "The Legislature has definitely spoken by the amendment of our statute so as to enlarge the class of property rights and interests which shall receive protection in the event of the death of the wrongdoer. Where the Legislature has so provided the courts should not countenance a tortious deprivation of property without redress."

[5] Therefore it appears from the pleadings that a "cause of action" did exist immediately prior to the applicant's death and that although sounding in tort the cause of action was connected with and primarily based upon contract, either express or implied and that the applicant

sustained an injury to his property and estate, either in being or expectancy, as distinguished from an injury to his person, and therefore a cause of action survived to the administrator of his estate. As to the second cause of action, therefore, the demurrer should have been overruled and the defendants given proper time to plead thereto.

The widow's claim to a cause of action, in the first count, is founded upon the theory that she was the beneficiary named in the application. We have disposed of this claim adversely to that contention unless the pleadings are broad enough to definitely show that at all times she had some community property right in and to the policy if issued, and still has some community property right in and to the applicant's cause of action. The only allegation in the complaint is that the *applicant* paid the agent \$21.20 as the first premium on the policy to be issued. There is no allegation that the amount paid was from community funds or that the wife had any community interest on which she could base a cause of action.

[6] In *Union Mutual Life Insurance Co. v. Broderick*, 196 Cal. 497, 238 P. 1034, it was held that where the premiums of an insurance policy issued on the life of the husband after coverture are paid entirely from community funds, the policy is a community asset. See, also, *Modern Woodmen of America v. Gray*, 113 Cal.App. 729, 299 P. 754; Probate Code secs. 201 and 201.5; Civ.Code secs. 161a, 163, 164 and 687. In the absence of proper pleading, the demurrer to that cause of action set forth in the first count should be sustained with leave to amend, if plaintiff be so advised.

The judgment of dismissal is reversed.

BARNARD, P. J., and MUSSELL, Justice pro tem., concur.

ROZZI v. ROZZI.

Civ. 13413.

District Court of Appeal, First District,
Division 2, California.

July 2, 1948.

Rehearing Denied July 31, 1948.

Hearing Denied Aug. 26, 1948.

1. Divorce ⇨252

Where divorce rests on cruelty, the innocent wife is entitled to more than one-half of the community property.

2. Appeal and error ⇨901

A reviewing court will not go out to search for error, and error will not be presumed from fact that appellant lost case on trial of issues.

3. Divorce ⇨286

Where wife was granted a divorce for cruelty and awarded the home and furniture and husband awarded other property, and wife offered no proof regarding value of the property assigned to husband, appellate court would not presume that wife received less than one-half of the community property to which she was entitled.

4. Divorce ⇨252

Where wife was awarded divorce for cruelty, and issue involved division of community property including husband's interest in a partnership, record did not indicate that trial court erred in treating husband's brother as a partner in the business on ground that arrangement under which the husband took brother in as a partner by which brother was to work without salary until wages earned equalled the one-third interest in the business was a fraudulent transfer of an interest in community property without consideration.

5. Divorce ⇨287

Where wife was granted a divorce for cruelty and issue involved division of community property, and an error in division of property was result of carelessness in preparation of findings and decree and the evidence was undisputed, the cause would be remanded to the trial court to prepare proper findings and decree.

6. Divorce ⇨288

Where blame for confusion in findings and decree in dividing community prop-

erty in divorce action seemed to rest upon the respondent husband and it was necessary to remand the cause for trial court to prepare a proper decree, appellant wife was entitled to have her costs on appeal.

7. Divorce ⇨288

Where wife's appeal from that part of divorce decree awarding and disposing of community property was not meritorious, and wife could not expect any material relief from reversal of decree because the errors referred to affected only the respective rights of defendant husband and husband's co-partner in a business, trial court did not abuse discretion in denying wife additional counsel fees on appeal.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Divorce action by Gladys Rozzi against Gildo Rozzi wherein defendant cross-complained. From that part of decree awarding and disposing of community property, and from an order denying plaintiff's motion for an order allowing her counsel fees on appeal, plaintiff appeals.

Order affirmed and decree reversed with directions.

Joseph F. O'Malley, of Burlingame, for appellant.

R. A. Rapsey, of San Bruno, for respondent.

NOURSE, Presiding Justice.

This is an appeal in a divorce action from that part of the judgment of the trial court awarding and disposing of the community property and from an order denying plaintiff's motion for an order allowing her counsel fees on appeal.

Plaintiff, Gladys Rozzi, and defendant, Gildo Rozzi, were married in June, 1934, and separated October, 1944. On June 29, 1945, plaintiff filed her first amended complaint for divorce on the grounds of extreme cruelty. Defendant cross-complained, pleading specially their interests in community property including an interest in the Model Appliance and Furniture Store operated in partnership by defendant and his brother.

The interlocutory decree divided the community property as follows: To the plaintiff, the home and household furniture; to the defendant the balance of the community property consisting of moneys in savings and commercial accounts; War Savings Bonds; moving picture camera with projector; an airplane; one 1940 Plymouth four-door sedan; a Dodge truck, insurance policies of no surrender value; and impliedly a two-thirds interest in the Model Appliance and Furniture Store.

[1-3] The facts, as to the issue of community property, are: Plaintiff was awarded the home and furniture valued at \$12,500 and also \$125 a month alimony. Defendant was awarded what was intended to be a two-thirds interest in the partnership, a two-thirds interest in bonds belonging to the partnership, an airplane and cash in bank, all estimated to be worth about \$12,538. The value of the home and furniture was undisputed. The value of the various interests awarded to defendant was speculative and uncertain. The plaintiff offered no proof regarding the value of any of the properties assigned to the defendant, and we cannot say on this state of the record that the trial court erred. Though it is the rule that the innocent wife is entitled to more than one-half of the community property, when the divorce rests on cruelty, the difference between true value and speculative value is well recognized. On appeal the reviewing court is not required to guess that one party really got more "value" through the award when there is no evidence to support it. To state the proposition differently—a reviewing court will not go out to search for error, and error will not be presumed from the fact that the appellant lost the case on the trial of the issues. Error on appeal is never a matter of mere conjecture. For us to hold that error was committed here it would be necessary to determine, as a fact, that the speculative estimates placed on the properties awarded the respondent represented a "value" equal or in excess of the value of the properties awarded appellant.

[4] Appellant argues that the court erred in treating respondent's brother as

a partner in the business. The evidence is that appellant took in his brother as a partner on a contract by which the latter was to work without salary until the wages earned would equal a one-third interest in the business. This was not a fraudulent transfer of an interest in community property without consideration. The services performed by the brother were some consideration—whether adequate is not disclosed because appellant offered no evidence.

Some confusion arises from the ambiguity of the findings relating to the portion of the personalty awarded to respondents. In a minute order entered January 25, 1946, following a hearing without a court reporter, a decree was ordered for appellant granting her alimony and attorney's fees and directing "The airplane, business, monies in bank, movie camera and personal property in his possession awarded to defendant." In the findings filed June 20, 1946, the community property awarded to respondent was found to consist of "moneys in savings and commercial accounts * * * one-third of which however is the property of (respondent's brother) * * * War Savings Bonds; (and other personal property) * * *". Immediately following this it was found that all this property should be awarded to respondent, including his "interest" in the partnership. In the interlocutory decree filed July 8, 1946, the respondent was awarded "moneys in savings and commercial accounts; War Savings Bonds; moving picture camera with projector; an airplane; one 1940 Plymouth four-door Sedan automobile; a Dodge Truck; insurance policies of no surrender value; and the Model Appliance & Furniture Store at South San Francisco, California."

The decree was defective in awarding respondent the whole of the partnership interest since the findings and undisputed evidence disclose that he owned but two-thirds of it. It was also defective and uncertain in its inclusion of the simple expression "War Savings Bonds." No finding was made as to the amount of war bonds held by the community. The undisputed evidence was that bonds of the value of \$9000 had been acquired by the

partnership during the prosperous war years, but that they had been sold and the proceeds returned to the business. No evidence was offered tending to show that any of these bonds were in the possession of respondent at the time of the trial. And the evidence was also undisputed that respondent's brother owned one-third of the partnership (and hence one-third of the bonds if any were still held by the partnership as well as one-third of the partnership assets). In the concurring opinion filed herein it was erroneously assumed that the value of these bonds held at the time of the trial was \$9000, whereas there was no evidence of such value.

It would serve no purpose to reverse the cause for further proceedings since the evidence is undisputed and the error, if material, is clearly a result of carelessness in the preparation of the findings and decree.

[5,6] The cause is therefore remanded to the trial court with directions to amend its findings so as to find that the community property consists (in addition to that heretofore found) of a "two-thirds interest in the partnership business and assets including the War Savings Bonds, if any were held by the partnership" and that the interlocutory decree be amended nunc pro tunc accordingly. Since blame for the confusion in the findings and decree seems to rest on respondent, the appellant should have her costs on this appeal.

[7] The further point is raised that the court erred in denying appellant counsel fees on this appeal. From what we have said it is apparent that the appeal was not meritorious and that appellant could not anticipate any material relief from a reversal of the decree. The errors referred to affected the respective rights of the respondent and his co-partner only. Hence there was no abuse of discretion in denying appellant additional counsel fees on this appeal. *Argabrite v. Argabrite*, 56 Cal.App. 650, 206 P. 81.

The order is affirmed. The decree is reversed with the directions heretofore noted.

GOODELL, J., concurs.

DOOLING, Justice.

I concur.

The appellant relies on the rule often repeated in the decisions that when a divorce is granted on the ground of adultery or extreme cruelty the innocent spouse is entitled to more than one-half of the community property. (*Arnold v. Arnold*, 76 Cal.App.2d 877, and cases cited at page 884, 174 P.2d 674.)

The appellant was awarded the home and furniture, valued at \$12,500. The respondent was awarded the balance of the community property described in the decree in the following language:

"Moneys in savings and commercial accounts; War Savings Bonds; Moving picture camera with projector; an airplane; one 1940 Plymouth four-door Sedan automobile; a Dodge truck; insurance policies of no surrender value; and the Model Appliance Furniture Store at South San Francisco, California."

The moving picture camera with projector may be disregarded since the record shows a stipulation that it is the separate property of respondent. The only evidence of the value of the community property was given by the respondent. I cannot agree that it was speculative. It was explicit and must be taken as true against him on this appeal. His testimony was that the bank accounts aggregate \$4959; that the business has a value of \$2800; that the airplane's value is \$1500; and that war savings bonds of the value of \$9000 had been converted to cash. He further testified that by an arrangement with his brother the brother had acquired a one-third interest in the business and its proceeds, which included the bank accounts and the proceeds of the bonds. He also testified that the value of the home and furniture was \$12,500.

The trial court found that one-third of the bank accounts was the property of the brother but failed to make a like finding with regard to the business and the bonds or their proceeds. Taking the findings literally the community property awarded to respondent consisted of $\frac{2}{3}$ of the bank accounts amounting to \$3306; the business (assuming the automobile and truck to be

included in its value), \$2800; the airplane, \$1500; and the proceeds of the war savings bonds (described in the findings and decree as "War Savings Bonds"), \$9000. This totals \$16,606 as against \$12,500 awarded to appellant.

It is obvious however that in its findings the trial court ignored the only evidence on the subject in failing to find that only $\frac{2}{3}$ of the business and $\frac{2}{3}$ of the war bonds belonged to the community. If the findings are amended to conform to the proof in this regard the total value of the community property awarded to respondent amounts to \$12,672. This amount is so close to the \$12,500 awarded to appellant that we may properly treat the division of the community property as having been in an equal amount to each party.

In addition to awarding the house and furniture to appellant the court awarded her \$125 per month for her support and the support of the two minor children of the parties. In *Marshall v. Marshall*, 196 Cal. 761, at page 765, 239 P. 36, 37, it is stated that the court may "award her alimony in lieu of a division of the property." It is also said in *Arnold v. Arnold*, supra, 76 Cal.App.2d 877, at page 881, 174 P.2d 674, 676: "The rule drawn from the cases hereinafter cited is that the greater the offense the larger the proportion of the community property that must be awarded to the innocent spouse;—where the acts of cruelty are of a flagrant character and have extended over a long period of time the portion of the community property awarded to the nonoffending party should be greater than if the acts were more trivial yet sufficient to warrant the granting of a divorce."

The acts of cruelty proved in this case were not of a flagrant character, consisting almost entirely of the respondent's absenting himself from their home without appellant's consent. Since no appeal was taken by respondent we must assume their sufficiency to support the decree of divorce but they are little more than barely sufficient for that purpose.

The court was doubtless bound to make an award of support money for the children but it could have denied any alimony
CAL.REP.195-196 P.2d-11

to appellant and I am satisfied to concur in the conclusion of this court on the ground that no abuse of discretion is shown, in view of the relatively innocuous acts of cruelty proved, in dividing the community property equally and making, in lieu of a greater award, an order for the payment of alimony to the wife.

The evidence shows that the respondent entered into an agreement with his brother by which a one-third interest in the business and its proceeds was transferred to the brother in consideration of services rendered by the brother to the business. There is no showing that this arrangement was not made in good faith or that it was unfair to the community.



PEOPLE v. MACHABIE et al.
Cr. 4209.

District Court of Appeal, Second District,
Division 3, California.

July 13, 1948.

Hearing Granted Aug. 12, 1948.*

1. Burglary ⇨42(3)
Larceny ⇨64(7)

Evidence showing that defendant had arranged for rental of garage in which stolen articles were stored had called at lessor's home late at night to inform him that some fellows were bringing some stuff to put in the garage and not to be alarmed if he should hear some noise out there and also showing that first defendant was engaged in a business in which stolen articles could be used was sufficient to sustain conviction of burglary of the second degree and grand theft.

2. Criminal law ⇨1144(13)

The evidence on appeal in criminal case should be viewed in the light most favorable to the prosecution.

3. Criminal law ⇨554

The testimony of accused may be so contradicted by circumstantial evidence
* Subsequent opinion 198 P.2d 681.

that the trier of facts need not believe it.

4. Larceny ☞64(1)

Possession of stolen property shortly after it was stolen is a circumstance pointing to the guilt of the accused.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Mitchell Machabie and William O. Reed were convicted of burglary of second degree and grand theft and defendant last named appeals from an order denying his motion for a new trial after proceedings were suspended as to him and he was placed on probation.

Affirmed.

Crispus A. Wright, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., John F. Hassler, Deputy Atty. Gen. and Wm. E. Simpson, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

WOOD, Justice.

Defendant Reed and one Machabie were convicted of burglary of the second degree and grand theft. Trial by jury was waived. Proceedings were suspended as to Reed and he was placed on probation. Reed appeals from an order denying his motion for a new trial.

He contends that the evidence was not sufficient to justify the decision. The evidence shows that between the hours of 6:15 p. m. on March 5, 1947, and 8:30 a. m. on March 6, 1947, burglary and grand theft were committed at the warehouse of S. L. Abbott Company in Los Angeles. The skylight of the building was broken and the lock on a rear-entrance door at the delivery "pit" had been pried off, and 98 sacks of pure shellac of an approximate value of \$10,000—each sack weighing 164 pounds—had been taken from the building. One week later 88 of those sacks of shellac were found in a garage at 10501 Zamorra Street, Watts, California. This kind of shellac is used principally in the production of the phonograph record material

that is known as "the biscuits" in the phonograph record manufacturing business.

Mr. Jackson, a witness called by the plaintiff, testified that he resided at 10501 Zamorra Street in Watts, and that he operated a service station at 5251 Central Avenue, Los Angeles; that on March 5, 1947, about 1:00 p. m. appellant, whom he had known about three years, came to the service station and told him that he wanted to rent a garage "to store some stuff in"; that it was "arranged" to rent the garage, which did not have a roof on it, until the roof was put on and the owner was ready to use it; that between 11:00 p. m. on March 5th and 1:00 a. m. on March 6th appellant came to the front door of his (witness') house and told him that some "fellows" were bringing "some stuff" to put in the garage and "don't be alarmed" if he should "hear some noise out there, don't think someone was breaking in the house"; that after appellant left, he (witness) heard the motor of a truck in the driveway; that on March 9th appellant went to the service station and paid the \$8 rent, and at that time, in response to Jackson's request that the garage be vacated, appellant said he would have the stuff moved out the next day, March 10th; that he saw appellant, the next time, on March 12th at appellant's home when he (witness) went there with police officers.

Police officer Goldstone testified that he, another officer, and Mr. Jackson, went to the home of appellant on March 12th and knocked on the door; that some one, in response thereto, said, "Who is there?"; that Jackson then said, "Jackson, the garage man"; that the door was then opened by appellant; that appellant, in response to an inquiry as to what his occupation was, said that he was in the phonograph record business at 709 East 29th Street; that they took appellant to that address and observed that phonograph records were being made there; and that Jackson said, in the presence of appellant, that he had rented the garage to appellant.

Appellant testified that his codefendant and friend, Machabie, had told him that some fellows wanted to hire him (Machabie) to do some hauling for them; that, as a favor to Machabie and to aid him in

getting the hauling job, he told Jackson that some fellows wanted to rent a garage for storage for a short time; that Jackson replied that he had a partially finished garage and if appellant would "stand good for the rent" he would rent it for a short time for \$8; that appellant told Machabie where the garage was located; that appellant went to Jackson's house about 10:30 p. m. and "told him the fellows were coming to bring something out there," and that perhaps he also told him "not to be alarmed, that they were coming to store something in his garage"; that Machabie gave appellant the \$8 rent; that when Jackson told him that he wanted him to get the stuff out of the garage, he replied that he "would try to see the fellows and tell them his desires"; that appellant was in the business of manufacturing phonograph records; that he did not use shellac in manufacturing the records; that he used "a biscuit" from which he pressed the records; that he did not know anything about the burglary, and was not implicated in any burglary; that when the officers asked him some questions he told them that he did not know what it was all about and that if they were attempting to implicate him in something he would appreciate it if they would speak with his attorney.

[1-4] It is clear that there was a burglary in the warehouse and that grand theft was committed in taking the shellac therefrom. Although the evidence as to appellant's participation in the crimes was circumstantial, it was sufficient to support the judgment. The evidence should be viewed in the light most favorable to the prosecution. *People v. Torrillo*, 60 Cal.App.2d 755, 757, 141 P.2d 472. The testimony of the accused may be so contradicted by circumstantial evidence that the trier of the facts need not believe it. *People v. Borrego*, 211 Cal. 759, 765, 297 P. 17. There were various circumstances from which it could reasonably be inferred that appellant aided and abetted in the commission of the crimes. Immediately after the crimes were committed the shellac was taken to the garage which appellant had rented a few hours previously for a short time only. Possession of stolen property, shortly after it is stolen, is a circumstance

pointing to the guilt of the accused. *People v. Carroll*, 79 Cal.App.2d 146, 148, 179 P.2d 75. His explanation of his conduct in renting, and in assuming the rental responsibilities of, the garage was unsatisfactory. In the afternoon preceding the night the crimes were committed, the appellant, for and on behalf of some unknown "fellows," rented a roofless garage as a storage place for some unidentified "stuff" or "something," merely for the purpose, according to his testimony, of aiding his codefendant Machabie in getting a job of hauling something to such a place as appellant might rent. He was present at the garage premises about midnight immediately before the delivery of the stolen property to the garage, and aroused the garage owner from his sleep, and announced to him that "some fellows" were then bringing "some stuff" to the garage. His explanation of that conduct, to the effect that his only interest in being there under such unusual circumstances was to warn the garage owner not to be alarmed, was unsatisfactory. That explanation, in view of other testimony by him, means that he was so solicitous of the welfare of the garage owner that about midnight he left his work at his phonograph record manufacturing company on 29th Street in Los Angeles, where he was working the night shift, and traveled several miles to the garage premises in Watts. Of course, his midnight trip to the garage premises, while the "stuff" was being delivered to the garage, had no relation to the matter of helping Machabie get the hauling job—it appearing that prior to that time Machabie or some one had obtained the job. His statement, made about three days after the property had been delivered to the garage, that he would have it removed the next day after the garage owner asked him to move it, indicates that he had an interest in the transaction other than that of helping Machabie get a hauling job. Another circumstance to be considered is that pure shellac is used principally in manufacturing phonograph record material, and that appellant was in the business of manufacturing phonograph records. Another material circumstance is that when the arresting officers asked him questions he replied that if they were attempting to

implicate him he would appreciate it if they would speak with his attorney. His codefendant did not testify, and of course did not corroborate his testimony. None of the "fellows," for whom he allegedly rented the garage, was called as a witness. As above stated, it was for the trier of the facts to determine whether the testimony of appellant should be believed.

The order denying the motion for a new trial is affirmed.

SHINN, Acting P. J., and McCOMB, J. assigned, concur.



86 Cal.App.2d 723

McNEIL et al. v. HIGGINS.

Civ. 16339.

District Court of Appeal, Second District,
Division 2, California.

July 13, 1948.

Hearing Denied Sept. 8, 1948.

1. Forcible entry and detainer ⇨29(4)

In forcible entry and detainer action, evidence was insufficient to establish that plaintiff consented to defendant's possession of premises. Code Civ.Proc. § 1159.

2. Forcible entry and detainer ⇨4

Where defendant had first agreed to rent property as it was, but thereafter refused to occupy it because it was in bad condition, defendant had no contract and his subsequent entry, after plaintiff had renovated premises, by entering open window was by exercise of unlawful force and entitled plaintiff to damages for forcible entry and detainer. Code Civ. Proc. §§ 1159, 1160.

3. Pleading ⇨364(1)

Striking of portions of defendant's answer was not error where answer contained repetitious, irrelevant counter charges and allegations of improper motive attributable to plaintiff.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Forcible entry and detainer action by Mack McNeil and another against George D. Higgins. Judgment for the plaintiffs and the defendant appeals.

Judgment affirmed.

George D. Higgins, in pro. per. and John F. Poole, both of Los Angeles, for appellant.

W. L. Pollard, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The judgment entered was in treble damages by reason of appellant's forcible entry and forcible detainer. (Code Civ.Proc., secs. 1159, 1160.) The action was tried by the court without a jury. Appellant demands a reversal upon the grounds (1) that the findings of forcible entry and forcible detainer were not supported by evidence and (2) that the court denied him a patient hearing and a fair trial. Such contentions are without support.

On December 13, 1945, Lucile McNeil as owner of the premises wrote to appellant as follows: "You may not find it up to your expectations. But my promise to let you have it still stands, of course. It will have to be taken as is, however. I do not intend to do a thing with it in the way of repairs or redecoration. So make sure it will suit you and let me know." On January 3, 1946, Higgins replied: "* * *" and therefore we accept your proposition to rent it unfurnished at the rental asked of \$40 per month." On May 13, 1946, after prior tenants had vacated the premises, the property was visited by both parties and found to be filthy and badly dilapidated. Appellant then refused to occupy the house. Respondents thereupon caused the house to be thoroughly renovated during the succeeding month but refused to permit appellant to enter. Not to be hindered by locked doors, on July 25, 1946, in the absence of the owner, according to his own testimony he "* * *" went around and entered an open window. There was an open window, and I crawled through the open window into the kitchen and unlocked the door." He conceded that he had no instructions

from Mrs. McNeil authorizing his entry, other than the asserted lease as outlined in the above quoted letters. Over the protestations of respondents appellant continued in occupancy for ten months without the payment of rent.

[1, 2] Appellant contends that Mrs. McNeil consented by word and deed to his possession of the premises. He urged the same contention at the trial and renewed it on his motion for a new trial. The court duly made finding against him and denied his motion for a new trial. A gleaning of the entire record fails to disclose any document or testimony other than his own which might substantiate his position. He further argues that he had a written lease and that Lucile McNiel modified it by an executed oral agreement. But upon that contention there is nothing in the record but appellant's assertions at the trial to prove such executed agreement. Mrs. McNeil denied making such agreement, and her actions prior to July 25, 1946, indicate only a contrary intention. Therefore appellant's entry by window on that date was without any express or implied authority from the owner and in contravention of section 1159, *supra*. Having rejected Mrs. McNeil's offer to lease the property "as is" at a specific rental appellant had no contract at all. Civil Code, sec. 1585; *Niles v. Hancock*, 140 Cal. 157, 162, 73 P. 840; *Jones-McLaughlin Inc. v. Kelly*, 100 Cal. App. 315, 319, 279 P. 1076. His entry was therefore gained by exercise of unlawful force.

[3] As other grounds for reversal appellant urges that the court permitted itself to be dominated by plaintiff's attorney and refused to accord defendant a patient hearing and a fair trial. But the reporter's transcript discloses that Judge Rhodes exercised only the utmost patience and consideration for an attorney who insisted on pleading his own cause. The striking of portions of defendant's answer on motion was not error when, as here, the answer contained repetitious irrelevant counter charges and allegations of improper motive attributable to plaintiff.

The authorities cited by appellant in no way bear upon any legal question presented

on this appeal and therefore warrant no discussion.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.



86 Cal.App.2d 740

WOLAS v. CRESCENT COMMERCIAL CORPORATION.

Civ. 16312.

District Court of Appeal, Second District,
Division 1, California.

July 14, 1948.

Rehearing Denied Aug. 10, 1948.

Hearing Denied Sept. 8, 1948.

1. Action ⇨6

To state a cause of action for relief under the declaratory relief statute, facts must be alleged from which court may determine that an actual controversy relating to the legal rights and duties of respective parties to a deed, will or other written instrument, or under a contract, exists. Code Civ.Proc. § 1060.

2. Action ⇨6

A complaint alleging that money deposit made by plaintiff buyer of goods from defendant was in nature of trust fund which defendant was required to hold subject to obligation to return to plaintiff upon failure of defendant to perform obligations under agreements, but that defendant had invested the money in a commercial enterprise without plaintiff's consent, disclosed an "actual controversy" within declaratory relief statute. Code Civ.Proc. § 1060.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Controversy".

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by Irving Wolos against Crescent Commercial Corporation, a corporation, for declaratory relief, cancellation of agree-

ments, and recovery of money deposited with defendant. From an adverse judgment, plaintiff appeals.

Reversed.

Aaron Sapiro, of Los Angeles, for appellant.

Don Lake, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal by plaintiff from a judgment entered against him after the court had sustained defendant's demurrer to the second amended complaint without leave to amend, in an action for declaratory relief.

Said second amended complaint alleges that on May 14, 1946, by virtue of a written contract, defendant agreed to sell and plaintiff agreed to buy 1,800 cases of beer, delivery to be made in 18 equal monthly installments and the sale price thereof to become due upon delivery; the first installment to be delivered in June, 1946, and the last installment in November, 1947; defendant to acquire the beer from time to time as might be necessary to enable it to fulfill its obligation under said agreement:

That on said date, May 14, 1946, plaintiff deposited with defendant \$1,800 "as a cash deposit, to be held by the defendant corporation by way of bond or guaranty and to be credited against the sale price, upon consummation of the sale; said deposit being made in accordance with the following provision printed on the back of the order constituting the aforesaid written agreement:

"2. The Seller hereby acknowledges receipt from the Buyer of the sum of \$1800.00 * * * as a deposit at the rate of One Dollar per case to be applied as against the total cost of the merchandise purchased. In the event the Buyer fails to make the payments for the merchandise purchased herein or does not perform as herein provided, or does not accept shipment of said merchandise, then the aforesaid deposit paid by Buyer shall be retained by Seller for its agreed cost and expense incurred herein. Pending delivery of the merchandise herein purchased, Seller here-

by agrees to pay to Buyer 5% interest, per annum, on the deposit hereinabove mentioned, such interest to be paid quarterly. As deliveries are made the amount of deposit shall be decreased in accordance with this agreement and interest shall be paid only on the amount remaining in the hands of Seller."

"And that the said sum of \$1800.00 did not at any time become the property of defendant corporation free from claim of plaintiff, but that the said fund remained the money and property of plaintiff at all times and that the possession of defendant corporation was solely as a mere depository and as a Trustee for plaintiff; and that the said sum of money was to be returned to plaintiff upon any failure by defendant to perform its obligations under the terms of the said agreement; and that the said sum of \$1800.00, as a deposit, was to be held in trust for plaintiff, and was required to be held by defendant corporation available for return to plaintiff at all times, in the event of non-compliance with or non-completion of the said contract."

It is further alleged that defendant delivered 550 cases of beer and plaintiff received a credit for \$550 against the cost price thereof;

That on July 26, 1946, plaintiff deposited with defendant \$1,800 under the same terms and conditions as above set forth; "and that no deliveries of beer were made at any time under the said second agreement and that plaintiff has received no credit of any kind and no return of funds out of the said second deposit."

That on December 26, 1946, plaintiff and defendant executed three separate documents, modifying the previous agreements, by extending defendant's time of performance as to the delivery of beer and further providing that all deposit moneys would remain with defendant without payment of interest; that the first of these three said documents entitled "Modification of Contract to Sell" contained the following provision: "Be it therefore agreed between the parties that the time for performance * * * be hereby extended to September, 1947, and that from and after the date of

this agreement, interest * * * on the deposit monies in the amount of \$1,300.00 now held by the Seller to the credit of the Buyer, shall cease and are hereby waived by the Buyer; and, the Seller hereby agrees to refund said moneys now on deposit with the Seller, to the Buyer, upon the payment of the total cost of the merchandise herein purchased." That the second modification agreement referred to a deposit of \$1,500 and the third to a deposit of \$250, the three modification agreements covering a total of \$3,050, "as sums admitted by defendant corporation being held by it as deposit moneys to the credit of plaintiff at said date, December 26, 1946 * * *."

That defendant has delivered 550 cases of beer to plaintiff under said agreements and that "plaintiff has paid defendant corporation in full therefor, in accordance with the terms of the aforesaid agreements; and that, at all times, plaintiff has performed all of the obligations incumbent upon him by reason of the said purchase orders and by reason of the said 'Modifications'; and that he has fully paid for all merchandise delivered to him thereunder; and has accepted shipment of all merchandise ordered and actually delivered under said purchase orders; and that the deposits made by him under the said purchase orders have not been repaid to him or withdrawn by him up to the date hereof and that, in accordance with the said agreements, the said moneys were required to be held by defendant corporation and were required to be available for repayment to the plaintiff at any time thereafter."

That "when and as the said moneys were received by said defendant * * * (it) was obligated to hold such funds on hand constantly for the benefit of plaintiff; but that the defendant did not keep the moneys on hand or deposit the same as a trust fund or otherwise in this vicinity or elsewhere; but that the defendant * * * utilized the said funds, together with similar funds from other persons, and other funds of the defendant corporation, in the purchase of a brewery located outside of the State of California, and thereby subjected said funds to the hazard of loss of

diminution by reason of such investment, all without the knowledge or consent of the plaintiff herein; and that the said use of the said funds and the investment of the said moneys of plaintiff in physical properties outside of the State of California constituted a violation and breach of all of the aforesaid agreements and constituted a violation of the obligation of defendant corporation as the holder of such funds on deposit."

That on May 20, 1947, plaintiff demanded a return of the said funds from defendant, which has refused to return or repay said money or any part thereof; and that the entire sum of \$3,050 is now due, owing and unpaid from defendant to plaintiff.

That by reason of the foregoing, "a dispute and actual controversy have arisen" between the parties "with respect to the said deposits and the rights, responsibilities and duties and legal obligations of the parties hereto under the said agreements and transactions.

"That the said dispute and controversy more particularly consists of the following points:

"(1) Plaintiff contends that the said funds were in the nature of trust funds and were required to be held and kept by defendant corporation on deposit as a special trust fund, belonging to plaintiff and other persons like plaintiff; and that defendant corporation has no right or power to invest the said moneys or any portion thereof in any real property or in any other business whatsoever, particularly in any business that was and is attended with commercial risk and obligations.

"(2) Defendant corporation denies that it was required to keep the said moneys on hand and contends that it had the right and privilege to use said moneys for any of these purposes, within its discretion."

Wherefore, plaintiff prays that the court make a declaration of the rights, obligations and duties of the parties (1) that defendant restore to plaintiff the sums of money paid to it as deposits; (2) that the agreements between the parties be cancelled and annulled because of violation of rights of plaintiff by defendant in the

improper use of said deposits; (3) that defendant be ordered to pay to plaintiff the sum of \$3,050, with interest from May 20, 1947.

Defendant's demurrer was made upon the following grounds: (1) that said complaint does not state facts sufficient to constitute a cause of action; (2) "That plaintiff's cause of action is apparently based upon a claim that advanced payments upon the purchase of merchandise were to be held in trust. No such arrangement appears in the contract, therefore, no cause of action can be stated, and request is hereby made that the demurrer be sustained without leave to amend."

Section 1060 of the Code of Civil Procedure known as the declaratory relief statute provides: "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. * * *

[1] To state a cause of action for declaratory relief under the quoted section, one invoking the remedy must allege facts from which the court may determine that an actual controversy relating to the legal rights and duties of the respective parties exists. *Lord v. Garland*, 27 Cal.2d 840, 851, 168 P.2d 5. Again in *Columbia Pictures Corp. v. DeToth*, 26 Cal.2d 753, 760, 161 P.2d 217, 220, 162 A.L.R. 747, the rule is stated: "A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract and requests that these rights and duties be adjudged by the court. *Maguire v. Hiber-*

nia Savings & Loan Soc., 23 Cal.2d 719, and cases cited at page 728, 146 P.2d 673, 151 A.L.R. 1062."

In *Maguire v. Hibernia Savings & Loan Soc.*, supra, the following appears in 23 Cal.2d at page 728, 146 P.2d at page 677: "Plaintiffs contend that the trial court erred in sustaining a demurrer to the complaint for want of facts. A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. (Citation of authorities.) Both the first and second counts of the complaint herein allege that the existence in plaintiffs or their predecessor of the rights asserted by them is denied by defendants and that defendants intend to convert the reserve fund into capital stock and distribute the same in disregard of plaintiffs' claimed rights; both counts set forth the written instruments upon which plaintiffs base their controverted claims and pray for a judicial construction thereof. The complaint, therefore, shows that there is an actual controversy relating to the legal rights and duties of the respective parties."

In *Coast Counties Real Estate & Inv. Co. v. Monterey County Water Works*, 96 Cal. App. 269, 277, 280, 274 P. 415, 418, wherein plaintiff alleged it had deposited with defendant a sum of money to be held by the latter as a guarantee that a certain venture, to wit: a water system operated by defendant would become a paying investment, and upon the happening of such event the money was to be repaid; it being further alleged that defendant claimed it was not obligated to return such deposit, the court stated: "The word 'deposit' in itself conveys the idea of a conditional delivery and is universally so understood. * * * Under the contract as pleaded the money was held by defendant purely by way of bond or guarantee, and at no time became the property of defendant free from claim of plaintiff. At all times it remained the money of plaintiff and the possession of defendant was as a trustee for plaintiff, or else as a mere depositary."

[2] An analysis of the allegations of the instant complaint discloses an actual controversy between the parties regarding the deposit delivered to respondent by appellant. It is alleged that this deposit is in the nature of a trust fund which respondent is required to hold under the terms of the written agreements subject to the obligation to return it to appellant under certain circumstances; but that contrary thereto respondent has invested it in a commercial enterprise without the consent of appellant. The complaint herein is sufficient as against the interposed demurrer since it sufficiently alleges an actual controversy relating to the legal rights and duties of the parties with respect to said deposit.

For the reasons stated, the judgment appealed from is reversed.

DORAN and WHITE, JJ., concur.



86 Cal.App.2d 810

SHATTUCK et al. v. CHASE.
Civ. 3904.

District Court of Appeal, Fourth District,
California.

July 19, 1948.

1. Pleading ⚡428(1)

An objection to the introduction of evidence on ground that complaint fails to state facts sufficient to constitute a cause of action has the same legal effect as a general demurrer.

2. Appeal and error ⚡837(4)

On plaintiffs' appeal from a take nothing judgment entered after objection to evidence on ground that complaint failed to state facts sufficient to constitute cause of action had been sustained, sufficiency of the complaint would be considered and court was not required to refer to answer.

3. Vendor and purchaser ⚡50

Option for purchase of realty fixing date of expiration, and subsequently ex-

ecuted escrow instructions concerned with sale of same realty and constituting part of the same transaction, and modifying option by granting thirty days in which to close escrow, and thereafter until one or both parties demanded return of deposited money or documents, would be construed together as stating the terms of a single contract. Civ.Code, § 1642.

4. Specific performance ⚡57

Where title to realty, to be conveyed under option to purchase, was to be vested in husband and wife as joint tenants, or their order, but wife signed none of the documents involved, no mutuality existed between wife and vendor, so that wife could not maintain action for specific performance of option.

5. Specific performance ⚡17

That wife could not maintain action for specific performance of option to purchase realty because of lack of mutuality between wife and vendor, arising from wife's failure to sign documents involved, did not preclude husband, who did sign documents involved, from maintaining action.

6. Specific performance ⚡116½

Where some allegations of complaint in action for specific performance of option to purchase realty, in attempting to allege that price to be paid was the reasonable market value of realty and that transaction was just, fair, and equitable, were legal conclusions and open to attack by special demurrer, but when taken as a whole showed an apparently honest attempt to allege facts, plaintiff was entitled to an opportunity to amend complaint when defendant objected to introduction of evidence on ground that complaint did not state a cause of action.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Ralph Shattuck against Eulalie Chase for specific performance of an option to purchase realty. From an adverse judgment, plaintiffs appeal.

Portion of judgment against Eileen Shattuck affirmed, and portion of judgment against Ralph Shattuck reversed.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellants.

Virgil S. Kipp, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment in an action for specific performance in which it was decreed that plaintiffs take nothing by their action and that the action be dismissed.

Defendant was the owner of real estate in the city of San Diego. On March 30, 1943, she signed a written option giving Ralph Shattuck the right to purchase the property for \$3500.00. In the option defendant acknowledged the receipt of \$1.00. The property involved was described and it was provided that the purchase price of \$3500.00 was to be paid: \$1.00 in cash; \$1499.00 into escrow, and \$2000.00 at \$20.00 per month including 5% interest; that a good and sufficient deed be executed by Eulalie Chase to Ralph Shattuck on or before May 4, 1943, if the \$1499.00 be paid or tendered by that date. It was further provided that if the \$1499.00 were not so paid or tendered the option would be void and of no effect "and both parties released from all obligations herein."

Under date of April 3, 1943, Ralph Shattuck and defendant signed escrow instructions on the form of the Union Title Insurance and Trust Company. Eileen Shattuck did not sign the instructions. The property to be sold was again described, the purchase price stated and the receipt of \$1.00 out of escrow acknowledged. Shattuck handed the escrow agent an additional \$100.00 and agreed to pay the \$1399.00 in cash, and also agreed to execute and deliver a promissory note and trust deed for the unpaid balance. Title was to be vested in Ralph and Eileen Shattuck, husband and wife, as joint tenants or their order. The instructions contained the following: "If you are unable to comply with the instructions within 30 days said money and instruments, except as hereinabove authorized, shall thereafter be returned on written demand, but in the absence of such demand you will proceed to comply with these instructions as soon as

possible thereafter. And time is declared to be the essence of these instructions.
* * *

In the portion of the escrow instructions signed by defendant she approved the terms and provisions set forth and already referred to, and agreed to the sale on the terms stated.

Plaintiffs filed the complaint in this action on March 30, 1946, three years after the giving of the option. There is no reason given in the record for the long delay in bringing the action, but defendant did not set up laches as a special defense.

Defendant was duly served with process, and having failed to appear her default was entered. On motion her default was vacated and she was permitted to appear by demurrer and answer, which she did. On vacating her default the condition was imposed that her demurrer be overruled so the sufficiency of the allegations of the complaint were not tested prior to the time of trial.

At the opening of the trial counsel for defendant objected to the introduction of any evidence by plaintiffs on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The objection was sustained and judgment was entered that plaintiffs take nothing by their suit and that their action be dismissed. This appeal followed.

[1, 2] An objection to the introduction of evidence on the ground that the complaint fails to state facts sufficient to constitute a cause of action has the same legal effect as a general demurrer so we must consider the sufficiency of the allegations of the pleading and do not need to refer to the answer.

Copies of the option and the escrow instructions are attached to the complaint and are made a part of it by reference. It is alleged that in addition to the \$101.00 previously paid the plaintiffs, on June 16, 1943, delivered to the escrow holder \$1399.00 which was accepted by it on behalf of defendant; that plaintiffs were ready, willing and able to deliver the trust deed mentioned; that defendant failed and refused and still fails and refuses to deliver the instruments provided to be delivered by her in the contract.

It was also alleged that plaintiffs had performed all the conditions of the agreement on their part to be performed; that the property to be conveyed was an adequate consideration for the money to be paid; that the \$3500.00 to be paid was in fair proportion to the value of the property to be conveyed; that the contract was just and reasonable.

There is no allegation that either of the parties had demanded a return of the money and instruments placed in escrow as required in the portion of the escrow instructions already quoted, so the thirty day limitation on the time for completion of the escrow did not come into effect.

Defendant first argues that the option by its express terms expired on May 4, 1943, and as plaintiffs had not performed on that date their rights were terminated and they could not specifically enforce the agreement.

[3] The option and escrow instructions clearly were parts of the same transaction. They were between the same parties and were concerned with the sale of the same property. Therefore they must be construed together as parts of one contract in order to ascertain the whole contract of the parties. Sec. 1642, Civil Code; *People v. Ganahl Lumber Co.*, 10 Cal.2d 501, 75 P.2d 1067; *Neher v. Kauffman*, 197 Cal. 674, 242 P. 713; *Tuso v. Green*, 194 Cal. 574, 229 P. 327. In *Symonds v. Sherman*, 219 Cal. 249, 26 P.2d 293, 295, the rule is thus stated: "It is a general rule that several papers relating to the same subject-matter, and executed as parts of substantially one transaction, are to be construed together as one contract. 6 Cal.Jur. 298; 19 Cal.Jur. 832; Civ.Code, § 1642; *Goodwin v. Nickerson*, 51 Cal. 166." Many other cases to the same effect are cited in Vol. 4 at page 129 of the Ten Year Supplement to Cal.Juris. We must therefore conclude that the option and escrow instructions form but one contract and must be construed together as stating the terms of a single contract.

It is true that the option, by its terms, expired on May 4, 1943. It is also true that the escrow instructions executed the day before, notified that provision of the option

by expressly granting thirty days in which to close the escrow and thereafter until one or both of the parties demanded the return of the deposited money or documents. As no such demand is alleged there is no express time limit on completion and under the pleadings we can hold neither party in default in that respect.

[4, 5] It is next argued that the action cannot be maintained because Eileen Shattuck did not sign, either in person or by agent, any of the documents involved. This is true in so far as she is concerned. There is no mutuality of contract between Mrs. Shattuck and Miss Chase which is a necessary element underlying an action for specific performance. *Seymour v. Shaeffer*, 82 Cal.App.2d 823, 187 P.2d 95. It follows that the complaint failed to state a cause of action in favor of Mrs. Shattuck and that the trial court's action in denying her relief must be affirmed. It does not necessarily follow that the judgment against Ralph Shattuck must be affirmed for we know of no rule providing that where there are two or more plaintiffs and the complaint fails to state a cause of action in favor of one of them it may not state a cause of action in favor of another. Mr. Shattuck was a party to and a signer of the contract of purchase so the reciprocal rights and remedy rule which is invoked against Mrs. Shattuck cannot be invoked against him.

[6] The other chief attack on the sufficiency of the complaint is in its attempting to allege that the price to be paid for the land was its reasonable market value and that the transaction was just, fair and equitable. We have already summarized some of these allegations. It must be admitted that some of them are subject to the criticism made by the defendant that they are legal conclusions. When taken as a whole they show an apparently honest attempt to allege facts. While the allegations are not clearly made and would be open to attack by special demurrer they are not entirely devoid of merit. They do not differ greatly from those held sufficient against general demurrer in the cases of *Cushing v. Levi*, 117 Cal.App. 94, 3 P.2d 958; *Boro v. Ruzich*, 58 Cal.App.2d 535, 137 P.2d 51, and

O'Donnell v. Lutter, 68 Cal.App.2d 376, 156 P.2d 958. Shattuck should be permitted to amend his complaint if he be so advised.

The portion of the judgment against Eileen Shattuck is affirmed. The portion of the judgment against Ralph Shattuck is reversed. Neither party will recover costs of appeal.

BARNARD, P. J., concurs.



86 Cal.App.2d 785

PEOPLE v. HENRY.

Cr. 659.

District Court of Appeal, Fourth District,
California.

July 16, 1948.

1. Polsons ⇨9

Evidence of defendant's appearances in drug stores to pick up prescriptions for narcotics ordered over telephone, taken in connection with her conflicting statements to police officers and her admissions, sustained conviction for attempting to obtain narcotics by fraud, deceit and misrepresentation. Health and Safety Code, § 11170.

2. Criminal law ⇨680(2)

In prosecution for conspiracy to obtain narcotics by fraud, proof of corpus delicti prior to receipt of evidence which might tend to prove a conspiracy was unnecessary in view of intimate blending of facts.

3. Conspiracy ⇨47

Evidence was not insufficient to sustain charge of conspiracy to obtain narcotics by fraud on ground that fact of conspiracy could not be proved by declarations of a co-conspirator, in view of statements and admissions of defendant with respect to another person who telephoned drug stores at which defendant sought to

get narcotics. Health and Safety Code § 11170.

4. Criminal law ⇨1168(1)

Alleged insufficiency of evidence to sustain conviction of conspiracy to obtain narcotics by fraud was not prejudicial, in absence of any order requiring that sentence on conviction of conspiracy and also on substantive count be served consecutively. Health and Safety Code, § 11170.

5. Criminal law ⇨419(2)

Where fact in controversy is whether certain things were said or done and not as to whether those things were true or false, the words or acts are admissible not as hearsay, but as original evidence.

6. Criminal law ⇨419(2), 1169(3)

In prosecution for attempting to obtain narcotics by fraud based on defendant's appearance at drug stores to pick up narcotics which had been ordered by telephone by persons claiming to be doctors, evidence of telephone conversations was admissible within exception to hearsay rule applying in case of evidence as to fact of making statement, and admission thereof was not prejudicial in view of defendant's statements and admissions.

7. Criminal law ⇨406(2)

Statements and admissions made by defendant to officers while under arrest and confined in hospital were not inadmissible as involuntary because of circumstances under which they were made.

8. Criminal law ⇨1186(4)

Failure to arraign defendant for judgment was not prejudicial error. Pen.Code, § 1200; Const. art. 6, § 4½.

9. Criminal law ⇨1216(2)

Where defendant convicted on two counts was not sentenced separately on each count and judgment did not state whether sentence was to run concurrently or consecutively, it would be presumed that only one sentence was intended and that confinement for the two counts was to run concurrently.

10. Criminal law ⇨1177

Where defendant was convicted on two counts, failure to impose separate sen-

tence on each count and failure of judgment to state whether sentence imposed was to run concurrently or consecutively was not prejudicial in view of presumption that only one sentence was intended and that confinement for the two counts was to run concurrently.

11. Criminal law ⇐1177

Where defendant had been charged with violation of Health and Safety Code and with conspiracy, erroneous statement in preliminary portion of judgment that defendant was convicted of two counts of violation of Health and Safety Code was not prejudicial where only one sentence was imposed.

12. Criminal law ⇐655(1)

Remark of court in imposing sentence upon a narcotic addict that in view of doctor's report he felt that defendant should not be in jail since she would not be able to get proper treatment was not an abuse of discretion.



Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Betty Marie Henry was convicted of attempting to obtain narcotics by fraud, deceit and misrepresentation and of conspiring to feloniously obtain narcotics by such means, and she appeals.

Judgment affirmed.

Leland E. Zeman, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., John F. Hassler, Jr., Deputy Atty. Gen., and James L. Davis, Dist. Atty., of Santa Ana, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of section 11170 of the Health and Safety Code in that on July 3, 1947, she feloniously attempted to obtain narcotics by fraud, deceit and misrepresentation. In a second count she was charged with conspiring with an unknown person to feloniously obtain narcotics by such means. A jury having been waived, she was tried by

the court and found guilty on both counts. Probation was denied and judgment was pronounced sentencing her to imprisonment at Tehachapi. While her notice of appeal is technically deficient it sufficiently appears that she has in good faith attempted to appeal from the judgment.

The appellant produced no evidence in her own behalf and the following facts appear without conflict. About 8:40 p. m. on July 3, 1947, a pharmacist in a certain drug store in Santa Ana received a telephone call from a man representing himself as Dr. Larson, who ordered thirty dilaudid tablets of a certain strength to be delivered to a Mrs. Mitchell, who would call for them. Dilaudid is a preparation made from morphine, about five times as strong and less toxic, and it is habit forming. The pharmacist phoned to Dr. Larson, who said that no such prescription had been ordered by him, and then called the police. At 8:45 p. m. the defendant came into this drug store and being asked by the pharmacist if she was after the prescription for Mrs. Mitchell she replied, "Yes." She was told to wait a few minutes. When another clerk asked if he could help her the defendant replied that she was waiting for a prescription for Mrs. Mitchell. She then purchased a few articles. When the police officers arrived the pharmacist called "Mrs. Mitchell" to the defendant, who was then at the front end of the store, and she came over to him. In reply to their questions the defendant told the officers that her name was Mrs. Marie Henry; that she lived at 1812 French Street in Santa Ana; that she had not come to the store to get narcotics or medicine; that her name was not Mitchell; and that she had three children who were alone at home. Later, she told the officers that she lived at another address in the 1500 block on French Street in Santa Ana. There is evidence that there was no 1800 block on French Street and that the man living at the other address in the 1500 block had never heard of the defendant.

A pharmacist from another drug store testified that about 6:30 p. m. on the same evening he received a phone call from a man who said he was Dr. Johnson of Santa Ana; that this man stated he had

an emergency prescription for Mrs. Gunther of 307 West Palmyra Street; that this man asked for thirty of these same "dilaudid" tablets, saying that the patient would be right over for it and that he would send a prescription blank over in the morning; that while he was thinking the matter over the defendant came in and called for medicine for Mrs. Gunther; that he told her he would have to have certain information; that the defendant replied she would go and get the information but did not return; and that he then investigated and found there was no 307 West Palmyra Street.

An officer testified that in the forenoon of July 8, 1947, he responded to a call from the county hospital saying the defendant wanted to talk to some one; that he talked to the defendant in the presence of the district attorney, a reporter and two others; that in reply to a question as to whether she used narcotics the defendant said she used "dilaudid", and that the last time she got some was on the preceding Thursday; that she got it from a friend named Sam Goldstein; that she went in the drug store first above mentioned on July 3rd; that she went in there to get narcotics; and that Goldstein had called this drug store from a pay phone across the street, saying that he was a doctor and that either the defendant or his wife would come in and get it. When asked if there were any other women working for Sam Goldstein she replied "Two or three." When asked what Goldstein's business was she said "Selling narcotics and pimping." When asked if she had done this before and had thus gone in for prescriptions she replied that she had.

[1] The appellant first contends that the evidence is insufficient to sustain a conviction on the first count. It is argued that there is no evidence that she attempted to obtain narcotics, and none that she attempted to do so through the use of a false name or a false address. This argument overlooks the other evidence showing misrepresentations as to the doctor, the prescription, the name and the address, all connected up with the appellant through her own statements and admissions.

[2-4] It is next contended that the evidence is insufficient to sustain a conviction or conspiracy on the second count. It is argued that the fact of conspiracy cannot be proved by the declarations of a coconspirator, that certain of the evidence was inadmissible, and that the corpus delicti was not established prior to the receipt of any evidence which might tend to prove a conspiracy. Insofar as these objections go to the order of proof they are without merit. This is one of those cases where certain facts are so intimately blended with other facts that a departure from the general rule is permissible. *People v. Fehrenbach*, 102 Cal. 394, 36 P. 678; *People v. Ferlin*, 203 Cal. 587, 265 P. 230; *People v. Compton*, 123 Cal. 403, 56 P. 44. The statements and admissions of the appellant are themselves sufficient to remove any doubt and to eliminate any possible prejudice which might otherwise have appeared. It may be further observed that, in any event, there could have been no prejudice in this regard in view of the fact that no order was made requiring a consecutive service of the sentence with respect to this count.

[5,6] It is next contended that the court erred in admitting certain testimony and in refusing to strike the same. It is first urged that the evidence of three telephone conversations was hearsay and inadmissible. With respect to the telephone conversation between Dr. Larson and the pharmacist both parties to the conversation testified. With respect to the telephone conversation between the pharmacist in the first-named drug store and an unknown person and that between the pharmacist at the second drug store and an unnamed person, only one party to the respective conversations testified and of course the appellant was not a party thereto. There is a well established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay, but as original evidence. *Pfister v. Dasey*, 68 Cal. 572, 10 P. 117; *People v. Kelley*.

22 Cal.2d 169, 137 P.2d 1; *People v. Klein*, 71 Cal.App.2d 588, 163 P.2d 71; *People v. Radley*, 68 Cal.App.2d 607, 157 P.2d 426. Not only does this case come within the exception thus provided, but the material matter is also amply covered in the statements and admissions made by the appellant personally. Neither error nor prejudice appears in this regard.

[7] It is further contended that the court erred in admitting into evidence the statements and admissions made by the appellant to the officers on July 8. The testimony of the officer that he was sent for because the appellant wanted to talk to some one, and that the statements made by the appellant were freely and voluntarily made, was in no way denied at the trial. It is now argued, however, that while the evidence is not conflicting it discloses that the statements were made while the appellant was under arrest and confined in the psychopathic ward of the hospital, while she was in bed and under a doctor's care, at a time when she said she was ill, at a time when she was not represented by counsel, and when the only persons present were officials and employees of the hospital. It is argued that the only reasonable inference that could be drawn under these circumstances is that the appellant was at the time physically and mentally incapable of making a clear and concise statement, and that the statements made were not free and voluntary. These contentions are without merit. These questions of fact were passed upon by the trial judge and there is nothing in the record which in any way tends to indicate that his conclusions were not correct or that they were not amply supported by the evidence.

[8-12] Five points are raised in connection with the entry of judgment. The first is that the appellant was not arraigned for judgment as required by section 1200 of the Penal Code. The clerk's minutes merely recite that at the hearing for probation the application was denied and that judgment was then pronounced, reciting its provisions. The formal judgment which was entered makes no mention of the matter. The matter was not called

to the court's attention and is raised for the first time on appeal. Aside from the presumption in favor of the judgment, any error appears to come within the provisions of section 4½ of article VI of the Constitution. No prejudice appears, and it would be an idle act and a prejudice to the appellant to return her solely for the purpose of again pronouncing judgment. The next two assignments of error are that the appellant should have been sentenced separately on each count and that the judgment fails to state whether the sentence is to run concurrently or consecutively. The judgment imposes but one sentence of imprisonment and nothing is said concerning an imprisonment with respect to each count. Under such circumstances, it will be presumed that only one sentence was intended and that the confinement for the two counts was to run concurrently. In *re Radovich*, 61 Cal. App.2d 177, 142 P.2d 325. No possible prejudice appears. It is next contended that the judgment erroneously states that the appellant was convicted of two counts of violation of section 11170 of the Health and Safety Code, whereas she was charged in Count I with a violation of that section and in Count II with conspiracy to violate that section. This appears in a preliminary statement and is not a part of the judgment itself. Only one sentence being imposed, no prejudice appears. Finally, it is urged that the court, in imposing sentence, improperly considered the fact that treatment for a narcotic addict was not available in a county jail. The reporter's transcript shows that after probation was denied counsel for the appellant stated that there was no legal cause to be shown why judgment should not be pronounced, and that the court thereupon remarked that in view of the doctor's report he felt that this particular individual should not be in jail since she would not be able to get proper treatment there. No abuse of discretion appears.

The judgment appealed from is affirmed, and the other purported appeal is dismissed.

GRIFFIN and MARKS, JJ., concur.

87 Cal.App.2d 16

SANGER v. SOUTHWORTH et ux.

Civ. 3695.

District Court of Appeal, Fourth District,
California.

July 29, 1948.

1. Dedication ☞44

An intent to dedicate may be shown by a writing or by acts of owners.

2. Dedication ☞15, 16(1)

A dedication may be either express or implied and is implied when acts of owner indicate a clear intention to dedicate.

3. Dedication ☞37

To constitute an acceptance of an offer of dedication by user, it must appear that use by public was under a claim of right and not by temporary license of owner and that user was for purpose manifested by owner in his offer and for purpose which land is fitted or intended to serve.

4. Dedication ☞44

Evidence sustained finding that land reserved by deed, stating that grantors reserved right to dedicate land to the public for road purposes, had been dedicated to public use and that offer to dedicate had been accepted by the public by user for more than 15 years.

5. Dedication ☞37

Use by public of land for road purposes was sufficient to constitute an acceptance of an offer of dedication by user even though public had not used full width of strip of land involved at all times.

6. Appeal and error ☞1051(1)

Admission of evidence concerning plaintiff's intention in reserving by deed the right to dedicate a strip of land to the public for road purposes was not prejudicial in view of convincing evidence of implied dedication of land and acceptance by user. Const. art. 6, § 4½.

easement in the plaintiff for egress and ingress as part of an easement for public street purposes over property conveyed to the defendants. Judgement for the plaintiff and the defendants appeal.

Judgment affirmed.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellants.

William Napier Gilliam and Donald A. Stewart, both of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment decreeing that the northerly fifteen feet of property owned by defendants in San Ysidro in San Diego County, is subject to an easement in the plaintiff for egress and ingress as a part of an easement for public street purposes and enjoining defendants from blocking or in any way interfering with the passage of plaintiff or his agents or assigns over the easement.

We have had considerable difficulty in understanding the evidence and in determining the factual situation involved in this case because of the manner in which it was tried.

Evidently in the trial court a map (Plaintiff's Exhibit 2) was used by the witnesses to illustrate their testimony. The plaintiff and other witnesses, evidently pointing to this map, testified that certain things like pavement, street grading, sand and gravel on the way, sidewalks, etc., were here or there or ran from here to here or here to there. There is nothing on the map or in the record to indicate where "here" or "there" might be. While this evidence was understandable to the trial judge who saw the witnesses pointing out "here" or "there" on the map, it means little to us here.

A careful study of the record and the exhibits leaves us uncertain about much of the evidence in this case. However, counsel for plaintiff, in his brief, has set forth facts that to some extent are enlightening. As those statements are not contradicted by defendants in their brief we will assume their correctness. Our statement of facts will be based on those parts of the record we can understand, supplemented by the statements of counsel in his brief. If errors

Appeal from Superior Court, San Diego County; J. O. Moncur, Judge assigned.

Suit by Philip Sanger against James D. Southworth and another to establish an

occur in our statement it should be remembered that we are trying to do the best we can with an unsatisfactory record on appeal.

Plaintiff acquired Lot A-99 in San Ysidro in 1929, and has occupied a considerable portion of it ever since. In 1930 he sold a portion of this land to his nephew who subsequently sold the same portion to defendants. The deed from plaintiff and his wife to his nephew contained the following: "Reserving to the grantors the right to dedicate the East 15 feet thereof, and the North 15 feet thereof to the public for road purposes." Probably some time in 1944, or shortly thereafter, defendants constructed a fence across the north 15 feet so reserved. Plaintiff removed this fence and brought this action on September 28, 1945.

Lot A-99 is triangular in shape. It is bounded on the east by Lot A-98, on the north by a 20-foot alley and on the southwest by another 20-foot alley. With its east line about 95 feet west of the east line of Lot A-99, is a 30-foot strip joining the two alleys mentioned. It runs north and south and includes the 15-foot reservation off from the east side of defendants' property. This is referred to as Sanger Place. About 70 feet south of the south line of the alley bounding Lot A-99 on the north is the north line of what we will refer to as East and West Sanger Place. It is 30 feet wide and about 60 feet long. It dead-ends at right angles in Sanger Place. Defendants' property lies south and west of the center line of Sanger Place and East and West Sanger Place. It has an extreme north and south dimension of about 125.97 feet, including the reservation and an east and west dimension of about 75 feet also including the reservation. The alley forming the southwesterly boundary of Lot A-99 forms the southwesterly boundary of defendants' land. Their residence is on this property. Plaintiff owns the balance of Lot A-99 with his residence just north of East and West Sanger Place over which he enters his home. At least the south half of Sanger Place is and has been paved for some years and East and West Sanger Place has been graded and improved with sand and gravel and a cement sidewalk has been constructed on its north side. Plaintiff

testified that he traveled over these Places without hindrance or objection and that they had been used by the public without objection for over 15 years.

Defendants argue in effect that the quoted reservation only reserved to the plaintiff the right to dedicate the reserved land to the public for road purposes, which is correct. From this they argue that there is no evidence of any such dedication by plaintiff or acceptance thereof by the public. This argument is not supported by the record although there is no evidence of an express dedication by plaintiff.

[1-3] An intent to dedicate may be shown by a writing or by acts of the owners. The dedication may be either express or implied. 9 Cal.Juris. 19. It is implied when the acts of the owner indicate a clear intention to dedicate. *People v. Myring*, 144 Cal. 351, 77 P. 975. As said in 9 Cal. Juris. 41:

"Where the public, or such portion of it as has occasion so to do, travel a road, with full knowledge of the land owners interested, without asking or receiving permission and without objection, for a period of time beyond that required to bar a right of action, a right in the public to the use of the road arises by implied dedication."

Acceptance of an implied offer to dedicate may be manifested by user. As said in 9 Cal.Juris. 58:

"To constitute an acceptance of an offer of dedication by user, it must appear that the use by the public was under a claim of right, and not by temporary license of the owner. It must appear also that the user is for the purpose intended and manifested by the owner in his offer, and for the purpose which the land is fitted or intended to serve. Thus the public use of a cul-de-sac ending in a creek, to take horses to water, and to reach the rear of a storeroom abutting on the alley, is a sufficient acceptance thereof."

[4, 5] The evidence in this case clearly supports the conclusion of the trial judge to the effect that the reserved land had been dedicated to public use and that the offer to dedicate had been accepted by the public by user for more than 15 years. The argu-

ment that the public had not used the full width of the reserved property at all times can avail defendants nothing. *Santa Ana v. Santa Ana Valley Irrigation Co.*, 163 Cal. 211, 124 P. 847.

[6] Defendants also complain of rulings of the trial judge in overruling their objections to questions which sought to learn from plaintiff his intention in making, and his understanding of the reservation in the deed to his nephew. If we assume these rulings to be error they cannot be held to be prejudicial because the evidence of implied dedication and acceptance by user is too complete and convincing to permit the belief of prejudice having resulted from them. Therefore we cannot reverse the judgment because of technical errors. Art. VI, Sec. 4½ Const.

The judgment is affirmed.

BARNARD, P. J., concurs.



86 Cal.App.2d 638

In re **SCHIFFMANN'S ESTATE.**

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SCHIFFMANN et al.

Civ. 16218.

District Court of Appeal, Second District,
Division 3, California.

July 8, 1948.

Hearing Denied Aug. 30, 1948.

1. Wills ⚡684(7)

Where will creating testamentary trust does not expressly fix a date from which income should be paid by trustee, the statute providing that in case of a bequest of the interest or income of certain sums the income accrues from testator's death controls; it being unnecessary to consider whether trust is one for maintenance and support. Probate Code, § 160, 163.

2. Wills ⚡684(7)

The quoted clause in rule that life beneficiary of a testamentary trust for payment of income is entitled to the income ac-

cumulated and the trust assets from date of testator's death, "unless it is otherwise provided in the will", means some language or provision in will that expressly fixes a different date than that of testator's death when right to income shall accrue, or makes some other specific disposition of income accumulating up to time the property comes into trustee's hands, or nullifies by definite expression or by clear implication presumed intention to have right to income accrue as of date of testator's death.

See Words and Phrases, Permanent Edition, for all other definitions of "Unless It Is Otherwise Provided in Will".

3. Wills ⚡470

Under statute, intention of testatrix is determining factor in construing will, and that intention is to be gathered from a consideration of will as a whole. Probate Code, § 163.

4. Wills ⚡684(7)

Fact that executor was not instructed by will to pay income from testamentary trust to widow of testatrix' deceased son, as life tenant, during administration of testatrix' estate, did not indicate that testatrix thereby intended that income was not to accrue as of date of her death. Probate Code, §§ 160, 163.

5. Wills ⚡684(7), 733(8)

The provision of Probate Code that in case of a bequest of the interest or income of certain sums the income accrues from testator's death is applicable irrespective of whether trustee or executor of will is directed to pay over the income. Probate Code, § 160.

6. Wills ⚡733(8)

Payments under will for support and maintenance are presumed to be intended to accrue as of date of testatrix' death.

7. Wills ⚡734(6)

The provision of Probate Code that legacies for maintenance bear interest from testator's death applies even though legacy is in trust. Probate Code, § 162.

8. Wills ⚡734(6)

A trust for support and maintenance created by residuary devise including both

real and personal property is not technically a "legacy" for maintenance, within statute providing that legacies for maintenance bear interest from testator's death, since a "legacy" is ordinarily a bequest of money or personal property, but statutory rule providing that legacies for maintenance bear interest from testator's death would be applied thereto. Probate Code, § 162.

See Words and Phrases, Permanent Edition, for all other definitions of "Legacy".

9. Wills ⚭684(7)

Where there was no express intention found in will that income from trust estate in which widow of testatrix' deceased son was named as life tenant should accrue other than from date of testatrix' death, will would be construed as intending that income for distribution to life tenant would accrue from date of testatrix' death and not from date of distribution, especially where trust was purely one for maintenance of the beneficiary. Probate Code, §§ 160, 162.

10. Wills ⚭684(5)

Except where contrary intention is expressed in will or where controlling purpose of testator would be defeated by application of contrary rule, expenses of administration prior to establishment of a testamentary trust are chargeable, insofar as it is adequate to meet them, to corpus of estate which is ultimately to form the trust and not to income accruing thereon during period of probate administration.

11. Internal Revenue ⚭1746

Wills ⚭684(5, 7)

Under provision in will creating testamentary trust of one-fourth of residue of testatrix' estate in which widow of testatrix' deceased son was named as life tenant, trustee was entitled to income of one-fourth of the residue of the estate from date of testatrix' death for distribution to son's widow, as life beneficiary, together with interest at rate of 4 per cent. per annum to date of distribution, and the income and interest to which trustee was entitled was gross income and interest, with all costs of administration, estate taxes, etc., first deducted from other assets remaining

in testatrix' estate. Probate Code, §§ 160, 162, 163.

12. Wills ⚭684(7)

Fact that income from testamentary trust was not payable during administration of testatrix' estate affected only the time at which payment might be enforced, and not the right to that income. Probate Code, §§ 160, 162, 163.

13. Wills ⚭684(5)

The words used in will stating that share of residue to be placed in trust for widow of testatrix' deceased son was that "which I would have left my son, * * * had he not predeceased me", were merely explanatory of testatrix' disposition of her residuary estate, and could not be construed as indicative of testatrix' intention that trust income so devised should be charged with an equal part of the administration expenses.

Appeals from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Proceeding in the matter of the estate of Isabel J. Schiffmann, deceased, wherein petition was filed by Security-First National Bank of Los Angeles, as executor of the estate of Isabel J. Schiffmann, deceased, for instructions, opposed by R. J. Schiffmann, Rudolph Jacques Schiffmann, and others. From order instructing the executor and from decree of distribution, R. J. Schiffmann alone appeals.

Affirmed.

Burr & Smith, Philip Grey Smith, and James G. Dempsey, all of Los Angeles, for appellant.

Newlin, Holley, Sandmeyer & Coleman, of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

Two appeals are taken by R. J. Schiffmann, a residuary legatee under the will of his mother, Isabella J. Schiffmann, deceased. One is from an order instructing the executor, the other from a decree of distribution, but the appeals raise the same questions.

Isabella J. Schiffmann, testatrix, died on June 21, 1934, leaving an estate appraised

at \$498,243.25. She was survived by three children, Minnie B. MacLeod, Florence A. Hagerty and appellant, R. J. Schiffmann, and a considerable number of grandchildren and great-grandchildren. Her will, in which Security-First National Bank of Los Angeles was nominated as executor and also named as trustee of the several testamentary trusts, was admitted to probate August 3, 1934. Testatrix devised the residue of her estate one-fourth each to her three children and the remaining one-fourth to the trustee for the use and benefit of Clara Haas Schiffmann, widow of a deceased son, during her lifetime, with remainder to the children of the deceased son. During the administration, the assets constituting the residue of the estate earned income in the amount of \$60,192.15. In its eighth and final account and petition for distribution, the executor petitioned the court for instructions as to whether the trustee, under the provisions of the trust created for the use and benefit of Clara Haas Schiffmann was "entitled to income on one-fourth of said residue from the date of decedent's death for distribution to Clara Haas Schiffmann, as life beneficiary," and if so, whether it was entitled to "gross income or net income." In its order, dated February 17, 1947, the court instructed the executor that the trustee was entitled to the income on one-fourth of the assets constituting the residue of decedent's estate for the purpose of distributing such share of the income to Clara Haas Schiffmann as life beneficiary, together with interest at the rate of 4% per annum to date of distribution, the "income to commence drawing interest from the date received by the executor," and that the income and interest to which the trustee was entitled was "gross income and interest, and all costs of administration, estate taxes, inheritance taxes and income taxes * * * shall be first deducted from the other assets remaining in this estate." Clara Haas Schiffmann, the life beneficiary, died on February 1, 1947, before the estate was ordered distributed.

In its order of March 19, 1947, settling the eighth and final account, instructing the executor and ordering distribution, the probate court, among other matters, found:

That under the "Ninth" paragraph of the will, decedent did not "express any intent or direct that the income of the one-fourth of the residue of this estate devised and bequeathed to said trustee as aforesaid should not accrue or be paid to said trustee from the date of death of said decedent for distribution to Clara Haas Schiffmann as life beneficiary of said trust, but on the contrary decedent intended that said income on said one-fourth of the residue should be paid to said trustee from the date of death of said decedent and intended that upon the termination of said trust said income from said one-fourth of said residue, if not then available for distribution to Clara Haas Schiffmann, should become a part of the trust estate for distribution in the same manner as the trust corpus"; that the trust had terminated by reason of the death of Clara Haas Schiffmann. The court then instructed the executor, and decreed, among other matters: (1) That since the income and interest thereon to which the trustee would have been entitled upon distribution of the estate had not been received by the trustee and were not available for distribution prior to the death of Clara Haas Schiffmann, the same became a part of the trust estate and should be distributed by the executor directly to the issue of Frederick C. Schiffmann living at the date of the demise of Clara Haas Schiffmann, pursuant to the terms of the trust; (2) that by reason of the death of the life beneficiary one-fourth of the assets remaining in the residue of the estate upon distribution, after the payment from the residue of the income and interest as provided for above and the deduction of all costs of administration, executor's commissions, attorneys' fees, income taxes and other proper items, should be distributed directly in equal shares to the remaindermen of the trust (naming them), and the remaining three-fourths of the residue should be distributed to the residuary legatees. It also ordered that the sum of \$15,048.04 (being one-fourth of \$60,192.15, income received by the executor from the residue of the estate from the date of the death of the decedent), together with interest in the amount of \$772.22, (being interest upon said income at the rate of 4%

from the date received by the executor to date of distribution), be distributed in equal shares to the remaindermen entitled to the corpus, together with interest at the rate of 4% per annum upon said sum of \$15,049.04 from the date of the decree of distribution to the date of distribution thereof. As will be noted, the decree of distribution was not made until March 19, 1947. The delay was due to the nature of the assets and claims and taxes against the estate and to certain other pending probate proceedings.

By the terms of her will, the testatrix made certain bequests and devises not material here. She provided for a trust in the principal amount of \$10,000 each to a named great-grandchild and as many others in the same amount "as equal the number of my grandchildren and great-grandchildren * * * in being at the time of my death." Each of these trusts provided, among other things: "This is a trust for maintenance, and I direct that the income from the trust estate be paid to the beneficiary *by my Executor beginning from the date of my demise and continuing until distribution of the trust estate to the trustee*, if, in the opinion of said executor, the same can be done without sacrifice or injury to my estate, and without injury to any legatee, devisee, or other beneficiary under this Last Will and Testament." (Italics added.) The residue of her estate was bequeathed in Paragraph "Ninth" as follows:

"One-fourth thereof to each of my following named children: R. J. Schiffmann, Minnie B. MacLeod and Florence A. Hagerty. * * *

"One-fourth thereof, which I would have left to my son, Frederick C. Schiffmann, had he not predeceased me, to SECURITY-FIRST NATIONAL BANK OF LOS ANGELES * * * in trust for the following uses and purposes in relation to the same:

"To receive and collect the principal and income of the trust estate, and to invest and re-invest the same in the manner the Trustee deems best for the purpose of securing the maximum of income consistent with safety whether the same is permissible

by law for the investment of trust funds or not, and, in addition, after the payments and deductions hereinafter mentioned to pay and/or accumulate and/or use and/or hold, and apply and distribute the same to or for the purposes hereinafter stated and/or for the use and benefit of the beneficiaries hereinafter named, and to convey and transfer the corpus or principal of the trust estate with accumulations, if any, as hereinafter provided.

"The entire net income received from the trust estate and available for distribution shall be distributed to and/or for the benefit of Clara Haas Schiffmann, the widow of my deceased son, Frederick C. Schiffmann, during her life time, unless she should marry, and, in event of her marriage, the payment of all income to and/or for the benefit of said Clara Haas Schiffmann shall cease.

"The income of this trust shall be paid to said Clara Haas Schiffmann in equal amounts monthly as nearly as practicable, the amounts and times of such payments to be left in the discretion of the Trustee.

"* * * If the income from this trust shall, in the opinion of the Trustee, be insufficient to provide Clara Haas Schiffmann with reasonable support, care and comfort, or shall be insufficient to provide her with reasonable care in case of illness or accident or other emergency, the Trustee may pay to or apply or expend for the use and benefit of such person so much of the principal up to and including the whole thereof as the Trustee may deem advisable.

"Each beneficiary hereunder is hereby restrained from anticipating, encumbering, alienating or in other manner assigning his or her interest or estate in either principal or income, and is without power so to do, nor shall such interest or estate be subject to his or her liabilities or obligations, or to judgment or other legal process, bankruptcy proceedings or claims of creditors or otherwise. All income and/or principal shall be payable and deliverable only and personally to the respective beneficiaries entitled thereto. * * *" Upon the termination of the trust by reason of the death of Clara Haas Schiffmann, or upon her remarriage, the trust estate was to be

distributed "to the then living issue of my deceased son, Frederick C. Schiffmann, in equal shares, per stirpes."

[1] Appellant contends that the court erred in instructing the executor that the income received by it from one-fourth of the residue accrued as of the date of death of the testatrix. The effect given to section 160, Probate Code, in *Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825, is determinative of this contention. This section provides: "In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death," and should be read with section 163, which gives controlling effect to the testator's "express intention." It was held in *Estate of Platt* that where a will does not expressly fix a date from which income should be paid by the trustee, section 160 controls, it being unnecessary then to consider whether the trust is one for maintenance and support. *Estate of Hyland*, 58 Cal.App.2d 556, 137 P.2d 73; Cf. *Estate of Delano*, 62 Cal.App.2d 808, 816, 145 P.2d 672. See, also, cases collected in 70 A.L.R. 637; 105 A.L.R. 1104; 158 A.L.R. 441; 32 Cal.L. Rev. 105; 2 Scott, Trusts, sec. 234 et seq.; Rest.Trusts, sec. 234.

[2] In applying the general rule, the court in *Folsom v. Strain*, 138 Neb. 497, 293 N.W. 357, 358, gave an excellent interpretation to the expression, "unless it is otherwise provided in the will," holding that it means "some language or provision in the will that (1) expressly fixes a different date than that of the testator's death when the right to the income shall accrue; or (2) makes other specific disposition of the income accumulating up to the time the property comes into the trustee's hands; or (3) nullifies by definite expression or by clear implication the presumed intention to have the right to income accrue as of the date of the testator's death."

[3] Appellant concedes that under the decision in the *Platt Estate*, section 160 of the Probate Code is controlling where the will is silent as to the date of accrual of income, but argues that it is clear from an examination of the will as a whole that it was the "express intention" of the testatrix that the income was to accrue from

the date of distribution to the trustee and not from the date of death. In support of his argument, appellant points to the specific provision contained in the trusts established for the grandchildren and great-grandchildren, *supra*, that the trusts are "for maintenance" and directs the executor to pay the income from the trust estate "from the date of my demise and continuing until distribution of the trust estate to the Trustee," and concludes therefrom that by reason of the absence of such direction to the executor in paragraph "Ninth" the testatrix intended the income to accrue from the date of distribution to the trustee, which, in the instant case, was a period in excess of twelve years. Admittedly, under section 163 of the Probate Code the intention of the testatrix is the determining factor and that intention is to be gathered from a consideration of the will as a whole. *Estate of Dasher*, 53 Cal.App.2d 721, 724, 128 P.2d 380.

[4,5] We are not convinced from the mere absence of an express direction in paragraph "Ninth" as to when the income was to accrue, that the testatrix intended, much less directed, that Clara Haas Schiffmann should not receive the income accruing during the period of administration. The provisions of the will in the instant case, consisting of some sixteen pages, are definite, explicit and comprehensive. From its terms it is manifest that the interests of the grandchildren and great-grandchildren were of special concern to the testatrix, for it is to be noted that after devising her residence, together with its furnishings, providing for the redelivery of whatever gifts her children had made to her during her lifetime, and making several other bequests of cash, her primary interest was in the education, welfare and well-being of her grandchildren and their children, fifteen of whom became beneficiaries under trusts in the amount of \$10,000 each. It is repeatedly emphasized in the provisions of these trusts that these beneficiaries were to "receive every advantage and the best education possible," and in furtherance thereof the trustee was instructed to expand, during the minority of these beneficiaries, whatever portion of the trust estate it deemed necessary or advantageous

to obtain for the beneficiaries the best "education, together with support and maintenance consistent with [their] station in life." Accordingly, the *executor* was instructed to *pay* the income commencing as of the date of the death of the testatrix. It does not by any means follow from the fact that the executor was not instructed to pay the income to Clara Haas Schiffmann during administration of the estate that she thereby intended that the income was not to *accrue* as of the date of her death. Under Estate of Platt, section 160 of the Probate Code is applicable irrespective of whether the trustee or executor of the will is directed to pay over the income.

[6-9] Appellant's argument that "the reasoning of the court in *Clayes v. Nutter*, *supra* (49 Cal.App. 148 [192 P. 870]), to the effect that the trustee could not begin payment until they [sic] received the fund and invested it so as to produce an income, and that the intention of the testatrix must therefore have been that the payments were not to begin until the fund from which it was to be produced was distributed to the trustee, applies with equal force to the case at bar," is without merit. The *Clayes* case, Estate of Mackay, 107 Cal. 303, 40 P. 558, and Estate of Brown, 143 Cal. 450, 77 P. 160, were distinguished in the Platt Estate, *supra*, 21 Cal.2d at page 349, 131 P.2d at page 829, and the Supreme Court stated that the conclusions reached by the courts in those cases were "justified by the facts concerning the expressed intention of the testator. Prob.Code, § 163." The same distinctions pointed out in Estate of Platt are applicable to the will before us. There is also an additional ground of distinction. The provisions of the trust created in Paragraph "Ninth" clearly express that the trust was created for the specific purpose of providing "maintenance and support" for the daughter-in-law of the testatrix. Any doubt on this point is resolved by the spendthrift provisions contained therein. Cf. Estate of DeLano, 62 Cal.App. 2d 808, 145 P.2d 672. Payments for support and maintenance are presumed to have been intended to accrue as of the date of the testatrix' death. Estate of Marre', 18 Cal. 2d 184, 189, 114 P.2d 586; Estate of Dare, 196 Cal. 29, 38, 235 P. 725. This presump-

tion "that a testator intends that a beneficiary of income, for a definite period or for life, from all or a part of the assets of his estate, shall receive such income as completely, and for as full a period, from the date of his death, as possible, is not a fictional imputation of intent, but a sound recognition of natural motive." *Folsom v. Strain*, 138 Neb. 497, 293 N.W. 357, 359. Section 162, Probate Code, provides that legacies for maintenance bear interest from the testator's death. In stating this rule, the court said in Estate of Marre', 18 Cal. 2d 184, 189, 114 P.2d 586, 590: "This is true even though the legacy is in trust. In *re Mackay*, 107 Cal. 303, 40 P. 558; Estate of McGill, 125 Cal.App. 310, 13 P.2d 746; See In *re Pearson's Estate*, 251 Pa. 612, 97 A. 71. It is true, of course, that a trust for support and maintenance, created by a residuary devise including both real and personal property, is not technically a legacy for maintenance, since a legacy is ordinarily a bequest of money or personal property. Estate of Ross, 140 Cal. 282, 290, 73 P. 976; Thompson, Wills 2d Ed., p. 19, sec. 11; 24 Words and Phrases, Perm.Ed., page 517. Identical considerations are involved, however, in ascertaining the testator's intent whether the gift is a legacy for maintenance, a trust of personal property for that purpose (cf. In *re Mackay*, *supra*), or a similar trust consisting of both real and personal property. See Estate of Dare, *supra*. The nature of the property placed in trust should not require different conclusions where it appears that the testator's motives and desires were identical." Since there is no express intention found in the will that income from the trust estate should accrue other than from the date of death of testatrix, section 160 is controlling. Section 162 furnishes independent support for the order and decree in this respect for the reason that the trust in question was clearly one for maintenance of the beneficiary.

The allowance of interest on the income in the hands of the executor is in accordance with the rule laid down in Estate of Platt, *supra*, and is not challenged here except insofar as it is based upon what is said to be an incorrectly calculated income figure. Appellant contends that the dis-

tribution of one-fourth of the *gross* income to the remaindermen was erroneous, and that if any income was payable at all, it should have been *net* income only. The contention is predicated upon the theory that the "residue," one-fourth of which was to comprise the trust estate, consisted of all the assets, including accrued income thereon, ultimately remaining after payment of the administration expenses. The income payable to the life beneficiary, it is argued, is derived from and is a part of this ultimate net residue, and thus must be charged with its share of the administration expenses.

[10-12] The principal is well established that, except where a contrary intention is expressed in the will (see *In re Pfenninger's Estate* [Held v. Keller], 135 Minn. 192, 160 N.W. 487), or where the controlling purpose of the testator would be defeated by the application of a contrary rule (see *Industrial Trust Co. v. Harrison*, 67 R.I. 131, 21 A.2d 254, 135 A.L.R. 1312), the expenses of administration prior to the establishment of the trust are chargeable, insofar as it is adequate to meet them, to the corpus of the estate which is ultimately to form the trust and not to the income accruing thereon during the period of probate administration. *Estate of Dare*, 196 Cal. 29, 40, 235 P. 725; *Estate of Lair*, 38 Cal.App.2d 737, 740, 102 P.2d 436; *In re Phelps' Estate*, 162 Misc. 703, 195 N.Y.S. 840, 845; *Estey v. Commerce Trust Co.*, 333 Mo. 977, 64 S.W.2d 608, 616; *In re Koffend's Will*, 218 Minn. 206, 15 N.W.2d 590, 601; annotation, 135 A.L.R. 1322. The ninth section of the present will, it is true, provided for payment to the life beneficiary of "the entire net income received from the trust estate and available for distribution." The amount of the income to be so applied is determined after the application to gross income of certain specified deductions, for the will provides that "From the gross income received or derived from the trust estate or from the principal thereof, if necessary, there shall be paid and discharged all taxes, assessments, costs, charges, attorney's fees and expenses incurred or expended in the care, management, administration, protection and distribution of said trust estate, including a

reasonable compensation to the Trustee for its services as such hereunder." These are the only deductions provided for by the terms of the will, and it will be noted that they comprise expenses which would arise solely out of the management of the trust estate by the trustee, and do not include the expenses incurred by the executor in the administration of the probate estate prior to formation of the trust. The method prescribed for calculation of net income during the life of the trust clearly can have no bearing on the question before us, for the income presently in issue accrued prior to the time when the trust was to come into existence. Any intention which the testatrix may have had in respect to the allocation of the probate administration expenses, which might have rendered the general rule referred to above inapplicable, appears to have remained completely unexpressed, and we find nothing in the will from which to imply any such intention. Furthermore, we discern no obvious or pressing necessity to allocate those expenses to income rather than to corpus, in order to carry out the testatrix' controlling purpose. There is no showing that the corpus is insufficient to pay these expenses, nor that it would be necessary to liquidate assets contained therein by way of forced sale at a substantial sacrifice in value in order to make the necessary payments. On the contrary, we think the intention of the testatrix to provide income for the support and care of her son's widow would be seriously and unnecessarily interfered with by assessing a proportionate part of the burden of the administration expenses upon that income. The fact that the income is not payable during administration, of course, affects only the time at which payment may be enforced and not the right to that income. See *Estate of Platt*, supra, 21 Cal. 2d 343, 347, 131 P.2d 825; *Estate of Marre'*, 18 Cal.2d 184, 190, 114 P.2d 586.

[13] Appellant, however, argues that the will evinces an intention to treat the three children who were named as residuary legatees, and the fourth child's widow who was named the income beneficiary of the trust, on an equal basis in respect to the amount designated for each of them. This intention is said to be revealed by the words

used in the will stating that the share of the residue to be placed in trust for the son's widow was that "which I would have left to my son, Frederick C. Schiffmann, had he not predeceased me." Thus, it is urged, the amount distributed to each of the four beneficiaries of the ninth section of the will should be equal, and they should bear equally the burden of the administration expenses. The decree appealed from, so it is said, fails to provide for either of these results. On their face the quoted words from the will upon which appellant relies appear to be merely explanatory of the testatrix' disposition of her residuary estate, rather than indicative of the claimed intention. If they were to be construed in the latter manner, the substantial effect of the dispositive provisions of the ninth section of the will would be in flat contradiction thereto, for, by giving to the widow only the income from a trust for life, she was clearly not treated on an equal basis with the three legatees receiving outright gifts. The income to which she was entitled might be either substantial or negligible, depending upon the rate of return and upon how long she might survive the testatrix. The son's widow thus did not receive the same share of the estate as the testatrix presumably would have left to her son, and there is therefore no basis for construing the quoted words as requiring the trust income to be charged with an equal part of the administration expenses. Furthermore, the present controversy arises as between the legatees and the remaindermen to whom, due to the termination of the trust, both the income and corpus have been awarded. As between the present parties, we think the instructions to the executor and the decree of distribution plainly do allocate the burden of administration expenses equally. Those expenses were charged to the assets remaining in the estate after paying the one-fourth share of the accrued gross income to the trust remaindermen. These assets consisted of all the residuary principal of the estate plus the remaining undistributed three-fourths of the accrued income thereon. Although no allocation was expressly made in the order as to which of these two categories of assets was to be used to pay the ad-

ministration expenses, we must assume that for accounting purposes at least, they were not charged to income but were to be paid from the principal assets or corpus in conformance to the controlling rule of law to which we have already referred. Thus, the assets within the residuary estate which were to become the corpus of the trust, were charged with a proportionate share of the administration expenses, equally with the respective shares of the three legatees.

As we have seen, the decree allocated to the trust corpus one-fourth of all the assets remaining after payment of the life beneficiary's accrued trust income and the administration expenses. Thus, in effect, the decree awarded, as the corpus of the trust, one-fourth of the principal *plus* one-fourth of the undistributed three-fourths of the gross income. The remaindermen, therefore, received as part of the corpus an additional three-sixteenths of the accrued gross income from the residuary principal of the estate, whereas one-fourth of that gross income, which supposedly was earned by the one-fourth share of the principal constituting the corpus of the trust, had previously been distributed to them as the income beneficiary's share. It is manifest that the said three-sixteenths of the income was actually earned by the residuary legatees' shares of the residuary principal, that is, by assets never embraced by the trust at all. The property distributed to these legatees was correspondingly diminished in amount.

It is at least questionable whether this was a correct basis of division, but appellant has not brought the question here for decision. He has appealed only from those provisions of the order and the decree which direct distribution to the beneficiaries of the trust of one-fourth of the income accruing from the date of death with interest thereon, and which failed to charge against the same any of the expenses of administration. His notices of appeal contain this strict limitation and under the broadest possible interpretation cannot be construed as bringing in question the correctness of the distribution to the beneficiaries of the additional three-sixteenths of the income derived from the residue of the estate during the course of administra-

tion. In fact, appellant does not raise the point in his briefs other than by general statements that too great a share was distributed to respondents. Our affirmance of the order and decree does not imply that we deem them to be correct in this particular.

The order and decree are affirmed.

WOOD, J., and McCOMB, Judge Assigned, concur.



86 Cal.App.2d 750

METZENBAUM et al. v. METZENBAUM et al.

Civ. 16288.

District Court of Appeal, Second District,
Division 2, California.

July 14, 1948.

1. Pleading ⚡417

Plaintiffs, by amending original complaint and first amended complaint after demurrers thereto had been sustained, waived error, if any, in rulings of trial court.

2. Appeal and error ⚡854(3)

Where defendant demurred generally and upon ground that second amended complaint was uncertain, ambiguous and unintelligible, and plaintiffs declined to avail themselves of leave to amend after demurrer had been sustained, plaintiffs must stand upon their pleading as against all grounds and if complaint was objectionable upon any ground judgment of dismissal would be affirmed.

3. Appeal and error ⚡916(1)

Upon appeal from judgment rendered after refusal to amend complaint to which a demurrer has been sustained, it must be presumed that pleader has stated his case as strongly as it can be stated in his favor and all ambiguities and uncertainties must be resolved against him.

4. Pleading ⚡18

A plaintiff must set forth in his complaint the essential facts of his case with reasonable precision and with sufficient clarity and particularity that defendant may be apprised of nature, source and extent of his cause of action.

5. Trusts ⚡17(3)

The only two ways by which a trust in relation to real property can be created is by an instrument in writing or by operation of law. Civ. Code, §§ 852, 2217, 2224.

6. Trusts ⚡371(2)

Amended complaint which alleged that one of plaintiffs was owner of oil and gas royalty interest, legal title of which was in defendant, without alleging any facts from which it could be ascertained whether royalty interest involved an interest in real property or otherwise, whether it was a voluntary or involuntary trust, or whether trust was created orally or in writing, was insufficient as against demurrer. Civ. Code, §§ 852, 2217, 2224.

7. Pleading ⚡18

Amended complaint which alleged that one of the two plaintiffs was owner of oil and gas royalty interest, legal title of which was in defendant, and that defendant orally contracted with plaintiff that income from royalty would be paid monthly by defendant to plaintiff for benefit of plaintiff who was alleged owner of the royalty, without stating facts from which it could be ascertained with which of plaintiffs defendant entered into the agreement, was insufficient as against demurrer for uncertainty. Civ. Code, §§ 852, 2217, 2224.

8. Pleading ⚡8(3)

An allegation that an act is wrongful and unlawful is a mere conclusion.

9. Pleading ⚡35

The words "duly", "wrongfully" and "unlawfully", when used in connection with issuable facts, are surplusage.

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by Walter Metzenbaum and another against Murray Metzenbaum and oth-

ers involving right to an oil and gas royalty interest. From judgment of dismissal following plaintiffs' failure to amend after demurrer to their second complaint had been sustained, the plaintiffs appeal.

Affirmed.

Walter Metzenbaum, of Bakersfield, for appellants.

Milton A. Krug, of Los Angeles, for respondent.

WILSON, Justice.

This is an appeal from a judgment of dismissal following plaintiffs' failure to amend after a demurrer to their second amended complaint had been sustained.

[1] Plaintiffs contend that the court erred in sustaining the demurrers to the original complaint, to the amended complaint and to the second amended complaint. Insofar as the demurrers to the first two of these pleadings are concerned, plaintiffs by amending them after the demurrers had been sustained waived error, if any, in the rulings of the court. *Alhambra Transfer & Storage Co. v. Muse*, 41 Cal.App.2d 92, 93, 106 P.2d 63; *Carter v. Canty*, 28 Cal. App. 323, 152 P. 312; *Ganceart v. Henry*, 98 Cal. 281, 282, 33 P. 92. The sole question for determination, therefore, is whether there was any error in sustaining the demurrer to the second amended complaint.

The material allegations of that complaint are that plaintiff Fanchon Metzenbaum is the owner and entitled to possession of an oil and gas royalty described as $2\frac{1}{2}$ of one per cent royalty interest in certain real property; that the legal title to the royalty is in the defendant Murray Metzenbaum, who has received monthly payments of the proceeds; that in August, 1943, defendant orally contracted and agreed with plaintiff [which one of plaintiffs is not stated] that the income from the royalty would be paid monthly by the defendant to the plaintiff for the benefit of Fanchon Metzenbaum; that this procedure was followed until in April and May, 1944, when defendant "wrongfully" pledged the royalty and used the income therefrom to partially repay the pledge; that in February, 1945, defendant "wrongfully and with-

out authority" sold $\frac{1}{32}$ of one per cent of the royalty and in the same month pledged $\frac{1}{32}$ of one per cent, using the income therefrom to the extent of \$3,000 to liquidate the pledge.

[2] Defendant demurred generally and upon the ground that the complaint is uncertain, ambiguous and unintelligible. Plaintiffs declined to avail themselves of the leave to amend. They must, then, stand upon their pleading as against all grounds and if the complaint is objectionable upon any ground the judgment of dismissal must be affirmed. *California Trust Co. v. Cohn*, 214 Cal. 619, 623, 7 P.2d 297; *Hendricks v. Osman*, 72 Cal.App.2d 465, 466, 164 P. 2d 545; *Veterans' Welfare Board v. Oakland*, 74 Cal.App.2d 818, 822, 169 P.2d 1000.

[3] Upon appeal from a judgment rendered after refusal to amend a complaint to which a demurrer has been sustained, it must be presumed that the pleader has stated his case as strongly as it can be stated in his favor and all ambiguities and uncertainties must be resolved against him. *Royal Insurance Co. v. Mazzei*, 50 Cal.App. 2d 549, 555, 123 P.2d 586; *Hauser v. Pacific Gas & Electric Co.*, 133 Cal.App. 222, 227, 23 P.2d 1068. *McIntyre v. Hauser*, 131 Cal. 11, 12, 63 P. 69; *Higgins v. Security Trust & Savings Bank*, 203 Cal. 398, 401, 264 P. 744.

[4] A plaintiff is required to set forth in his complaint the essential facts of his case with reasonable precision and with sufficient clarity and particularity that the defendant may be apprised of the nature, source and extent of his cause of action. *Dunn v. Dufficy*, 194 Cal. 383, 391, 228 P. 1029; *Rannard v. Lockheed Aircraft Corp.*, 26 Cal.2d 149, 156, 157 P.2d 1; *Goldstein v. Healy*, 187 Cal. 206, 210, 201 P. 462; *Miller v. Pacific Constructors, Inc.*, 68 Cal. App.2d 529, 539, 157 P.2d 57.

[5, 6] It is alleged in the complaint that Fanchon Metzenbaum is the owner of the royalty interest, the legal title being in the defendant. No facts are alleged from which it can be ascertained (1) whether the royalty interest involved is an interest in real property or otherwise, (2) whether this is a voluntary or an involuntary trust, or (3) whether the trust was created orally

or in writing. The only two ways by which a trust in relation to real property can be created is by an instrument in writing or by operation of law. Civ.Code, sec. 852; *Sheehan v. Sullivan*, 126 Cal. 189, 192, 58 P. 543; *Borton v. Joslin*, 88 Cal.App. 515, 522, 263 P. 1033. A trust created by operation of law is an involuntary trust (Civ. Code, sec. 2217) and an involuntary trustee is one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act. (Civ.Code, sec. 2224.)

[7] With respect to the alleged contract between defendant Murray Metzenbaum and plaintiff whereby defendant was to pay the income from the royalty to plaintiff for the benefit of Fanchon Metzenbaum, the complaint does not state facts from which it can be ascertained with which of the plaintiffs defendant entered into the agreement. If it were with plaintiff Walter Metzenbaum, there are no allegations as to the authority of Walter Metzenbaum to enter into such a contract or in what capacity he acted, whether as attorney or agent for Fanchon Metzenbaum. If defendant, who had legal title to the royalty interest, was holding the income therefrom as trustee for the benefit of Fanchon Metzenbaum he could not without authority enter into a valid agreement to pay such income to Walter Metzenbaum or any one other than Fanchon.

[8,9] Furthermore, it cannot be determined from the facts alleged in what manner the pledge of the royalty interest by the defendant was wrongful. An allegation that an act is wrongful and unlawful is a mere legal conclusion. *McRae v. Blakeley*, 3 Cal.App. 171, 174, 84 P. 679. The words "duly," "wrongfully" and "unlawfully," when used in connection with issuable facts, while they do not vitiate a pleading, are surplusage, and had better be omitted. *Miles v. McDermott*, 31 Cal. 270, 271, 274; *Jones v. Alameda*, 85 Cal.App. 607, 613, 259 P. 976; *Burlingame v. Traeger*, 101 Cal.App. 365, 369, 281 P. 1051.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

HORTON v. CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES
et al.

Civ. 16067.

District Court of Appeal, Second District,
Division 3, California.

July 9, 1948.

As Modified July 12, 1948.

1. Action ⇐6

Where lot owners in residential subdivision were divided into two classes, one consisting of owners advocating only two-story residences and other consisting of owners who wished to build one-story residences, one of the lot owners could not claim to represent or sue on behalf of all lot owners in the tract in bringing action for declaratory judgment for purpose of determining manner of appointment of board of architecture, which was vested with authority to approve or disapprove of plans for any buildings constructed in the tract.

2. Appeal and error ⇐1036(1)

Even if action by lot owner in residential subdivision for declaratory judgment to determine manner of appointment of board of architecture, which was vested with authority to approve or disapprove buildings constructed in tract, was not a proper one for mutual representation, judgment entered therein would be allowed to stand if no prejudice resulted therefrom to other lot owners.

3. Action ⇐6

Where lot owners in residential subdivision were divided into two classes, one consisting of owners advocating only two-story residences and other consisting of owners who wished to build one-story residences, all owners of lots in the tract were "indispensable parties" in action for declaratory judgment to determine manner of appointment of board of architecture, which was vested with authority to approve or disapprove buildings constructed in tract, and one lot owner could not maintain the action in behalf of all of the lot owners in the tract.

See Words and Phrases, Permanent Edition, for all other definitions of "Indispensable Parties".

Appeal from Superior Court, Los Angeles County; Ben R. Ragain, Judge Assigned.

Action by C. C. Horton against Citizens National Trust & Savings Bank of Los Angeles, a national banking association, and others, for a declaratory judgment which affects rights of all owners of lots in a certain tract. Upon death of the plaintiff, Frances D. Horton, as executrix of the last will and testament of C. C. Horton, deceased, was substituted as plaintiff. From judgment for plaintiff, the defendants appeal.

Reversed.

Cosgrove, Clayton, Cramer & Diether, of Los Angeles, for appellants.

No appearance for respondent.

SHINN, Acting Presiding Justice.

This is an action for declaratory judgment which affects the rights of all of the owners of lots in tract 9038, in the county of Los Angeles, a residential subdivision comprising some 93 lots. The action was instituted by C. C. Horton, one of the lot owners. He has since deceased and Frances D. Horton has been appointed as executrix. An order of substitution has been applied for and made, but our references will be to Mr. Horton as plaintiff. The court is advised by counsel who represented the plaintiff at the trial, that they have been instructed that the executrix has employed other counsel and does not wish to defend the appeal. Consequently, no brief has been filed on behalf of the respondent.

The tract is restricted under a declaration recorded by the owners many years ago pursuant to which all of the lots have been sold and titles conveyed subject to the restrictions. The paragraph of the declaration here involved provides for the appointment of a Board of Architecture composed of three members, which board is vested with the authority to approve or disapprove plans, specifications and color scheme for any building constructed in the tract, and further authority to approve or disapprove any changes in the exterior of residences, the destruction of trees, and the installation or alteration of fences, walls, poles and other structures in the tract. No

building or other structure may be erected on any of the lots until plans therefor have received the written approval of the Board of Architecture. The matter in controversy here is whether the members of this board are to be selected by the present lot owners with the consent and approval of the Citizens National Trust and Savings Bank of Los Angeles, or whether the bank alone is authorized to appoint the members. Plaintiff contends for the former construction of the declaration of restrictions and he alleges in his complaint that the issue raised is one of common and general interest to all of the lot owners and that he therefore brings this action on their behalf and for their benefit, alleging that they are more than 100 in number and that it is impracticable to bring them all before the court.

The essential facts giving rise to the controversy are the following: In 1924, one W. S. Sparr, who then owned the acreage now comprising tract 9038, conveyed the same to Citizens Trust and Savings Bank, a state bank, which later, through merger and consolidation, became Citizens National Trust & Savings Bank. The bank issued a declaration of subdivision trust, with Sparr as sole beneficiary, and at the same time loaned Sparr certain money which was secured by the terms of the declaration. In 1930 Sparr and the bank conveyed their respective beneficial interests in the trust to Land Corporation Company, Ltd., and a new declaration of trust was issued by the bank with the Land Corporation as sole beneficiary, under which latter declaration the bank continued to sell and convey lots, and later a third declaration was issued with the Land Corporation as sole beneficiary. In 1940 Land Corporation assigned to the bank its entire beneficial interest, thereby authorizing the bank as owner to terminate the trust, which the bank proceeded to do. Some three months before the institution of the present action the bank sold the last of the unsold lots.

The controlling provision in the declaration of restrictions with relation to the appointment of the Board of Architecture requires that plans, etc., be submitted to "a Board of Architecture composed of three members to be appointed by W. S. Sparr or

his successors in interest, with the consent and approval of the Citizens National Trust and Savings Bank of Los Angeles." At the time the declaration was executed, Sparr, as we have said, was the owner of the entire beneficial interest in the trust which eventually passed to the bank, and the question is whether the several lot owners are his successors in interest, or whether the bank is his successor in interest, within the meaning of the declaration. The judgment of the trial court declares that the lot owners are the successors in interest of Sparr, sets up a scheme for an election by the lot owners of members of the Board of Architecture and restrains the present members from acting as the board after an election has taken place.

Defendant bank and the individual members of the architectural board now serving, who are named as defendants, appeal from the judgment. They contend that upon the undisputed facts the action was not one that could be prosecuted by plaintiff on behalf of all lot owners and that the judgment, based upon findings that it is a representative action, is wholly erroneous and in excess of the court's jurisdiction. There are other defenses, but the conclusion we have reached with reference to the first one is that the action should not have been tried without bringing in, as parties plaintiff or defendant, all of the other lot owners.

The equity rules which are applicable to this situation are stated in two sections of the Code of Civil Procedure. They read as follows: Sec. 382. "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Sec. 389. "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can-

not be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of real or personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment." These sections, when read together and applied to the facts of the case, present the following questions: (1) Are all the lot owners united in interest; (2) have they a common interest; (3) could the controversy be determined without prejudice to the rights of those who were not parties to the action or by saving their rights. Unless all these questions may be answered in the affirmative, it is necessary that all the lot owners be brought in as parties. We shall see that the several questions call for negative answers.

It will appear from a statement of the admitted facts that the contest here is in reality not one between the owners and the bank, but between different groups of owners, and that numerous owners whom plaintiff assumes to represent are his real adversaries as to the matters in issue.

It was alleged in the answer and developed in the evidence that there is a controversy among the lot owners themselves as to how the tract may be improved, which underlies the dispute as to the power, whether of the lot owners or the bank, to name the members of the board. Twenty-three two-story houses had been built in the tract, five one-story houses had been completed, two more were nearly completed at the time of the trial, and sixty-five of the lots had not been improved. It was in evidence that several months before the institution of the present action plaintiff herein, and five other lot owners, filed an action against the bank and the members of the architectural board seeking damages of \$30,000 and injunctive relief based upon the approval by the board of plans and specifications for the construction of one-story residences in the tract. It was al-

leged in the complaint in that action that a member of the board, one of the bank's employees, had represented to plaintiff Horton before he purchased a lot and built his two-story residence that the Board of Architecture would approve plans for only two-story residences, and would construe paragraph V of the declaration as granting it authority to disapprove all other plans under the provision which gave it power to maintain uniform exteriors and physical appearances of the houses in the tract. It was alleged that plaintiff Horton, relying upon the representations, had purchased a lot and constructed a two-story house, that the board had approved plans for a one-story residence in the tract, that the same was under construction and that plaintiff Horton had been damaged in the sum of \$30,000. Injunctive relief was sought restraining the board from permitting or allowing single story residences to be constructed in the tract. Shortly after the present action was filed the plaintiffs in the former action caused the same to be dismissed. The present complaint alleges that the members of the board "may approve the erection of buildings on lots in said tract which will not maintain a uniform and reasonably high standard of artistic results in exteriors and physical appearance, to the irreparable harm of plaintiff and other owners of said lots."

It is clearly apparent that there are two classes of lot owners in the tract, one consisting of the owners and advocates of only two-story residences, and the other, those who have built or wish to build one-story residences. Plaintiff obviously is not in a position to, and does not represent all owners of lots in the tract, but only those who would bar the erection of one-story houses. This group may, but does not necessarily include all of the owners of two-story houses, and in the absence of all evidence on the subject it is questionable whether it includes many of the owners of unimproved lots. Anyone who has given the slightest heed to the trend of residential construction in these times knows that restriction of improvements to two-story dwellings would indefinitely delay further development.

[1] *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 119, 85 L.Ed. 22, 132 A.L.R. 741, is in point. The court had under consideration the effect of a judgment which declared that some 500 parcels of land had been brought under a racial restriction agreement by the signatures of the owners of 95% of the frontage. The restriction would have barred the ownership of any of the land by Negroes. The judgment had been rendered in what was claimed to be a representative action, on behalf of all of the landowners and it was contended that the petitioner *Hansberry*, a Negro, was bound by the adjudication, although he was not a party to the action. The court rejected the plea of *res judicata* for the reason that to give it effect would be to deny due process to those landowners who were not before the court and whose interest would be adversely affected by enforcement of the agreement. There could be no common class where enforcement of the agreement in favor of some would adversely affect the substantial interests of others. "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. [Citing cases.] It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interest in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far." *Hansberry v. Lee*, *supra*. The holding of the court and the expressions we have quoted, furnish a complete answer to the contention that the plaintiff herein is prosecuting a representative action. He cannot be heard to say that he rep-

resents or sues on behalf of all the lot owners in the tract, when the interests of his group are in direct conflict with those of the remaining owners.

[2] The third question stated above relates to the effect which the judgment has upon the rights of the other lot owners. If no prejudice results to them the judgment may be allowed to stand, even though the case is not a proper one for virtual representation. But prejudice does result. The power to appoint the members of the Board of Architecture has been taken from the bank and conferred upon the lot owners and this has been done without affording all of them an opportunity to have their day in court on the question of construction of the agreement. It may be that control in the matter of appointing members to the board would be gained by a group of owners antagonistic to the construction of one-story dwellings, and that this group would select a board similarly disposed. While this result is only a possibility, it would be a serious one if it occurred, and the judgment does not guard against it. But there are other reasons why the judgment ignores the rights of the absent lot owners. They may have rights in the matter which are independent of, and do not rest upon, a construction of the agreement. Some of them may be in a position to invoke the doctrine of estoppel against those who seek to take from the bank the power of appointing the members of the board. From the commencement of the project the members have been selected by Sparr or Land Corporation with the consent of the bank, or by the bank alone. The lot owners have acquiesced in this procedure and by their conduct have given a practical construction to the terms of the agreement. Moreover, they have allowed it to appear that the powers to be exercised by the board would continue to be vested in a board appointed by the bank as a disinterested party. Those who have constructed one-story dwellings no doubt have anticipated that others would be allowed to do the same, and it may be that numerous owners have purchased their lots in the belief that other one-story dwellings would be permitted, or perhaps under assurance to that effect by the representa-

tives of the bank, in connection with the sale of lots. The effect of the judgment is to foreclose the assertion of all such equitable rights. A complete determination of the controversy required the presence of all lot owners. There can be no just procedure directed by judgment which ignores the rights of any lot owner and adversely affects his interests without his having his day in court. For these reasons the bank could not be allowed to defend the action on behalf of all the lot owners. It did not attempt to do so and the judgment does not declare that it is defending on their behalf.

[3] All the owners of lots in the tract were indispensable parties under the rules stated in *Bank of California v. Superior Court*, 16 Cal.2d 516, 106 P.2d 879. The court there discussed the subject comprehensively, with full citation of authority. Anything further we might say on the question of indispensability of parties would only be a reiteration of what was said in the *Bank of California* case in expounding the law on that subject.

The judgment is reversed.

WOOD, J., and McCOMB, Justice Assigned, concur.



86 Cal.App.2d 735

**HAIRSTON v. STUDIO AMUSEMENTS,
LIMITED, et al.**
Civ. 16249.

District Court of Appeal, Second District,
Division 1, California.
July 14, 1948.

Rehearing Denied Aug. 2, 1948.

Hearing Denied Sept. 8, 1948.

I. Appeal and error ⇨1050(1)

In action for injuries sustained by roller skating rink patron as alleged result of negligent failure to provide sufficient number of supervisory guards and failure of guards to take any action after patron fell, permitting floor manager to testify as an expert on behalf of patron regarding proper

safeguards for protection of skaters was not prejudicial.

2. Appeal and error ⇐1048(1)

In action for injuries sustained by roller skating rink patron, where manager of another skating rink was called by defendants as an expert to testify regarding practices of rinks in locality but manager had visited only one or two rinks other than one he managed, sustaining objection to hypothetical question which assumed certain facts including presence of four supervisory guards and inquired whether that number was adequate was not prejudicial particularly where the testimony which might have been adduced was merely cumulative.

3. Theaters and shows ⇐6

In action for injuries sustained by roller skating rink patron as alleged result of negligent failure to provide sufficient number of supervisory guards and failure of guards to take any action after patron fell, instruction that patron did not assume risk of reckless action of other skaters, capable in exercise of ordinary care, of being prevented by guards who were stationed upon floor for protection of patrons, was not prejudicial error.

Appeal from Superior Court, Los Angeles County; Paul Vallee, Judge.

Action by Lorene Hairston against Studio Amusements, a limited partnership consisting of Sid Grauman, general partner, and Russell D. Garner, limited partner, for injuries. Judgment for plaintiff and defendants appeal.

Affirmed.

Bauder, Veatch & W. I. Gilbert, of Los Angeles (Robert E. Ford, of Los Angeles, of counsel), for appellants.

S. L. Kurland, of Los Angeles, for respondent.

DORAN, Justice.

This action arose out of an injury sustained by the respondent while roller skating at appellants' Hollywood Roller Bowl on the evening of March 4, 1946. Plaintiff's cause of action was predicated on alle-

gations of negligence in failing to "secure sufficient or any supervision or protection for the plaintiff"; more specifically, in failing to have a sufficient number of guards present to prevent reckless skating by other patrons, and by reason of the failure of the guards present to take any action or precautions after respondent had fallen and lay helpless on the floor.

The dimensions of the appellants' skating rink are 100 feet by 200 feet, and a central portion approximately 50 x 100 feet had been marked off for fancy skating and backward skating. However, there was evidence that, three weeks prior to respondent's accident, the floor had been sanded and the line separating the central portion had been obliterated. The number of skaters present on the floor at the time in question was variously estimated at from 250 to 398, and the number of guards then present was likewise variously placed at from two to four. The record discloses that, after skating for a time with respondent, the witness Janet Endelman saw the respondent lying on the floor approximately 10 or 15 feet from the rail on the south side of the rink. This witness testified that no guards or attendants came over there but that groups of people collected around respondent; that while the witness was kneeling beside plaintiff, a sailor, skating backwards, and apparently pursued by another skater, fell on top of Mrs. Endelman and the respondent. Mrs. Endelman testified that the respondent had been lying on the floor from three to five minutes before the crash, after which the floor manager came over and respondent was carried to the first aid room. Respondent's injuries included a double fracture at the head and neck of the right femur which resulted in a permanent crippling and shortening of the leg; intense pain caused by the injury and by a metal plate inserted to hold the parts together, continuing at the time of trial some 16 months after the injury, and requiring a further operation. After trial by jury, a verdict was rendered in favor of respondent for \$25,006.83, and the present appeal is from the judgment entered thereon. As noted in the respondent's brief, there is no complaint that the amount of the verdict was excessive.

The appellants' brief contains but three assignments of error: (1) "The trial court committed prejudicial error in permitting an expert witness on behalf of respondent to testify as to what are the proper practices and safeguards for the protection of skaters"; (2) prejudicial error "in sustaining an objection to the hypothetical question propounded to (appellants') expert witness"; and (3) prejudicial error in instructing the jury "that appellant did not assume the risk of reckless action of other skaters capable in the exercise of ordinary care, of being prevented by guards who were stationed upon the floor for the protection of the patrons".

[1] Appellants' first assignment of error relates to the testimony of one John Niddifer, floor manager, who, after testifying to several years experience in the operation of skating arenas, was then permitted to state that "The proper safeguard (for protection of skaters) is that you have a sufficient number of men, and also that those men are capable of performing their duties as guards, and immediately upon any accident a man is to be there immediately to prevent a pileup", etc. The witness further stated that with an attendance of 250 people, "it would take a man every 50 feet, plus the floor manager" to handle the crowd and effectuate those objects; or five men besides the manager. The floor manager then testified that on the night in question, "to the best of my memory, there were three (floor guards), including myself". It is contended by appellants "that the trial court, in permitting the lone expert, summoned by the plaintiff, to testify as to what are proper practices in safeguarding skaters, in effect allowed that witness to determine for the jury the ultimate fact in question"; that "in the absence of such testimony no case would have been made out sufficient to go to the jury".

The respondent's brief, however, suggests that "The short form of the question, using the word 'proper' in place of the detailed expression in regard to precautions exercised by other similar businesses in the locality has been used many times without disapproval". For example, in *Thurman v. Clune*, 51 Cal.App.2d 505, 507, 125 P.2d 59, 60, involving an action for personal in-

juries sustained by a spectator at an ice hockey game, the court said: "The practice in other places relative to the safeguarding of ice hockey rinks and the opinion of experts relative to the *proper* safeguards to be taken in the construction of ice hockey rinks is evidence which is admissible and is entitled to consideration with other evidence on the query of whether defendant in a particular instance has properly safeguarded the ice hockey rink in question." (*Italics added.*) In the instant case, as mentioned in respondent's brief, there appears to be no particular dispute as to the duties of floor guards, although there was a certain conflict of testimony as to the number of guards required and the number actually present. Respondent's cause of action, moreover, was not predicated alone upon the number of guards, and the record includes other evidence bearing on the issue of negligence, for example that at the time of the accident, the floor manager was drinking coffee at a soft drink stand, and had only a "limited view" of the skating floor; that the one guard who saw respondent lying on the floor made no effort to go to the scene of the accident and that respondent was permitted to remain in such a dangerous position for a space of from three to four minutes without protection.

In view of these facts, appellants' objection, going as it does to the terminology used by the expert witness, cannot be said to have been prejudicial.

[2] Appellants' second complaint relates to the sustaining of an objection to appellants' hypothetical question propounded to the witness Albert Baker. The question assumed the dimensions of the skating rink, an attendance of 398 persons and the presence of four guards, and inquired whether or not "in this locality and in the practice of rinks in this locality there was a sufficient and adequate number of guards for that crowd". The trial court sustained an objection thereto, "upon the ground that no foundation has been laid", and declined to permit appellants' attorney to approach the bench for the purpose of arguing the objection.

The record discloses that the witness Baker had had about four years experience

as manager of a rollerdrome located at Culver City; that the witness had "only visited one or two rinks since I have been there because I have been busy enough attending to my own business". The trial court evidently felt that this limited experience was not sufficient foundation to entitle the witness to express an opinion as to "the practices of rinks in this locality", and stated: "it is a perfectly obvious proposition, it seems to me it does not require any argument". Moreover, as mentioned in respondent's brief, "no separate offer of proof was made from which it might be inferred that testimony favorable to the appellant would have been produced by the response if one were permitted". Also, "the most that would have been elicited from the witness was that the four guards referred to in the question were a sufficient and adequate number", and four other experts had given similar testimony on behalf of appellants. Under these circumstances it cannot be assumed that the admission of the testimony in question would have affected the verdict of the jury. In this connection respondent's brief calls attention to the fact that "No number of guards employed * * * would affect the finding of negligence if those employed were not performing their duties".

[3] Finally, prejudicial error is claimed to have resulted from the giving of an instruction "that appellant did not assume the risk of reckless action of other skaters capable in the exercise of ordinary care, of being prevented by guards who were stationed upon the floor for the protection of the patrons". This instruction was given, as appellants' brief avers, "after properly instructing the jurors on the doctrine of assumption of risk". The instruction in question is in accord with the language used in *Thomas v. Studio Amusements*, 50 Cal.App. 2d 538, 543, 123 P.2d 552, 555, where the court said: "One of respondent corporation's defenses was the assumption by appellant of the risks incident to skating upon such a rink; but it cannot be argued that one of the normal risks involved is the reckless action of other skaters capable of being prevented by guards who are stationed upon the rink for the protection of patrons. While the operator of a skating

rink is not an insurer of the patrons' safety, nevertheless, he owes a duty to protect them from risks other than those normally incident to the sport." The appellants' attempt to distinguish the *Thomas* case from the present situation by claiming that, notwithstanding respondent's testimony that "she skated about without noting anything unusual until she was suddenly and unexpectedly struck", nevertheless, because of the fact that other witnesses testified to observing two sailors skating recklessly just before the accident, "it is a fair inference that she (respondent) saw them", is not persuasive. No prejudicial error is apparent.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.



86 Cal.App.2d 596

NEUBER v. ROYAL REALTY CO. et al.
Civ. 15971.

District Court of Appeal, Second District,
Division 1, California.

July 7, 1948.

Rehearing Denied July 26, 1948.

Hearing Denied Aug. 30, 1948.

1. Landlord and tenant ⇨ 164(1), 165(1), 166(2), 167(2)

Generally, a landlord is not liable for injuries to person or property of tenant or his invitees or employees caused by defects in leased premises.

2. Landlord and tenant ⇨ 164(7), 165(7), 167(2)

If there be some hidden defect in or danger on premises which is known to lessor at time of executing a lease but which is not apparent to prospective lessee, lessor is obligated to inform lessee thereof or render himself liable for injuries sustained by lessee resulting from such a defect or sustained by his employees or other invitees, except as to lease of a public or semi-public building, to same extent as if tenant had been injured.

3. Torts ⇨3

To constitute an "actionable tort" there must be a legal duty imposed by statute or otherwise owing by defendant to the one injured, for, in absence of such a duty, any damage caused is injury without wrong.

See Words and Phrases, Permanent Edition, for all other definitions of "Actionable Tort".

4. Torts ⇨26(1)

The existence of a legal duty sufficient to constitute an actionable tort must appear in the allegations of a complaint as a necessary requisite essential to the statement of a cause of action.

5. Negligence ⇨1, 119(1)

To constitute "actionable negligence" there must be a duty which defendant is under to protect plaintiff from injury, a failure to discharge that duty and injury resulting therefrom; and not only must the complaint disclose these essentials, but the evidence must support them, and absence of proof of any of them is fatal to recovery.

See Words and Phrases, Permanent Edition, for all other definitions of "Actionable Negligence".

6. Negligence ⇨1

No tortious liability can be imposed upon a defendant even though he was negligent unless it was a duty of care owed by defendant to plaintiff.

7. Negligence ⇨32(1)

The owner of property can rely on the assumption that an invitee will perceive that which would be obvious to him through ordinary use of his own senses.

8. Landlord and tenant ⇨165(7), 167(2)

Lessor was not required to give employee or invitee of lessee notice of dangerous conditions of premises that were manifestly obvious.

9. Landlord and tenant ⇨169(6)

Evidence was insufficient to sustain finding that lessor was guilty of common-law negligence contributing proximately to injury sustained by employee of tenant in fire caused by negligent manner in which tenant through employees conducted a business using highly inflammable materials on the demised premises.

10. Landlord and tenant ⇨169(3)

Where lessor owed employee of tenant no duty of reasonable care under common law to prevent tenant from carrying on business in demised premises in negligent manner, causing employee to receive serious injuries, right to recover was not increased or augmented by labeling the condition a nuisance.

11. Municipal corporations ⇨120
Statutes ⇨181(1), 212

All laws and ordinances are to be construed according to intention of the legislative body enacting them; and in ascertaining that intention, court must presume a prospective and not a retrospective operation was intended unless such presumption is negated by express language.

12. Constitutional law ⇨70(3)

Courts cannot concern themselves with wisdom of legislative enactments that are within constitutional power of the legislative branch.

13. Municipal corporations ⇨116

1943 ordinance of the city of Los Angeles "amending in its entirety" the Los Angeles Building Code was intended as a substitute for the existing code and repealed everything that was in the old ordinance and not contained in the new one.

See Words and Phrases, Permanent Edition, for all other definitions of "Amending in Its Entirety".

14. Landlord and tenant ⇨169(5)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's negligent use of inflammable materials, stairway and ramp ordinance of city of Los Angeles requiring all interior stairways to be enclosed with fire-resistant materials was properly excluded as inapplicable to office buildings where floors are connected with a continuing stairway at one side of the building which can be used as an exit in case of fire and inapplicable to an intercommunicating stairway between two floors.

15. Landlord and tenant ⇨169(11)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's

negligent use of inflammable materials, evidence that landlord's failure to enclose open stairway between floors with fire-resistant materials proximately contributed to employee's injuries was insufficient for the jury.

16. Evidence ⇨595

When it appears that facts from which a conclusion is sought to be deduced, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for.

17. Landlord and tenant ⇨168(1)

When a lessee rents premises that are safe as leased but are rendered unsafe by his use of them, neither the lessee nor his employees can recover from the lessor for injuries resulting from that condition.

18. Landlord and tenant ⇨169(5)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's negligent use of inflammable materials, where lack of safety of premises and their failure to comply with safety ordinances was caused solely by tenant's conduct of his business, ordinances were properly excluded as basis of imposing liability upon landlord notwithstanding lease gave landlord right to re-enter at all times.

19. Landlord and tenant ⇨169(5)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's negligent use of inflammable materials, safety orders promulgated by the Industrial Accident Commission dealing primarily and exclusively with relationship of employer and employee were properly excluded.

20. Workmen's compensation ⇨1092

Under the Constitution granting to the Legislature power to delegate to the Industrial Accident Commission authority to make regulations affecting the relationship of employer and employee, the Commission is without authority to impose liability upon third persons for injuries to employees or to establish rules of law applicable between landlord and tenant. Const. art. 20, § 21.

21. Municipal corporations ⇨601

Primary purpose of zoning ordinances is to prevent property of one person from being damaged by encroachment of a neighboring property in a manner not compatible with the general locality of the two properties.

22. Landlord and tenant ⇨169(5)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's negligent use of inflammable materials, exclusion of zoning ordinance of city of Los Angeles limiting floor space devoted to manufacturing and violated by nature of tenant's business was not error where employee was not within class of protected persons and violation could not have been a proximate cause of her injuries.

23. Municipal corporations ⇨621

Building Code of city of Los Angeles does not impose upon the owner a duty to apply for or obtain a new certificate of occupancy where there has been no change in occupancy since ordinance became effective, but merely requires superintendent of buildings, upon request of owner, architect, contractor or tenant, to issue a certificate in the name of the owner.

24. Landlord and tenant ⇨165(1)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's negligent use of inflammable materials, failure of landlord to have certificate of occupancy for tenant required by city of Los Angeles Building Code could not be regarded as a proximate cause of employee's injuries where responsibility for the fire rested upon grossly negligent manner in which tenant carried on his business operations.

25. Evidence ⇨29, 32

Courts may judicially notice statutes but not ordinances.

26. Trial ⇨136(3)

Proper construction of statutes and ordinances is for the court.

27. Trial ⇨213

In action by tenant's employee against landlord for injuries sustained in fire on

demised premises, court properly instructed jury as to meaning of ordinances in regard to issues with reference to which the ordinances were offered.

28. Landlord and tenant ⇨169(3)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's negligent use of inflammable materials, photographs of barricaded door were properly excluded where fact that door was barricaded as shown was admitted by defendants' answer and conceded at trial.

29. Landlord and tenant ⇨169(5)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's negligent use of inflammable materials, photographs taken officially by Los Angeles Fire Department shortly after the fire showing violations of ordinances which did not impose a duty on landlord toward the employee were properly excluded as immaterial.

30. Landlord and tenant ⇨170(4)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's negligent use of inflammable materials, recovery upon theory of nuisance could not be predicated upon nonobservance of ordinances which were properly excluded with respect to issue of negligence.

31. Nuisance ⇨44

An action based upon a private nuisance may be maintained only by those whose property rights have been invaded, and while a possessor of land is allowed to recover incidental damages for harms to his person or chattels in an action for private nuisance, the action is not available for the protection of those interests to a person who has no property rights or privileges in the land.

32. Landlord and tenant ⇨170(4)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's negligent use of inflammable materials, court properly excluded testimony predicated upon theory of nuisance where premises

were safe structurally or otherwise when demised and dangerous condition asserted to be a nuisance was created by the tenant through operations participated in by his employees.

33. Negligence ⇨121(5)

Plaintiff must not only prove defendant's negligence, but it is a basic element in every right of recovery that a defendant's negligence must contribute and be the proximate cause of the injury; and before a defendant can be held to answer in damages for injuries suffered by a plaintiff it is incumbent upon plaintiff to assume the burden of proof and show by a preponderance of the evidence that negligence of defendant was the proximate cause.

34. Negligence ⇨134(11)

Where facts go no further than to establish a possibility that defendant's negligence was a proximate cause of injury, plaintiff cannot recover.

35. Trial ⇨178

While, on a motion for a directed verdict, all reasonable inferences are to be drawn from the evidence in favor of plaintiff, and conflicts are also to be resolved in favor of plaintiff, nevertheless inferences cannot be based on imagination, speculation or supposition.

36. Trial ⇨142

Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the triers of fact.

37. Landlord and tenant ⇨169(11)

In action by tenant's employee against landlord for injuries sustained in fire on demised premises resulting from tenant's negligent use of inflammable materials, evidence that landlord's failure to remove doors swinging inward into workroom and replace them with others as required by ordinance of the city of Los Angeles was a proximate cause of employee's injuries in delaying her escape during the fire was insufficient for the jury.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Alma L. Neuber against Royal Realty Company, a corporation, Herman Helbush and E. R. Livingston, for personal injuries sustained in a fire occurring in a building owned by defendants and caused by the grossly negligent conduct of defendants' tenants. From the judgment, plaintiff appeals.

Affirmed.

Musick, Burrell & Ingebretsen, Anson B. Jackson, Jr., and James E. Ludlani, all of Los Angeles, for appellant.

Lasher B. Gallagher, Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff appeals from a judgment entered against her on a verdict of the jury rendered in favor of the defendants pursuant to direction of the court.

Epitomizing the facts as they appear in the record, it appears that defendant Royal Realty Company is a California corporation (hereinafter referred to as "the company"), and at all times here pertinent, was the owner of certain property at the corner of Wilshire Boulevard and Alvarado Street, in the City of Los Angeles, improved with a "Class C" building.

Defendant Herman Helbush is and at all times herein pertinent was president of the corporation, owner of all its outstanding stock except for one or two qualifying shares, and in charge of the management and operation of said corporation.

Defendant E. R. Livingston was also an officer of the corporation, but as to him a nonsuit was granted at the conclusion of plaintiff's case, and no appeal was taken from the judgment rendered thereon.

On June 22, 1937, defendant corporation through its president, defendant Helbush, entered into a lease with one Norman Noll, doing business under the firm name and style of Noll and Company, for the purpose of conducting in a portion of the aforesaid building " * * * the business of manufacturers of and dealers in club furniture and equipment, and for no other purpose * * *".

The lease was on a printed form and was accompanied by a letter describing certain changes to be made in the partitioning of space, closing up the door opening on the mezzanine floor, and building a new stairway at the rear of the building, after which the letter provided: "Any other changes which may be necessary to the carrying on of your business, and which shall be subject to our approval, shall be at your own cost and expense."

Other provisions of the lease provided as follows:

First: "In the event of a breach of any of the other covenants herein contained on the part of the lessee to be kept and performed, it shall be lawful for the lessor or for the heirs, executors, administrators, successors and/or assigns of the lessor to re-enter into and upon the said premises, and every part thereof, and to remove all persons therefrom, and to repossess and enjoy the said premises as in the first and former estate of the lessor, anything to the contrary herein contained notwithstanding."

"Second: That the lessee will not use, or permit to be used, the said premises, or any part thereof, for any purpose or purposes other than the purpose or purposes for which the said premises are leased, demised and let unto the lessee, as hereinbefore specified."

The twelfth paragraph of the lease reserves to the lessor the right "to enter into and upon the said premises at all reasonable times, for the purpose of inspecting the same."

Noll entered upon the demised premises and continued in possession thereof until the expiration of the lease on June 22, 1942. Thereafter, he held over as a tenant from month to month under the terms contained in paragraph eleven of the lease, and was in such possession on January 20, 1944, when there occurred a fire which gave rise to this litigation.

The portions of the building on the second floor occupied by the tenant Noll, employer of plaintiff, consisted of a second floor room designated at the trial as "show-room", and another room designated as

"workroom", and two other rooms designated as "storerooms" 1 and 2.

A stairway consisting of fifteen risers descended from the floor of storeroom No. 2 to the ground floor of the building immediately under said storeroom. There was a doorway opening inward from the alley immediately east of the building to the ground floor at the bottom of this stairway.

On January 20, 1944, the day of the fire, and for a long time prior thereto, the stairwell descending from storeroom No. 2 to the ground floor was covered with planking which entirely obstructed the stairway, rendering it incapable of use, and the doorway at the bottom of the stairway, opening inward from the alley, was barred with bolts and a wooden obstruction.

Between the workroom and the showroom at the top of the steps which elevate the floor of the workroom some two and one-half to three feet above the elevation of the floor of the showroom, was a set of double doors which swung to the south only, or into and not away from the workroom. The westerly of these doors was always closed, being obstructed by a heavy table and cash register which were placed against it on the workroom side.

Plaintiff had been employed by Noll for some months prior to the fire and the table at which she worked was located in the workroom. Her duties consisted of painting or "spotting" the spots on dice. The dice had previously had small holes drilled in their surfaces for the spots, and the latter were made by applying paint in these holes with an instrument called a "nail".

Plaintiff testified that she had never, before the fire, been told by anyone that any of the material in use in the establishment was inflammable or explosive, which testimony was stricken out by the trial court. That Noll himself spent a large part of his time working with his employees in the workroom on various machines. That when Noll was in the workroom he was in the habit of smoking cigarettes. This testimony was also stricken by the trial court, upon motion of the defendant.

During Noll's entire tenancy, the greater part of his activities in the demised premises was the manufacture of dice from nitro-cellulose, which, in finely divided particles is highly inflammable. Dice were fabricated from cubes, and in shaping the cubes shavings were cut from them all the way from large shavings to finely divided particles. These shavings were strewn all over the room and the air impregnated with cellulose-nitrate dust. Noll had attached to several of his cutting machines a blower which blew the shavings and dust out into the room where they settled on the floor, walls and curtains, as well as upon the clothing and persons of the workers. At the close of each day's operation, the refuse, including the sweepings of the nitro-cellulose dust and shavings upon the floor, was swept up and put into gunny sacks which were stacked along the wall until Mr. Noll found it convenient to take them out and burn them.

Another phase of Noll's activities consisted in fastening cloth covers to the surfaces of gaming tables, requiring the use of shellac and other inflammable liquids, and putting monograms upon poker chips, using therefor cellophane and similar inflammable materials. Noll also engaged in cleaning playing cards in large quantities, using therefor an inflammable liquid cleaner the same or similar to that used in dry cleaning establishments. He also trimmed the edges of such cards with a machine which he had in the workroom for that purpose.

There was no suction equipment or contrivance of any kind installed in the workroom, or elsewhere, to remove this debris at its source or at all, nor was any mechanical ventilation provided. The only ventilation of any kind in the workroom was afforded by the doors and windows.

With reference to the manner in which the tenant Noll, employer of plaintiff, conducted his business, respondents at the oral argument epitomized the same as follows: "It must be conceded * * * that he conducted his operations in a highly negligent manner."

The fire around which this litigation centers occurred at the end of a working

day, about 5 o'clock on the afternoon of January 20, 1944. At that time there were in the workroom seven employees of Noll—one man and six women. Three met their deaths within a few minutes after the fire started, and the other four, including plaintiff, were very severely burned.

Immediately preceding the fire, plaintiff had left her worktable and, preparatory to going home, was on her way to obtain her purse which she had placed on a shelf immediately west of the stairwell. As she was walking to get her purse there was a loud explosion in the room. Immediately it was filled with flames and smoke. Plaintiff testified there was only a second or an instant between the explosion and the spread of the flames all over the room. Plaintiff grabbed her purse from the shelf, crouched down low, and started north for the double doorway between the workroom and the showroom. After going about six feet she fell and by that time her hands and arms were burned so badly she had to drop her purse. When she arrived near the door, the east half of which only was available for use because the west half was obstructed by the heavy cash register and table, she fell over something. During her progress from where she got her purse to the door, smoke, fumes and flames filled the room. As she lay on the floor near the doorway, something came down from above and struck her on the body. She does not recall how long she lay on the floor near the door because she was not wholly conscious. Subsequently, she did stagger to her feet, the door was open, she went out through the doorway and fell down the steps between the workroom and the showroom.

The cause proceeded to trial on the amended complaint containing thirteen causes of action, and an amendment filed thereto.

The first cause of action contains all of the charges of negligence and ordinance violations to be found in the entire amended complaint, and may be digested as follows: After alleging in the first three paragraphs that defendant corporation conducted all its business through its president

and secretary, defendants Helbush and Livingston, the ownership and construction of the building by defendant corporation, a description of the same, the lease to Noll, his occupancy on a month-to-month tenancy subsequent to the expiration of the lease, and that for a long time prior to the date of the fire, to the knowledge of the defendants, the stairwell of the stairway leading to the alleyway had been covered with heavy planking, entirely obstructed, and that the stairway opening from the ground floor of the building onto the alley had been barred and obstructed, that one-half of the double doorway leading from the workroom into the showroom had been blocked off and obstructed by a heavy table being placed against it with a heavy cash register on the table, the amended complaint in paragraph IV alleges that Noll, prior to the lease, had been engaged in the manufacture of gaming equipment, including the manufacture of dice out of nitro-cellulose, and that he, Noll, expected to continue such manufacture of dice, and that in addition thereto, he was engaged in the business of cleaning playing cards, and that for such purposes he kept volatile liquids customarily used for dry cleaning clothes.

In paragraph V it is alleged that he kept in the workroom and storerooms in excess of one thousand pounds of cellulose-nitrate cubes and also quantities of inflammable liquids. It is then alleged that the workroom was equipped with various machinery, consisting of drills, milling machines, polishers, lathes, grinders, etc., which were electrically driven; that the cubes were cut to the size desired, holes drilled in them which were later filled with inflammable paint substances, and the manufactured dice kept in "tote" boxes. It is alleged that cellulose-nitrate is a violent explosive containing within its own structure the oxygen necessary for combustion, and that common practice required the use of preventive measures to prevent the accumulation of dust and small shavings, and that electrical equipment be grounded, operations isolated, clothing frequently washed, spark-proof type shoes worn, and dust and cuttings removed.

In paragraph VI it is alleged that on the 20th of January, 1944, plaintiff was one of seven employees engaged in the process of manufacturing and fabricating dice from cellulose-nitrate; that plaintiff's particular work consisted of painting the spots on dice with inflammable paint; that at about 5 o'clock on said day, the atmosphere in the said workroom was filled with quantities of cellulose-nitrate shavings, dust, and accumulations that without warning suddenly exploded and ignited, causing all of the air in said room to be ablaze and in flame; that plaintiff attempted to leave the workroom, by the only exit, to-wit, half of the double door between the workroom and the showroom; that the other employees had simultaneously attempted to escape but were overcome by flames, heat, and gases, and had fallen to the floor in front of the doorway; that the said doorway was obstructed and incapable of use, and the bodies of the employees made it impossible to open the door; that plaintiff was overcome with heat, gas, and flames, became unconscious, and fell to the floor, approximately in front of the doorway.

In paragraph VII it is alleged that as a result of said explosion and fire and inability to escape from the room, plaintiff suffered and sustained serious and severe burns, which it is alleged resulted in general damages of \$100,000.00.

Paragraph VIII alleges special damages in the sum of \$6,500.00.

Paragraph IX alleges that prior to the fire, she had an earning power of \$30.00 per week.

In paragraph X it is alleged that long prior to January 20, the defendants negligently permitted Noll to carry on and conduct the operations described in the complaint, with full knowledge of the conditions surrounding the manufacturing and processing of said dice, and with knowledge that the manufacturing and processing of dice was negligently and unlawfully conducted, without the use of reasonable care, and that the negligence of the defendants contributed proximately to the flash fire and explosion.

Each of the remaining causes of action rec alleged all of the averments of the

first cause, then set out special averments by which it was evidently intended to limit the particular cause of action to some one element included in the first cause of action.

Thus, in the second cause of action the specific charge is failure to have a fire escape.

The third cause of action charged failure to have an exhaust system whereby dust and shavings, vapors and fumes were drawn out of the room; negligent failure to heat the rooms with steam heat, so that the sole means of heating was an ordinary domestic type gas heating stove with an open flame, negligent failure to require any no smoking signs to be installed in the room, and negligent failure to have the electrical equipment for the operation of the motors properly insulated.

The fourth cause of action charged negligence in not having two exits in the room.

The fifth cause of action charged negligence in permitting the storage of cellulose-nitrate in the storerooms without having proper explosive vaults for them.

The sixth cause of action, negligently failing to have an explosion hatch in the ceiling.

The seventh cause of action, negligently failing to have a stairway to the roof.

The eighth cause of action charged negligence in not having the proper electrical installations for the electrical equipment used by Noll to operate his machinery.

The ninth cause of action was the same as the eighth, except that it is alleged as to the electrical wiring.

The tenth cause of action charged further negligence in regard to not properly equipping the electrical motors with ventilation and dust-proof housing, etc.

The eleventh cause of action charged negligence with reference to wiring enclosures, motors, and electrical appliances used by Noll.

The twelfth cause of action charged that the defendants furnished an open gas heater for heating said room.

The thirteenth cause of action charged that the acts and omissions of the defend-

ants constituted a public and private nuisance.

By their answer, defendants admitted the ownership of the building, the leasing of the premises to Noll, and generally admitted upon information and belief of the defendants, obtained subsequent to the fire, that Noll had blocked off the stairwell from the storeroom floor and barricaded the door at the foot of the stairs opening onto the alley, and blocked off half of the door between the workroom and the display room, but denied that any of these facts were known to the defendants before the fire; and likewise admitted generally the manufacture of dice by Noll on the premises, but denied that either the fabrication of dice or that they were manufactured out of inflammable material was known to the defendants prior to the fire. It is alleged in the third paragraph of the answer that at the time of the making of the lease, the defendants were informed that Noll did not intend to manufacture gaming equipment but simply to assemble the same.

The answer also contained a plea of contributory negligence on the part of the plaintiff.

By an amendment to the answer, the defendants pleaded assumption of risk by the plaintiff.

When the cause was called for trial, defendants, pursuant to notice of motion theretofore given, moved the court for judgment on the pleadings, basing said motion on the ground that the amended complaint did not state a cause of action against the defendants, jointly or severally. In denying the motion, the court prepared a written opinion which we here epitomize because it may aid the clarity of this decision in that it decides the following points to which the court adhered throughout the trial:

(1) That the plaintiff as an employee of Noll had no greater rights against the lessor than had Noll.

(2) That a lessee and his employees had a right of recovery from the lessor for injuries resulting from the dangerous condition of the premises only where the dangerous condition was not apparent, and

was known to the lessor and not to the lessee; that the basis of the landlord's liability was not the dangerous condition of the premises but the concealment thereof, and that a lessee who rented premises in a dangerous condition knowing of that condition assumed all the risks incident thereto.

(3) That the above rules were not applicable to the non-performance by a lessor of a statute or ordinance requiring certain structural or safety devices in the building, the trial court observing: "On the other hand, in the case of a duty imposed by statute, it is not the concealment which renders the owner liable, but the continued existence of the danger which has been inhibited by the statute."

(4) That this rule, however, applied only to ordinances which were required of a building as a building, and not to ordinances which were violated only by the use which Noll, the tenant, made of the premises leased to him.

(5) That the complaint did not disclose contributory negligence or assumption of risk as a matter of law.

The further suggestion was made by the court that a saving of time as well as an orderly procedure would be enhanced if before the empanelment of the jury, court and counsel would examine the various ordinances which plaintiff intended to offer in evidence, to the end that before trial, both parties would know what ordinances would be received in evidence.

Following such discussion the court rendered an oral opinion in which it held that the plaintiff could not recover upon the thirteenth cause of action based upon the theory that the premises created a nuisance, this because: (1) the common law action of nuisance was based upon a use of land which damaged adjoining land or damaged or inconvenienced persons having a right upon adjoining land, and (2) that the alleged nuisance was created not only by Noll but by his employees as well.

With reference to the ordinances and safety regulations which counsel for plaintiff had apprised the court they relied upon, they were grouped by the court into three classifications, viz.:

"(1) Any requirements which have to do with the structure of the building itself as a building designed for a general purpose—such as a garage, hospital, or theater—place a duty upon the owner to comply therewith.

"(2) Any requirements for specific installations in the building having to do with safety measures incidental to the special activity of the tenant in his operations—such as special type of machinery or things deemed necessary to reduce the danger of its use, as for instance a suction dust remover—place a duty solely upon the occupant in charge of such operations and not upon the owner, whether their installation incidentally involves some alteration in that portion of the building or not.

"(3) Any requirements as to the manner in which the activity is to be carried on—such as not placing furniture in front of a door, or using only manila envelopes as containers for certain materials—place a duty upon the occupant in charge of the operations and not on the owner. * * *"

Throughout the trial the court consistently abided by the views expressed in the just-quoted oral opinion, receiving in evidence all ordinances and safety regulations falling within the first classification, and rejecting those that fell within the second and third.

Before the introduction of any evidence, the defendants, each separately for himself and itself, objected to the introduction of any evidence either under the complaint or under any of the causes of action therein stated, on the ground that the complaint did not, nor did any cause of action therein, state facts sufficient to constitute a cause of action against the defendants, jointly or severally. The objection was overruled as to the first twelve causes of action and sustained as to the thirteenth.

While the court admitted a number of ordinances into evidence, there was only one the violation of which it was held proximately contributed in any way to plaintiff's injuries. This was section 91.3303 of the Building and Safety Ordinance of the City of Los Angeles, which provided that every exit door serving an aggregate floor space of more than 1,000

square feet should swing outward instead of inward.

In accordance with its foregoing basic rulings, the trial court held that the only issue to be submitted to the jury was whether the fact that the door between the workroom and the showroom swung inward instead of outward proximately contributed to plaintiff's injuries. In this regard, defendants contended that there was no violation of the aforesaid ordinance No. 91.3303 for the reasons: (1) the ordinance was not applicable to existing buildings, but only to those constructed after its adoption; (2) the square footage of the room in question was not in excess of 1,000 feet. The court, however, held otherwise, but directed a verdict for the defendants on the ground that the evidence affirmatively established as a matter of law that the manner in which the door swung in no way interfered with or impeded plaintiff's exit from the workroom.

We shall first give consideration to appellant's claim that regardless of ordinance requirements which she claims were violated, there was sufficient evidence under the first cause of action to warrant submission to the jury of the question whether defendants were guilty of common law negligence or lack of ordinary care, which proximately contributed to her injuries.

In support of this contention, appellant asserts that under the facts proven or offered to be proven upon the trial, "defendants were guilty of general or common law negligence which proximately caused her injuries, especially in view of the fact which must be assumed for the purposes of this appeal, that they at all times during Noll's tenancy in their building knew all about his activities therein, that these were highly negligent and dangerous and that the defendant owners permitted them to continue until the disaster occurred on January 20, 1944, although they at all times under their lease had the absolute power to stop them, and that the question of whether they were or were not guilty of negligence by reason of these facts was, at the least, one for a jury to determine."

Appellant's contention in this regard is that, entirely aside from claimed law vio-

lations, Noll's admittedly grossly dangerous and negligent use of the premises through his operations therein were at all times known to respondents. That under the lease and at all times after its expiration up to the date of the fire, respondents had the right to enter upon the premises "for the purposes of inspection", which right asserts appellant it is only fair to assume was reserved so that respondents might be in a position to learn of and stop dangerous or illegal operations by the tenant. That under a covenant contained in the lease, the tenant Noll was obligated to conduct his tenancy in a lawful manner, and that a violation of this covenant entitled the lessor to terminate the tenancy, thereby eliminating the tenant's dangerous negligent and illegal conduct upon the demised premises. That under the terms of the lease the tenant had no power or right to make structural alterations in the building so as to make his operations therein safe or legal.

[1,2] There can be no doubt that the general rule is that the landlord is not liable for injuries to the person or property of the tenant or his invitees or employees caused by defects in the leased premises, the rule amounting to an application of the doctrine of caveat emptor. Equally well settled is the rule that the doctrine just enunciated is subject to the exception that if there be some hidden defect in or danger on the premises, which is known to the lessor at the time of executing the lease, but which is not apparent to the prospective lessee, the lessor is obligated to inform the lessee thereof. Failing so to do the lessor renders himself liable for injuries sustained by the lessee resulting from such hidden defect. And that as to the tenant's employees or other invitees (except as to the lease of public or semi-public buildings), the landlord is liable to the same extent as he would have been had the tenant been injured. *Shotwell v. Bloom*, 60 Cal.App.2d 303, 309, 310, 140 P.2d 728. In the case just cited, 60 Cal. App.2d at page 310, 140 P.2d at page 733, we find the following: "Stated another way, the landlord's liability, except in the case of public and semi-public buildings where his liability is greater (see *King v.*

New Masonic Temple Ass'n, 51 Cal.App.2d 512, 125 P.2d 559), is no greater to the invitee of the tenant than it would be to the tenant himself."

In the instant case we are not confronted by a situation wherein the dangerous condition of the premises was brought about through faulty construction or by any hidden defect or danger existing on the premises at the time the lease was executed. But we are met with a dangerous condition resulting from the concededly grossly negligent manner in which Noll, the lessee, conducted his operations on the premises. And it must be conceded that the danger emanated from the use which Noll made of the premises, a use which he made thereof through the services of his employees, including appellant.

We are convinced that under well-established principles, appellant's claim of common law negligence must be founded upon the proposition that respondent lessor company and its officers owed to Noll as the company's lessee, and to appellant as Noll's employee, a duty to prevent them from injuring themselves by the careless and negligent manner in which Noll, through his employees, carried on and conducted his business in the demised premises.

[3-5] As was said by this court in *Palmer v. Crafts*, 16 Cal.App.2d 370, 374, 375, 60 P.2d 533, 535: "In order to constitute an actionable tort, there must be a legal duty—imposed by statute or otherwise—owing by the defendant to the one injured, for in the absence of such a duty any damage caused is injury without wrong—*damnum absque injuria*. *Wilson v. Union Iron Works Drydock Co.*, 167 Cal. 539, 140 P. 250; *Mernin v. Cory*, 145 Cal. 573, 79 P. 174; *Smith v. Whittier*, 95 Cal. 279, 30 P. 529; *People v. Schmitz*, 7 Cal.App. 330, 370, 94 P. 407, 15 L.R.A.,N.S., 717. The existence of such a duty must appear in the allegations of the complaint as a necessary prerequisite essential to the statement of a cause of action; and we find in the averments of the complaint before us no such duty existing, nor does a reading of the evidence in this case indicate the existence of any such duty on the part of appellant to respondent. In view of the

relation existing between the parties here, as shown by the pleadings, coupled with the circumstances surrounding the accident where appellant and respondent were engaged in a joint enterprise and respondent was injured while performing an act in the furtherance of their joint adventure, we are unable to perceive the existence of any duty reposing upon appellant the violation of which resulted in injury to respondent. In order to constitute actionable negligence, there must exist three essential elements, namely: A duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. Not only must the complaint disclose these essentials, but the evidence must support them, and the absence of proof of any of them is fatal to a recovery. *Means v. Southern California Ry. Co.*, 144 Cal. 473, 478, 77 P. 1001, 1 Ann.Cas. 206."

[6] That no tortious liability can be imposed upon a defendant even though he was negligent, unless there was a duty of care owed by defendant to plaintiff, was the holding in *DeMotte v. Arkell*, 77 Cal.App. 610, 621, 247 P. 254; *Coleman v. California etc. Church*, 27 Cal.App.2d 579, 81 P.2d 469; *Toomey v. Southern Pacific R. R. Co.*, 86 Cal. 374, 24 P. 1074, 10 L.R.A. 139; *Grundel v. Union Iron Works*, 141 Cal. 564, 566, 567, 75 P. 184; *Leslie v. City of Monterey*, 139 Cal.App. 715, 719, 720, 34 P.2d 837; *Hall v. Southern Cal. Edison Co., Ltd.*, 137 Cal.App. 449, 452, 453, 30 P.2d 1013; *Slyter v. Clinton Construction Company*, 107 Cal.App. 348, 353, 290 P. 643; *Jacobson v. Northwestern Pac. R. R. Co.*, 175 Cal. 468, 472, 166 P. 3; *Smelser v. Deutsche Evangelische, etc.*, 88 Cal.App. 469, 475, 476, 263 P. 838.

[7,8] Let us assume, as contended by appellant, that respondents were at all times aware of the careless and negligent manner in which Noll, the tenant, was conducting his business on the premises, and of the dangerous condition thereby created, of what existing dangers were respondents required to warn appellant of which she was not cognizant and which were not readily apparent to her? Further, assuming that appellant was an invitee on the

premises, and that respondents were burdened with the duty of exercising ordinary care to prevent injury to her, nevertheless, the danger being obvious, appellant had equal, if not superior knowledge of the dangerous conditions which brought about her injuries. Under such circumstances, the authorities are uniform in holding that the owner of the property can rely on the assumption that an invitee will perceive that which would be obvious to him through the ordinary use of his own senses. To have warned appellant herein would be but to inform her of dangers and conditions which she herself saw throughout each day she worked on the premises. The dangers being manifestly obvious, the respondent lessor company and its officers were not required to give appellant notice thereof. *Funari v. Gravem-Inglis Baking Co.*, 40 Cal.App.2d 25, 29, 104 P.2d 44; *Vitrano v. Westgate Sea Products Co.*, 34 Cal.App. 2d 462, 466, 93 P.2d 832; *Shanley v. American Olive Co.*, 185 Cal. 552, 555, 197 P. 793; *Weddle v. Heath*, 211 Cal. 445, 452, 295 P. 832; *Mautino v. Suter Hospital*, 211 Cal. 556, 560, 296 P. 76; *Goldstein v. Healy*, 187 Cal. 206, 211, 201 P. 462; *Blodgett v. B. H. Dyas Co.*, 4 Cal.2d 511, 512, 50 P.2d 801.

[9] We are persuaded that it must be held, eliminating consideration of ordinance violations, to which we shall later give consideration, that the evidence was insufficient to warrant submission to the jury under the first cause of action of the question whether respondents were guilty of common law negligence or a lack of ordinary care, which proximately contributed to appellant's injuries.

[10] Aside from any consideration or ordinances or the violation thereof, it must be held that the evidence failing to disclose the breach of any common law duty owed by respondents to appellant, the latter can not recover whether the negligent and careless manner in which the lessee Noll conducted his operations be characterized as a dangerous condition or as a nuisance. If respondent owed no duty to the employees of Noll to warn them against participating daily in the creation or maintenance of what amounted either to a dangerous condition or a nuisance, whichever term is ap-

plicable, then appellant can not recover. Her right to recover is not increased or augmented by labeling the condition a nuisance nor is that right in any degree lessened by labeling it a negligent and dangerous condition. Her right to recover rests upon whether respondents owed her any duty to prevent the existence and continuation of the condition complained of. As heretofore pointed out, exclusive of claimed ordinance violations, respondents owed no such duty to appellant under the circumstances here present.

We come now to a consideration of the correctness of the court's rulings excluding from the evidence certain ordinances offered by the appellant.

In this regard, appellant challenges the trial court's ruling that when, on January 1, 1943, ordinance No. 87,000 entitled, "An Ordinance Amending, in Its Entirety, Article I of Chapter 9 of the Los Angeles Municipal Code, Being the Article Commonly Called 'The Building Code'" became effective, it repealed the existing or "old" Building Code. The court held that on and after January 1, 1943, the Building Code of the City of Los Angeles "consisted entirely of what was thereafter said in that (the amending) ordinance, and nothing else. That everything that was in the old ordinance and not contained in the new one was repealed thereby".

[11] This ruling was correct. Over a long period of time it has been the rule in this state that no statute shall be held retroactive unless such intention clearly appears. All laws and ordinances are to be construed according to the intention of the legislative body enacting them, and in ascertaining that intention the courts must presume a prospective and not a retrospective operation was intended unless such presumption is negated by express language. There is nothing in the ordinance now before us which would indicate that it was to be retroactive. On the contrary, the language in section I of the ordinance provides that the then existing ordinance "is hereby amended in its entirety so as to read as follows:".

[12] Appellant asserts that if this ruling is correct it would remove all buildings

in the City of Los Angeles, including respondent company's building, from control by any Building Code or ordinance unless they were controlled by some provision of the new Building Code. While courts can not concern themselves with the wisdom of legislative enactments that are within the constitutional power of the legislative branch of the government, it is at once apparent that the City Council intended the ordinance to apply to buildings thereafter to be constructed except in so far as the provisions of the new ordinance should be made applicable to existing buildings. Had the legislative intent been otherwise, it could easily have been made manifest. It is not within the province of the courts to rewrite the ordinance.

[13] Manifestly, the new ordinance was intended as a substitute for the existing one. Such being the case, the latter or substituted ordinance repeals the former. The new ordinance must from its very terms be regarded as revisory of the entire matter of the earlier ordinance, and the latter must be held to have been superseded. The language "amended in its entirety so as to read as follows" can only mean that the legislative body had made a new and complete expression of its will upon the subject of building control. Therefore, this last expression must prevail, and whatever is excluded therefrom must be ignored. *Charnock v. Rose*, 70 Cal. 189, 192, 11 P. 625; *Bond v. Farmers & Merchants National Bank*, 64 Cal.App.2d 842, 845, 846, 149 P. 2d 722; *Treadwell v. Yolo County*, 62 Cal. 563, 564; *Dillon v. Bicknell*, 116 Cal. 111, 114, 47 P. 937; *Mack v. Jastro*, 126 Cal. 130, 132, 58 P. 372.

[14] It would unduly prolong this opinion to here set forth in detail the various ordinances offered in evidence and rejected by the court. Generally speaking, they fall into two classes:

(1) The stairway and ramp ordinance, which ordinance applied to a building as a building and not to its use. This ordinance was properly excluded as not being applicable to existing buildings, and for the reasons heretofore stated, was applicable under the new Building Code to buildings thereafter to be constructed. The ordinance

required that all interior stairways and interior ramps shall be enclosed with fire-resistant materials or walls. There is much to be said in favor of respondent's contention that the provision was intended for stairways exterior to offices such as are found in most office buildings where the floors are connected one after another with a continuing stairway at one side of the building which can be used as a means of exit in case of fire or other emergency, and that the provision in question was not intended to apply to an intercommunicating stairway of the character of the one here involved, simply between two floors. But, assuming the stairway had been enclosed with fire-resistant material, there is no evidence in the record or offer to prove that appellant's burns would have been any less severe. Furthermore, she could not have escaped because the stairway leading from the mezzanine floor to the alley had been blocked by the stairwell being covered over and the door at the bottom being secured. But the blocking of this exit way was the act of Noll, the tenant. It was not a structural part of the building. Indeed, as leased and turned over to Noll, the stairway furnished a safe and sufficient exit from the mezzanine floor to the alleyway. Noll's blocking it by planks placed over the stairwell and barricading the door was not an act of the respondents and had no connection whatever with the fact that the stairway between the storeroom and the workroom was not enclosed with fire-resistant material.

[15,16] Though it be conceded that this provision of the ordinance was applicable to existing buildings—and we think it is clear that it was not—the question of whether the open stairway proximately contributed to plaintiff's injuries could not have been submitted to the jury without inviting them to indulge in conjecture and speculation. When it appears that the facts and circumstances from which a conclusion is sought to be deduced, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for.

(2) Ordinances which were claimed to have been violated, not by the structure of the building as a building, but by the use

which the tenant Noll made of the leased premises, or which were excluded by the court because of its rulings that respondents were not responsible for such ordinance violations by Noll, as lessee.

Generally speaking, the ordinances in this category fell roughly into three classes or groups:

(A) Ordinances making certain requirements for a building in which cellulose-nitrate was handled or stored (such as the ordinances requiring explosion vaults where a certain quantity of the material was kept, and a sprinkler system where the material was processed).

(B) Ordinances which required manufacturers to take certain precautions in the operation of their machinery.

(C) General, miscellaneous ordinances.

[17] The court below sustained objections to all of these proffered ordinances on the ground that appellant being an employee of Noll the lessee, stands as to the lessor, in the shoes of the lessee, and has no greater or different right against the lessor because of defects in the leased premises than has the lessee; that necessarily, when a lessee rents premises that are safe as leased, but are rendered unsafe by his use of them, neither the lessee nor his employees can recover from the lessor for injuries resulting from that condition. In this view the trial court is supported by a long, uniform and unbroken line of decisions in this state. See *Shotwell v. Bloom*, supra, 60 Cal.App.2d page 310, 140 P.2d 732. To the same effect are a veritable forest of cases, including *Runyon v. City of Los Angeles*, 40 Cal.App. 383, 392, 180 P. 837; *Donohoo v. Kress House Moving Corp.*, 25 Cal.2d 237, 242, 243, 153 P.2d 349; *Singer v. Eastern Columbia Inc.*, 72 Cal.App.2d 402, 410, 411, 164 P.2d 531; *Scholey v. Steele*, 59 Cal.App.2d 402, 405, 138 P.2d 733.

The premises as leased to Noll were structurally safe and except as to the construction of the door between the show-room and the workroom, to which we shall later give consideration, there was no failure to comply with any ordinance affecting the building as a building. The lack of safety of the premises and their failure to

comply with the ordinances now engaging our attention, was caused solely by Noll's operations and the manner in which he conducted his business.

Under the foregoing rule, so firmly established in this state, the question then arises as to whether Noll, had he been injured in the fire could have successfully prosecuted an action against the landlord, and would the ordinances have been admissible in his favor as against respondents? The answer is obvious. As an employee of the lessee Noll, appellant was in exactly the same relation to the lessor as Noll. Appellant concedes that in the present case the tenant Noll could not recover for any injury he might have sustained as a result of the dangerous condition in the maintenance of which he participated, but insists that in the instant case the lease gave the respondent lessor company the right to re-enter at all times, obligated the tenant Noll to comply with the law, invested the lessor with the right to cancel the lease if the law was not complied with, and prohibited the tenant from making any alterations in the building without the written consent of the lessor. That respondent owners had full and complete knowledge of the illegal and negligent activities being conducted in the premises during Noll's entire period of occupancy. That respondents were joint tort-feasors with the tenant Noll, and were guilty of negligence and unlawful conduct which concurred with that of Noll to create the continuing grossly dangerous condition which resulted in serious injury to the appellant. That where the cause of injury is created by the license, consent or concurrence of the landlord, he becomes the principal of or a joint tort-feasor with the tenant in doing the wrongful act or in the maintenance of the dangerous condition and becomes responsible to a third person injured thereby. That the liability in such a case results, not from his status as lessor, but is fundamental, and the result of participation in the wrong.

In analyzing the cases cited by respondents, it would at first appear difficult to harmonize them with the view taken by the courts of this state. But a careful perusal of the authorities relied upon by

appellant fails to reveal one wherein the landlord was held responsible under facts and circumstances similar to those present in the case at bar. In none of them do we find a situation where the plaintiff was an employee of the lessee, and where the dangerous conditions resulting from violations of ordinances or negligent operation were effected by the lessee through his employees, of whom the injured plaintiff was one.

Two California cases are cited by appellant, the first of which is *Dennis v. City of Orange*, 110 Cal.App. 16, 293 P. 865. A mere recital of the factual situation presented in that case will demonstrate clearly that it is distinguishable from the case now engaging our attention. In the cited case the city rented a portion of a river bed for the purpose of permitting the excavation of sand. The lessee excavated the sand in such a negligent manner as to make it certain that during high water the current of the stream would be diverted. After the tenancy had ended, the city, without attempting to rectify the condition, released the portion of the river bed, and at the time of the next high water the stream was diverted, with the result that it washed out the land of the plaintiff, who was a lower riparian owner on the opposite side of the stream. The court properly held that the city was liable, pointing out that if the flood had occurred during the original term, the city would not have been liable, but that when the tenancy ceased and the city had a right to re-enter and take possession of the premises it was its duty to rectify the nuisance created by the tenant. Suppose, however, instead of the plaintiff being a lower riparian owner the lessee had put his own machinery upon the land that was washed out and the machinery had been damaged or destroyed. Could it for a moment be contended that he could recover?

The case of *Harmon v. M. H. Sherman Co.*, 29 Cal.App.2d 580, 85 P.2d 205, is not helpful to appellant because that case fell within the rule of an ordinance applicable to a building as a building, and not to any special use the tenant made of the building. The points raised were not analogous to the issues urged in the case now before us.

From other jurisdictions, appellant cites the cases of *Deutsch v. Max*, 318 Pa. 450, 178 A. 481; *Swift & Co. v. People's Coal & Oil Co.*, 121 Conn. 579, 186 A. 629; *Patterson v. Schlitz Brewing Co.*, 16 S.D. 33, 91 N.W. 336. Whatever may be said in these and other cited cases which might be regarded as varying and modifying the rule so firmly established in this state cannot prevail. And finally, it may be said that appellant's theory breaks down for lack of any legal duty on the part of respondents to prevent the violations of ordinances by either the tenant Noll or by appellant, his employee.

The following language of the Supreme Court of Kansas in *Bailey v. Kelly*, 93 Kan. 723, 145 P. 556, 559, L.R.A.1916D, 1220, seems to us timely and pertinent to the instant case: "To ingraft an exception upon the law for this particular case is to recognize the first of a wilderness of single instances. To cistern cases must soon be added cases involving defective railings about steps, stairways, porches, and areas, whereby the tenant's servants are injured. If after the fact of a distressing accident a jury should conclude to find negligence in maintaining some structure or place where the tenant's children invited some friends to play, the landlord must respond in damages. The list is certain to grow until it may be impossible to say what is the rule and what an exception. If the property law of the state is to be changed, and a general duty is to be imposed upon the landlord to make his premises secure for use by tenants and whomsoever a tenant may invite there, the Legislature should create the obligation and not the courts."

[18] The court did not err in its rulings excluding the ordinances in question.

Appellant next urges that the court erred in its rulings as to the non-applicability of certain sections of the Labor Code and in denying admission into evidence of certain safety orders promulgated by the Industrial Accident Commission.

[19] The rejection of these code provisions and safety orders was proper. They deal primarily and exclusively with the relationship of employer and employee.

As heretofore pointed out, the premises were safe when leased to Noll and it was his use and occupancy thereof that rendered them unsafe and hazardous. The Industrial Accident Commission is without power to establish rules of law applicable between landlord and tenant.

[20] Section 21 of Article XX of the Constitution of California grants to the legislature power to delegate to the Industrial Accident Commission the authority to make regulations affecting only the relationship of employer and employee. That the Industrial Accident Commission is without authority to impose liability upon third persons for injuries was the unequivocal holding in *Pacific Gas and Electric Co. v. Industrial Accident Commission*, 180 Cal. 497, 501, 181 P. 788. See also *Hayden v. Paramount Productions, Inc.*, 33 Cal.App. 2d 287, 296, 297, 91 P.2d 231.

[21] No error was committed by the court in sustaining objections to the introduction into evidence of the zoning ordinance of the City of Los Angeles. The primary purpose of zoning ordinances is to prevent the property of one person from being damaged by the encroachment of a neighboring property in a manner not compatible with the general locality of the two properties. For instance, to prevent residence property from being impaired by property devoted to business purposes.

[22] In the zone in which the demised premises herein were located, certain classes of business, not including the tenant Noll's business, were permitted and a certain percentage of floor space only could be used for manufacturing. The zoning ordinance was not designed to protect employees within a particular zone from injuries received by fire in the course of their work. Such protection is afforded by the fire ordinances of the city. The fire with which we are here concerned did not ensue because more of the floor space of the demised premises was used for manufacturing purposes than was permitted in the zone within which the property was located, but resulted from the negligent and grossly careless manner in which Noll, through his employees, carried on and conducted his business. Not being within any

class of persons which the zoning ordinance was designed to protect, appellant cannot claim that such violation constituted negligence. *Corbett v. Spanos*, 37 Cal.App. 200, 204, 173 P. 769; *Figone v. Guisti*, 43 Cal.App. 606, 608, 610, 185 P. 694; *Hitson v. Dwyer*, 61 Cal.App.2d 803, 807, 808, 143 P.2d 952. It also appears manifest that the claimed violations of the zoning ordinance could not have been a proximate cause of appellant's injuries.

Appellant next insists that respondent company's claimed violation of Section 91.0315 of the new Building Code, was a proximate cause of the fire and appellant's injuries.

The section in question provides that "No building or structure or portion thereof shall be used or occupied until a certificate of occupancy has been issued therefor".

However, the section contains exceptions reading as follows:

"1. No existing building or portion thereof shall require a Certificate of Occupancy unless the occupancy housed therein is different from that for which the original permit was issued.

"(b) *Change of Occupancy*. Each change of occupancy to one classified in a different sub group shall require a new Certificate of Occupancy whether or not any alterations to the building are required by this code."

Since no Certificate of Occupancy had been required at the time of execution of the lease and there had been no change of occupancy since the ordinance became effective, it would seem manifest that Noll's occupancy of the premises clearly fell within the exceptions.

[23] Appellant earnestly insists that the ordinance imposed a duty on the owner to apply for and obtain a Certificate of Occupancy, but we fail to find in the section any such requirement. It is true that the section provides "the Superintendent of Buildings shall issue a Certificate of Occupancy, without charge, to the owner of the building." But we fail to see wherein this language places upon the owner the obligation to make the request or application, and simply means that when issued, whether upon request of the owner, archi-

tect, contractor or tenant, it shall be issued in the name of the owner. This conclusion is fortified by further language in the ordinance dealing with inspection, which provides that when an inspection is made the "inspector shall advise the *applicant* (not owner) of those alterations necessary".

As to the failure of the owner to make application for a Certificate of Occupancy being the proximate cause of the fire and consequent injuries to appellant, it is argued that had such application been made the required inspection would have resulted in a denial of the certificate authorizing use of the premises for the purposes of Noll's business, the lease would not have been executed, the fire would not have occurred in this locality and appellant would not have been injured. Aside from the fact that such an argument may be strictured as being based wholly upon conjecture and speculation, we are impressed that it is decisively answered by the statement that the responsibility for the fire must be laid at the door of the person or persons who created the condition that resulted in the fire. In the instant case the conditions resulting in the fire were created by the lessee Noll through the grossly negligent manner in which he conducted his operations. Noll could have so conducted his business that the hazards of fire would have been minimized if not eliminated. Whether Noll had a Certificate of Occupancy or not, the fire would have occurred as it did because of the negligent manner in which the business was conducted, and not by reason of any structural changes that might or could have been made in the building.

[24] The reasoning contained in the case of *Merrill v. Los Angeles Gas and Electric Company*, 158 Cal. 499, 111 P. 534, 139 Am.St.Rep. 134, 31 L.R.A.,N.S., 559, we feel, sustains our position.

[25-27] Appellant urges that the court erred in refusing to receive any of the vast number of ordinances offered in evidence as exhibits so that the jury could take them to the jury room, and in limiting their admission to the purpose of informing the court as to what was the law of the City

of Los Angeles, so that the court could correctly charge the jury with reference to what constituted a violation of any applicable ordinance. While courts take judicial knowledge of statutes, but not of ordinances, it would seem to us just as improper to submit ordinances to the jury for interpretation as it would be to hand them a copy of the Civil Code for them to peruse in determining what the law of the state was. Just as in the case of statutes, the proper construction of an ordinance is a question not for the jury but for the court. 43 C.J., sec. 903, p. 569. The trial court was therefore correct in its rulings that it was for the court to instruct the jury as to the meaning of the ordinances in regard to issues in the case with reference to which such ordinances were offered. *Hirsch v. James S. Remick Co.*, 38 Cal.App. 764, 773, 774, 177 P. 876; *Merced County v. Fleming*, 111 Cal. 46, 51, 43 P. 392.

Appellant offered in evidence some twenty-four photographs taken officially by the Los Angeles City Fire Department on the evening of January 20, 1944, shortly after the fire was extinguished or during the morning following. These photographs showed portions of the workroom, views of the storeroom, a view of the doorway opening into the ground floor from the alley on the east side of the building, showing the wooden prop and one of the bolts blocking the use and opening of this door. All were excluded by the trial court.

[28] The photographs of the barricaded door might have been admissible if there had been any issue as to the fact that it was so barricaded, but that fact was admitted by respondents' answer and conceded at the trial.

As to the other photographs, they were excluded upon the ground that there was no showing that they represented the condition of the premises during the time appellant was in the workroom, and that they depicted nothing but situations concerning and connected with the tenant Noll's activities in the premises for which respondent company had no liability or responsibility.

[29] In view of the rulings of the court that, except for the violation of the or-

dinance as to the door, none of the ordinances imposed a duty on respondents for the violation of which appellant might recover, rulings with which we are in accord, it is obvious that the refusal to receive in evidence the photographs other than the one showing the condition of the door, was immaterial and could not have prejudiced appellant. As to the ruling on the admissibility of the photograph of the door, we shall hereafter give consideration thereto when we determine the correctness of the court's ruling that there was no evidence sufficient to justify the submission to the jury of the question as to whether the violation of the ordinance concerning the door had any causal connection with appellant's injuries.

Appellant asserts that the court erred in sustaining an objection to the introduction of any testimony by her under the thirteenth cause of action, based upon the theory of nuisance. In this contention, appellant cannot be sustained.

We do not deem it necessary to here set forth the historical aspect of the cause of action based on nuisance, a word concededly used very indiscriminately and loosely as well as very often denoting negligence. As is said in *Prosser on Torts*, page 549, with reference to the word "nuisance": "It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition."

Insofar as the present case is concerned, the "nuisance" theory adopted in the thirteenth cause of action is but another way of asserting that appellant had a common law right of recovery against respondents. As heretofore noted, appellant's right of recovery is not enhanced in any manner by characterizing the existing condition as a nuisance, nor is her right of recovery in any way diminished by labeling the condition a negligent one. We have heretofore held that respondent breached no common law duty owed to appellant, that being an employee of the tenant Noll, she stood in the same position as he did as respondents lessee.

[30] With reference to appellant's argument that the nuisance resulted in part from respondents' failure to observe the numerous ordinances sought to be introduced in evidence, and the cases cited to the effect that non-observance of an ordinance creates a nuisance, it is sufficient to say that none of the ordinances which appellant claims were violated were received in evidence. Our view, as heretofore expressed, being that the rulings of the court in this regard were correct, it follows that the theory of nuisance cannot be predicated upon the non-observance of ordinances which were properly excluded from evidence.

[31] There is also creditable authority to the effect that an action based upon a private nuisance as that the term is known to the law may be maintained only by those whose property rights have been invaded; that while a possessor of land is allowed to recover incidental damages for harms to his person or chattels in an action for private nuisance, the action is not available for the protection of those interests to a person who has no property rights or privileges in land. Restatement of the Law of Torts, Vol. 15, Chap. 40, pages 215, 216-222.

The case of *Coole v. Haskins*, 57 Cal. App.2d 737, 135 P.2d 176, 178, relied upon by appellant, presents no discord with the principle just enunciated, for therein the court says: "* * * But as we view the complaint, the gist of plaintiffs' causes of action was an *alleged violation by defendants of their duties as owners and possessors of the adjoining property rather than an alleged violation of defendants' duties as lessors*. Under these circumstances, any allegations relating to the relationship of lessors and lessees were superfluous but such allegations did not render the remaining allegations insufficient to show a violation of the duties of defendants as owners and possessors of the adjoining property." (Emphasis added.)

The same situation prevails as to the cases of *Spence v. Schultz*, 103 Cal. 208, 37 P. 220, and *Colegrove v. Smith*, 102 Cal. 220, 36 P. 411, 27 L.R.A. 590, wherein the injuries were attributable to excavations in a public street which in every sense of the word was a nuisance. An

examination of the case of *Boothby v. Town of Yreka*, 117 Cal.App. 643, 4 P.2d 589, which appellant asserts is conclusive as to her right of recovery on the theory that the condition existing on the premises and not upon adjacent or adjoining property constituted the nuisance, indicates clearly that the case has no application to the issues with which we are here confronted. In the *Boothby* case, the defendant rented a building to the county for the purpose of conducting therein an election to which the voting public of course was to be invited. The court sustained the right of one of the voters to recover for injuries resulting from a dangerous and defective condition of the premises, holding that the rule, that a guest of a tenant has no greater rights against the landlord than the tenant, does not apply where the premises are leased for a public purpose or in order to enable the tenant to invite the public to enter.

This exception to the rule is universally recognized and is pointed out in nearly all of the decisions which we have heretofore cited, and is especially commented upon in *Shotwell v. Bloom*, supra, 60 Cal.App.2d page 311, 140 P.2d 733.

It can not successfully be contended that this exception to the general rule is at all applicable to the case at bar. Since the leased or demised premises herein were safe structurally or otherwise when demised, respondents, as we have pointed out, owed no duty to the lessee or his employees, when the dangerous condition of the premises, which appellant asserts to be a nuisance, was created by the lessee through operations participated in by his employees.

[32] From what we have herein stated, it follows that the trial court did not err in sustaining objections to the introduction of any testimony by appellant on her thirteenth cause of action, predicated upon the theory of nuisance.

Finally, we come to a consideration of the correctness of the court's ruling that while respondents were guilty of an ordinance violation in that the double doors between the workroom and the showroom opened only inward into the workroom, that the manner in which the doors swung

did not have a proximate or any connection with the injuries sustained by appellant, as a result of which the court directed a verdict for respondents.

The ordinance in question (secs. (a) and (d) of Ordinance 91.3303 of the City of Los Angeles) reads as follows:

"(a) *Scope.* Every door serving as an exit from an aggregate floor area of more than one thousand square feet (1,000 sq. ft.) shall be constructed and installed in conformity with the requirements of this Section.

* * * * *

"(d) *Details.* Every door to an exit enclosure shall be selfclosing. Doors serving as exits shall open only in the direction of exit and shall be openable from the inside without the use of a key. Sliding doors and rolling shutters shall not be used on exit doors."

The foregoing provisions of the ordinance were admitted into evidence on the theory that as the door between the workroom and the showroom swung inward toward the workroom, it violated the ordinance and that such ordinance violation would render respondents liable if it retarded appellant's escape from the room, and thereby contributed directly or proximately to the injuries sustained by her.

In determining what if any direct or proximate connection the construction of the double door had with the injuries sustained by appellant, it becomes necessary to set forth a narrative of the pertinent evidence.

Appellant testified that she stopped work on the afternoon of the fire at 5 o'clock or shortly thereafter. She had been working at a table which the photostatic copy of the map received as appellant's Exhibit "1" and attached to her brief, shows was about in the middle of the workroom and near the stairwell at the south wall. Her purse was on a shelf which ran along the south wall, west of the stairwell. She had left her table and was moving over toward her purse at a point which was just about opposite the southwest end of the stairwell when she heard an explosion. The explosion was toward the northeast corner of the room. Immediately there were flames

and smoke which instantly spread over the entire room, after which as she testified, "I grabbed my purse off the shelf and then I started—I got down as low as I could and I started to go out and I fell."

"Q. All right. Describe your course as you proceeded toward the door. What happened? A. Well, I went about six feet and I fell and my hands and arms were burned so badly, I had to drop my purse; then I got up and then I started to go towards the—this way (indicating), towards the door, and I fell over someone right there at the doorway.

"Q. At the doorway? A. Yes, sir.

* * * * *

"Mr. Jackson: Now, I will mark an x at each end of that and I will place some N's on the cross, if that is satisfactory.

"The Court: N-1.

"Mr. Jackson: N-1.

"Q. By Mr. Jackson: Now you say that at some point between the shelving and the door, you fell? A. Yes, sir.

"Q. Will you indicate about where that was, Alma? A. Right—I don't know what is the name of it, but it is just about here (indicating).

"Q. About there? A. Yes.

"Q. I will put an x at that point and mark that N-2."

Appellant went about six feet and fell, her hands being so badly burned that she dropped her purse. Her course was traced on the map by a line to the point where she fell, but very soon got up, but, as she testified, the smoke was "terrific, the flames were all over the place".

Quoting from appellant's direct examination by her counsel as to the doorway, we find the following:

"Q. Now, when you got up there to the doorway which side of the doorway did you stop at. The east side or the west side? A. Why, it would be on the east side.

"Q. On the east side? A. Yes, sir.

"Q. And was the doorway when you got there open or closed? A. When I got there?

"Q. Yes, sir. A. When I got there it was open.

"Q. When you got there it was open?

A. I don't remember now let me think, I am confused.

"Mr. Gallagher: May we have the last part of that answer (answer read).

"Mr. Jackson: Well, forget that for a moment. When you got to the doorway what happened? A. Well, I laid there for I don't know how long, something came down and seemed to hit me on my body.

* * * * *

"Mr. Jackson: Now, Alma, when you got up to the door you say you lay there?

A. Yes, sir.

"Q. Where, on the floor? A. Yes, sir.

"Q. Did you fall down when you got to the door? A. I fell over a body at the doorway.

"Q. You fell over what? A. A body at the doorway.

"Q. At the doorway? A. Yes, sir.

"Q. Now, do you know how long you lay there at the bottom of the door? A. No, I haven't any idea.

"Q. Were you conscious at that time? A. Not wholly conscious, no.

"Q. What happened then? Did the door eventually open? A. Yes, sir.

"Q. Do you know who opened it? A. No, I haven't any idea.

"Q. Do you know whether it was opened by someone in the workroom or someone in the other room? A. I don't know.

"Q. You don't know how it opened? A. No, sir.

"Q. Do you know whether it was opened by someone in the workroom or someone in the other room? A. I don't know.

"Q. You don't know how it opened? A. No, sir.

"Q. Well, in any event, when it did open, Alma, then what did you do? A. Well, I staggered to my feet and went out the door and I fell down those steps that lead from the workroom to the showroom.

"Q. Into the showroom? A. Yes, sir.

"Q. And when you got into the showroom did you see anyone in that room? A. Yes, sir, somebody came in; I don't

know who he was, and he had something on his face and I don't know who he was."

Regarding appellant's testimony heretofore quoted, that she fell over a body near the door and lay unconscious on the floor, it is asserted in her brief, "that after having lain for sometime at the bottom of the closed door, it was eventually opened, by whom she does not know."

We do not feel that appellant's testimony fairly admits of the construction that the door was opened while she was on the floor or after she fell the second time or that she saw it opened, because she testified positively and unequivocally that when she got to the doorway it was open. It is true that immediately following this testimony she testified:

"Q. When you got there it was opened? A. I don't remember now let me think. I am confused."

Thereupon, her examination continued as follows:

"Q. (by Mr. Jackson, appellant's counsel). Well, forget that for a moment. When you got to the doorway what happened? A. Well, I laid there for I don't know how long, something came down and seemed to hit me on my body."

After testifying that she did not know how long she lay upon the floor, and that she was not fully conscious, appellant further testified:

"Q. What happened then? Did the door eventually open? A. Yes, sir. * * *

"Q. Well, in any event, when it did open, Alma, then what did you do? A. Well, I staggered to my feet and went out the door and I fell down those steps that lead from the workroom to the showroom."

We do not regard appellant's statement that she fell over a body near the door as being sufficient to warrant the submission to the jury of the question whether the door delayed her exit in any manner. Appellant admitted that in the prosecution of Mr. Noll she had testified: "I fell over something, I don't know what, and then this plank from up above came down and hit me across the body."

In this regard the state of the evidence, without here narrating it, is such that it

would be pure conjecture to assume that there was a person lying on the floor over whom appellant could fall. Thus we see that a verdict based on the premise that some other employee had been unable to escape from the room and thereby obstructed appellant's passage would be pure surmise and conjecture.

Appellant urges that when she testified that at the time she first reached the door, it was open, she "was in a condition of hysteria bordering on frenzy". However, such a contention is not borne out by the record, which we must take as we find it.

The testimony of Mrs. Finnegan, a fellow employee of appellant, was that she was delayed in leaving the room until she got hold of the doorknob. But that she did finally open the door and leave the room ahead of appellant seems undisputed.

Appellant further argues that the testimony of various members of the Fire Department is to the effect that the door between the workroom and showroom was opened by Captain Wheeler, from which appellant insists, the jury could have inferred that it was his opening this door that afforded appellant an opportunity to escape. To us, however, it seems immaterial whether the door was opened by Fire Department Captain Wheeler, by someone else, or that it remained open after Mrs. Finnegan passed through it. Assuming the door remained closed for sometime after Mrs. Finnegan's exit, that fact did not cause the plank to fall on appellant and knock her to the floor, nor did it render her unconscious as she lay upon the floor. If she regained consciousness after the door was opened, it is manifest that the construction of the door and the way it swung had no connection with the burns and injuries sustained by appellant and her testimony is uncontradicted that when she fell she was "practically right there at the doorway". When asked by the court for her recollection as to approximately how far she was from the open doorway when she stumbled to her feet after being struck by the object, appellant testified, "I imagine about, oh, a foot and a half."

"Q. As it stood open? A. Yes."

We are satisfied from the testimony of appellant herself, uncontradicted by any

other witness, the court was warranted in concluding that the appellant was aflame almost instantly following the explosion, and before she could move six feet she was so badly burned that she had to drop her purse; as she moved toward the doorway she fell twice, the second time when she was about a foot and a half from the open door—that fall being caused by a plank or some object striking her and knocking her to the floor; she lay on the floor, unconscious, for some time, and when she came to, saw the door open, and according to her own statement, got to her feet and staggered to the doorway.

[33-35] It is not only necessary to prove a defendant's negligence, but it is a basic element in every right of recovery that a defendant's negligence must contribute to the injury—must be the proximate cause of the injury. Unless in addition to proving defendant's negligence, such negligence is in some way fastened to the injury, then a case is not made out. And before a defendant can be held to answer in damages for the injuries suffered by a plaintiff it is incumbent upon the latter to assume the burden of proof and show by a preponderance of the evidence that the negligence of the defendant was the proximate cause of such injuries. Where the facts go no further than to establish a possibility that defendant's negligence was the proximate cause of the injury, a plaintiff can not recover. *McKellar v. Pendergast*, 68 Cal. App.2d 485, 490, 156 P.2d 950; *Puckhaber v. Southern Pacific Co.*, 132 Cal. 363, 364, 365, 64 P. 480; *Bartholomai v. Owl Drug Co.*, 42 Cal.App.2d 38, 42, 108 P.2d 36. As was said by this court in *Dull v. Atchison, T. & S. F. Ry. Co.*, 27 Cal.App.2d 473, 476, 81 P.2d 158, 160: "While on a motion for a directed verdict all reasonable inferences are to be drawn from the evidence in favor of the plaintiff and conflicts are also to be resolved in favor of the plaintiff, nevertheless, inferences cannot be based on imagination, speculation or supposition."

[36, 37] Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the triers of fact. But where as here, it must be said from a review of the

**SOLORZA et al. v. PARK WATER CO.
et al.**

Civ. 16034.

District Court of Appeal, Second District,
Division 1, California.

July 9, 1948.

Rehearing Denied July 26, 1948.

Hearing Denied Aug. 30, 1948.

1. Corporations ⇨442

Statute requiring consent of majority shareholders to sale of substantially all corporate assets was enacted for protection of shareholders and creditors of corporation, and they alone can object to transfer of corporate assets in violation of statute. Civ.Code, § 343.

2. Corporations ⇨442

Section of Penal Code making criminal the distribution of corporate assets by a director with dishonest or fraudulent purpose does not provide a penalty for failure to comply with statute requiring consent of majority shareholders to sale of corporate assets. Civ.Code, § 343; Pen.Code, § 560.

3. Corporations ⇨442

Sale of corporate assets in violation of statute requiring consent of majority of shareholders to sale of substantially all corporate assets is voidable only, and not void ab initio, and can be rescinded at election of shareholder or creditor. Civ.Code, § 343.

4. Corporations ⇨395

Books, records and papers of private corporations are private property and not open to public inspection.

5. Corporations ⇨445

In shareholders' representative suit to rescind sale and transfer of all corporate assets on ground that majority of shareholders had not consented to sale, shareholders had burden to overthrow presumption that purchaser purchased in good faith, for a valuable consideration, arising from representations made by officers of plaintiffs' corporation that more than a majority of shareholders entitled to vote had voted to confirm sale, and from documents apparently regularly executed under the corporate seal, in order to defeat purchaser's right to restitution. Civ.Code, § 343.

evidence, giving full credit only to that portion of the evidence which tends to support the allegations contained in appellant's complaint, indulging in every legitimate inference which may be drawn from that evidence, the determination inevitably follows that there is no evidence of sufficient substantiality to support a verdict in favor of appellant if such verdict were given, under well established rules and the settled law of this state, we must affirm the judgment herein based upon a verdict directed by the court.

We are persuaded that the situation with which we are her confronted was correctly epitomized by the trial judge in his explanation made to the jury at the time he directed the verdict for respondents, and in which explanation he said in part: "In the final analysis, no witness was produced who could testify directly to this fact (that appellant's escape was impeded and her injuries caused or added to by the ordinance violation) but the plaintiff herself. It is to her great credit, though perhaps of little comfort to her, that she testified to the truth without attempting to color it for her own benefit. Not only did she not testify that she had any difficulty in opening the door or that she ever got to the point of trying to open it, but on the contrary she testified not once but ten times that when she reached the door it was open and she went through it.

"In the face of this testimony, neither Court nor jury could possibly make a solemn finding that the manner in which this door swung upon its hinges was a proximate cause of the injuries which this unfortunate plaintiff has suffered or compel the owners of the building to pay therefor."

The foregoing conclusions at which we have arrived render it unnecessary to consider or decide the questions as to whether or not respondent Helbush owed any duty individually to appellant or was liable for any breach of duty on the part of respondent company; whether appellant was guilty of contributory negligence, or assumed the risk of her injuries.

For the reasons herein stated, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.

6. Corporations Ⓒ445

Where sale of all corporate assets was voidable because consent of majority of shareholders was not obtained as required by statute, fact that book containing description and amount of shares of each shareholder of selling corporation was delivered to purchaser after culmination of transaction did not establish absence of good faith on part of purchaser so as to preclude purchaser from obtaining restitution when shareholders of selling corporation sued for rescission. Civ.Code, § 343.

7. Contracts Ⓒ265, 266(1)

Rescission implies the restoration of the parties to same situation in which they were when contract in question was made, and any consideration or advantage secured by either party must be surrendered.

8. Corporations Ⓒ445

Where all corporate assets were sold in violation of statute requiring consent of majority of shareholders, moneys paid by purchaser as consideration and expended for benefit of selling corporation would not be regarded as voluntarily made and were recoverable by purchaser when shareholders of selling corporation sued for rescission.

9. Appeal and error Ⓒ172(3)

A party is precluded from asserting on appeal a claim for relief not asserted or asked for in court below.

10. Judgment Ⓒ210**New trial** Ⓒ12

Where interlocutory judgment for plaintiffs in shareholders' representative suit to rescind sale and transfer of corporate assets was entered, on condition of restitution within 60 days, plaintiffs were not required to make restitution during time motion for new trial was under submission, and after plaintiffs had been granted leave pursuant to statute to present proposed amendments to findings, and after plaintiffs' motion to reopen case for further testimony had been granted, and therefore final judgment entered on ground that more than 60 days had elapsed since entry of interlocutory judgment without restitution having been made was unauthorized. Code Civ. Proc. § 662.

11. Corporations Ⓒ445

Evidence sustained interlocutory judgment rescinding sale and transfer of all corporate assets on ground that majority of shareholders of selling corporation had not consented to sale, and requiring restoration to purchaser of benefits received by selling corporation. Civ.Code, § 343.

12. New trial Ⓒ164

The purpose of statute authorizing court in ruling on motion for new trial in cause tried without jury to change or add to findings, modify judgment, grant a new trial, vacate and set aside findings and judgment and reopen case for further proceedings and introduction of additional evidence is to permit a court to correct its own errors in ruling upon a motion for new trial without incurring the delay and expense incident to a new trial or appeal. Code Civ.Proc. § 662.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Representative suit by Dolores Solorza, on behalf of himself and all other stockholders of the Mutual Water Company of El Jardin Tract, against Park Water Company, a corporation, and G. G. Talamantes and others, to rescind sale and transfer of assets of corporation. From an adverse judgment, plaintiffs appeal.

Judgment reversed and cause remanded with directions.

See also 80 Cal.App.2d 809, 183 P.2d 275.

Manuel Ruiz, Jr., of Los Angeles, for appellants.

Paul Overton, of Los Angeles (Frank T. Cotter, of Los Angeles, of counsel), for respondents.

WHITE, Justice.

This is a representative suit brought by the stockholders on behalf of Mutual Water Company of El Jardin Tract, a corporation, organized for the purpose of securing a supply of water and distributing the same proportionately among its shareholders for use upon lands owned by them within certain defined boundaries. Shares in

Mutual Water Company were made appurtenant to the land, one share to each lot in the tract.

The subdivision of the foregoing parcel of land and the setting up of Mutual Water Company occurred about 1923. The mutual company continued to operate until in March, 1945, when defendant Park Water Company, a California public utility corporation, furnishing water service in territory contiguous with said El Jardin Tract, in a written communication signed by its President, defendant H. H. Wheeler, made an offer to plaintiff Mutual Water Company to purchase all the latter's assets for the sum of \$18,800.00, upon condition that \$4,300.00 thereof be expended by the Mutual Water Company in liquidation of its existent liabilities, and that \$14,500.00 thereof be placed in trust with said defendant H. H. Wheeler to be used only for improvements of said water system. This offer was accepted by the board of directors of the Mutual Water Company by resolution duly adopted at a meeting held on March 19, 1945.

Thereafter, the Mutual Water Company's board of directors sought to obtain the consent of a majority of its shareholders to the sale of the assets of the corporation in accordance with section 343 of the Civil Code (now section 3901 of the Corporations Code). At a special meeting convened on March 19, 1945, it was found that the attendance of shareholders was insufficient to constitute a quorum, and the meeting was adjourned to March 26, 1945, at which time a purported majority of the shareholders of Mutual Water Company voted in favor of approving the aforesaid resolution adopted by the board of directors to sell the assets of said company.

Thereafter, on March 30, 1945, the de facto president of Mutual Water Company executed a bill of sale of the personal property to Park Water Company, to which was attached a certificate of the de facto secretary in accordance with section 343 of the Civil Code (now section 3901 of the Corporations Code).

There was testimony given by defendant H. H. Wheeler, President of Park Water Company, that the sum of \$18,800.00 was

paid by his corporation to Mutual Water Company, of which \$4,300.00 was utilized to liquidate the latter's liabilities, and \$14,500.00 was given to said defendant Wheeler in trust as aforesaid.

Thereafter, defendant Park Water Company entered into possession of the said water system, and, according to testimony offered by defendants, up to the date of the trial \$6,763.39 of the aforesaid trust fund had been expended in improvements upon said water system.

On April 23, 1945, plaintiffs served upon Park Water Company a notice to rescind, wherein offer and tender was made by plaintiffs to return to defendants the amount of actual monies received by Mutual Water Company, in the sum of \$4,300.00.

The cause proceeded to trial before the court without a jury. Findings were made wherein it was found that with reference to the aforesaid meetings of the shareholders of Mutual Water Company in accordance with section 343 of the Civil Code (now section 3901 of the Corporations Code) due and legal notice was not given to the shareholders of said Mutual Water Company of El Jardin Tract of any of said meetings of such shareholders purportedly held in the month of March, 1945, and a majority of the shareholders of said Mutual Water Company of El Jardin Tract was not present at said purported meetings, or any thereof, and that the transfer and conveyance of the assets and property of said Mutual Water Company of El Jardin Tract to said Park Water Company was without the consent of a majority of the shareholders of said Mutual Water Company. That "Defendant Park Water Company, since the purported sale has been in possession of and operating the water system of said Mutual Water Company of El Jardin Tract, and ever since has furnished and supplied water to the shareholders of said Mutual Water Company and other consumers and users of water residing in the area served by said water system".

It was further found that of the \$18,800.00 paid to Mutual Water Company by Park Water Company, \$4,300.00 thereof was used to liquidate existing indebtedness of

the former, and that the balance of \$14,500.00 was paid to defendant H. H. Wheeler to be used by Park Water Company for making improvements in and upon said water system. That "at the time of the trial of this action \$6,763.39 of said \$14,500.00 had been expended by said Park Water Company for improvements and betterments to said water system".

The judgment, which was by way of interlocutory decree, was rendered in favor of plaintiffs and provided in part:

"1. That the sale and transfer of the assets and property of Mutual Water Company of El Jardin Tract to Park Water Company be rescinded upon condition that within sixty (60) days from date of entry of this interlocutory judgment the sum of \$4,300.00 plus all moneys expended by said Park Water Company for improvements and additions to and upon said properties of said Mutual Water Company of El Jardin Tract be paid to said Park Water Company.

"2. Upon such payment, said Park Water Company shall account to said Mutual Water Company of El Jardin Tract for the profits, if any, made by said Park Water Company during the time said properties have been in its possession and under its operation.

"4. Upon compliance with the conditions hereinabove set out, defendants Park Water Company and H. H. Wheeler shall restore to said Mutual Water Company of El Jardin Tract all property and assets of said Mutual Water Company coming into their, or either of their, possession, together with any additions and improvements thereto acquired or constructed during the time in which said properties were in their, or either of their, possession, control and operation.

"5. Upon compliance with the conditions hereinabove set out, final judgment of rescission shall be entered herein".

Plaintiffs moved for a new trial, which motion came on for hearing on November 27, 1946, at which time the court made an order, the pertinent parts of which were:

"* * * said motion is by the Court submitted. Counsel for plaintiff is granted leave, pursuant to Section 662, C.C.P., to

present proposed amendments to Findings of Facts and Interlocutory Judgment, and to reopen case for further testimony, and to submit authority in re attorney fee."

Subsequently, on February 24, 1947, the court, notwithstanding its previous order of November 27, 1946, granting plaintiffs leave "to reopen case for further testimony", made the following order:

"Memorandum of Decision

"1. Motion for new trial is denied.

"2. Motion to change or add to the findings and conclusions of law pursuant to section 662, C.C.P. is denied.

"3. Motion to enter final judgment is granted. Counsel for defendants to prepare same."

On March 17, 1947, pursuant to the last-mentioned "Memorandum of Decision", the court signed a final judgment in which it referred to the foregoing interlocutory judgment as having provided that plaintiffs were entitled to a judgment rescinding the sale and transfer of the assets of Mutual Water Company to defendant Park Water Company "upon condition that within 60 days from date of entry of said interlocutory decree restoration be made to said Park Water Company of all moneys paid by it to or for the benefit of said Mutual Water Company", and "more than 60 days having elapsed since the entry of said interlocutory judgment and said restoration not having been made to said Park Water Company, and motion by plaintiff for new trial and motion to change and/or add to the findings and conclusions of law pursuant to Section 662 of the Code of Civil Procedure having been denied;

"Now, upon motion of defendants Park Water Company and H. H. Wheeler it is adjudged and decreed;

"1. That plaintiff take nothing either individually or on behalf of all or any stockholders of said Mutual Water Company of El Jardin Tracts by his said action against either of said defendants Park Water Company or H. H. Wheeler;

"2. That the purported dissolution of said Mutual Water Company of El Jardin Tracts is null and void; * * *".

From such judgment plaintiffs prosecute this appeal.

As a first ground of appeal, it is urged that the sale in question, having been made in contravention of section 343 of the Civil Code as then in effect, is void. Respondents, on the contrary, assert that sales of corporate assets which fail to comply with the requirements of section 343 of the Civil Code are not illegal or void, but merely ultra vires and voidable only, at the instance of shareholders or creditors who are injured thereby.

[1] The statute in question (section 343 of the Civil Code, now section 3901 of the Corporations Code), was enacted for the protection of shareholders and creditors of the corporation, and they alone have the right to object to the transfer of corporate assets in violation of the code section. Such was the holding in *Gunther v. Thompson*, 211 Cal. 631, 633, 296 P. 611, and *Lost Burros Gold Mining Co. v. Inyo County Bank*, 83 Cal.App. 679, 682, 683, 257 P. 209, wherein the court had under consideration section 361a of the Civil Code (the predecessor statute to section 343).

[2] Analyzing the language of the statute in the light of the foregoing decisions, and in an effort to discern therefrom the legislative intent, we are persuaded that the transaction here in question, when challenged by shareholders of the corporation, must, in view of the court's finding that it was in direct violation of the statute, be held void in its entirety, but that until an attack is made upon such a transaction by those entitled so to do, the same must be regarded as voidable. This we say because of the fact that statutes of this kind are not designed for the protection of the public, or for the prevention of acts prejudicial to the public at large, but merely as a protection for stockholders and creditors of the selling corporation only. That the actions of the board of directors in making a sale in contravention of the provisions of the statute is not to be regarded as illegal and void ab initio, but rather as an ultra vires act of the directors, and voidable at the election of stockholders or creditors, seems to us evidenced by the language of the section itself, which provides

that approval of the action of the board of directors by a majority of the shareholders "may be given *before or after the adoption of the resolution* by the board of Directors, and *before or after any such transfer or disposition*." (Emphasis added.) In addition to this is the fact that no penalty was provided by the legislature by way of penal statute or otherwise, for failure to comply with the provisions of said section 343 of the Civil Code. Appellants' contention that section 560 of the Penal Code provides for such a penalty cannot be sustained because the Penal Code section just mentioned makes criminal and unlawful "distribution of assets" with "dishonest or fraudulent purpose". Furthermore, the legislature in enacting section 343 of the Civil Code made no pronouncement therein as to the validity or effect of the contracts, bargains or sales made in violation of that section, but did provide that the requisite majority of the shareholders could "ratify" sales made in violation of the statute by boards of directors, and that such "consent" of or "ratification" by the shareholders may be given at any time, even after a sale and transfer of assets thereunder had been consummated. It seems only reasonable to assume, in the light of the foregoing, that had the legislature intended that such transaction should be deemed a nullity, and void ab initio, it would have so provided, and had the legislative body so intended, it seems unlikely they would have given to the shareholders authority to "ratify" such a transaction after its consummation.

[3] We therefore hold that while such transactions as the one in the case at bar are violative of the provisions of the statute, they are voidable and may be rescinded and set aside at the election of a shareholder or creditor, for whose benefit alone the statute was enacted.

[4] To hold otherwise would inevitably lead to wrong and injustice. If persons dealing with corporations cannot rely at least prima facie upon deeds, bills of sale and other documents of private corporations apparently regularly executed in the due course of business, pursuant to the powers conferred by their charters, and attested by the signatures of the officers

upon whom control of their corporate affairs is conferred by law, then upon what may they rely? It is through their directors and officers that private corporations deal with the world and manifest their corporate will. The duly executed instruments, attested by the officers of a corporation, are the only reliable means one has of ascertaining the circumstances under which the act in question was performed. The books, records and papers of private corporations are not open to public inspection—they are private property. To say that one who honestly deals with a corporation in the purchase of its assets, relies upon the declarations contained in the instruments transferring to him title to such assets, must return the assets to the corporation because the provisions of section 343 of the Civil Code were not complied with, and himself be denied the return of the consideration he gave for such assets, and money he expended for the benefit of the corporation while in control of its assets, would be grossly unjust. Law and good morals should be one and inseparable.

Appellants place great reliance upon the case of *Hansen v. California Bank*, 17 Cal.App.2d 80, at page 100, 61 P.2d 794, and the language therein contained, but as we read that case it impresses us as holding, as did the court in the instant case, that the transaction being in violation of the statute was void in its entirety. But the case is not analogous to the one now engaging our attention. The gist of the action in the cited case was not based upon the rescission of a contract which was deemed to be merely voidable. It was a suit to recover a trust fund held by defendant bank for the benefit of the creditors of a bankrupt corporation because the bank, through its agent, fraudulently and wrongfully induced the bankrupt corporation by tortious representations to purchase 37 shares of its own stock, owned by the bank, in violation of sections 309 and 354 of the Civil Code as the sections then existed; that the purported sale was therefore, *ultra vires* and void *ab initio*; that the bank received the benefits of the illegal transaction and retained the same, which it was held, the bank possessed for the creditors of the corporation. The judgment

was simply that the plaintiff as trustee for the bankrupt corporation, was entitled to a judgment for the money paid by the corporation to purchase its own stock from the bank, and that the bank was entitled to a return of the thirty-seven shares of stock. We have no such factual situation here, but the interlocutory judgment in the case at bar, as did the judgment in the case relied upon by appellants, provided "that the purported dissolution of said Mutual Water Company of El Jardin Tract is null and void", and that respondents were entitled to a return of the moneys paid to Mutual Water Company and expended for the benefit of said corporation while respondent was in control of the same.

It is next contended by appellants that respondent Park Water Company having purchased the assets of Mutual Water Company "with knowledge, or under circumstances indicating knowledge, that the required majority of stockholders have not given the consent required by law for a valid transaction, is not entitled to restitution for any benefits officiously conferred by him as a consequence of such purchase, upon the exposure of his illegal acts under such void and illegal contract."

[5, 6] In the case at bar, there is no evidence that respondent Wheeler, President of Park Water Company, saw the "notices" for the meeting, knew of their mode of service or was aware of their legal inadequacy. The record contains no evidence that Mr. Wheeler was aware of the true total of the shareholders entitled to vote, nor the number of votes necessary to constitute a majority, and the court made no finding that respondent Wheeler was aware of these facts. The record does, however, contain some evidence that the directors of Mutual Water Company did represent to respondent Wheeler, as President of Park Water Company, that the total number of shareholders entitled to vote was 249, and that 222 thereof had voted to confirm the sale. The burden rested upon appellants to overthrow the presumption that respondents purchased in good faith, for a valuable consideration, relying upon the presumption arising from the representations made by officers of the appellant corporation and

from documents apparently regularly executed under the corporate seal, and by officers upon whom the law confers the corporate powers. *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543, 599. The fact that the book containing the description and amount of shares of each shareholder of the Mutual Water Company was delivered to respondent Wheeler upon the culmination of the transaction was not sufficient to establish the absence of good faith at the time the transaction was being negotiated and consummated.

[7] The complaint and amended complaint herein is for rescission, and the interlocutory decree of the trial court was in favor of appellant Mutual Water Company upon condition it return all benefits received under the sale. In so ruling, the court properly followed the general rule in such cases embodied in section 1691 of the Civil Code. Rescission implies the restoration of the parties to the same situation in which they were when the contract in question was made. Any consideration or advantage secured by either party must be surrendered. *List v. Moore*, 20 Cal.App. 616, 620, 129 P. 962.

[8] In view of our holding that the contract and transaction here in question was not illegal and void ab initio, but voidable, appellant's contention that the moneys paid by respondents as consideration for the contract and expended for the benefit of appellant Mutual Water Company are not recoverable in this action and must be deemed to have been voluntarily made, must fail.

In the instant case, as heretofore pointed out, the statute which was violated contained no express declaration that transactions violative thereof are unlawful or that no recovery shall be had for anything of value given pursuant to such transaction, and the statute not being designed for the protection of the public, the rule contended for by appellants, that any moneys paid to Mutual Water Company under the transaction must be regarded as having been voluntarily made is not applicable.

[9] In fairness to the trial court, it should be said that both the interlocutory and final judgments herein were rendered upon the theory chosen and advanced by

appellants. The complaint herein was framed in an action for rescission. It alleged that appellants were ready, willing and able to restore all benefits received. The case was tried on the theory that the transaction was merely voidable and not void ab initio. The trial court framed its interlocutory and final judgments on the issue and theory tendered by the pleadings and raised by the evidence. Under long recognized and well-established rules of law, a party is precluded from asserting on appeal, claims for relief not asserted or asked for in the court below but, because of the disposition which we feel must be made of this appeal we have given consideration to theories advanced and issues raised for the first time on appeal.

[10] Finally, appellants contend that the entry of the final judgment herein was wholly unauthorized and must be set aside. In this claim appellants must be sustained. As heretofore pointed out, following entry of the interlocutory judgment, appellants interposed a motion for a new trial. After argument thereon, the court made an order that the motion be submitted, and further that, "counsel for plaintiffs is granted leave, pursuant to section 662, Code of Civil Procedure, to present proposed amendments to findings of facts and interlocutory judgment, and to reopen case for further testimony, and to submit authority in re attorney fee". Thereafter, the court rendered its "Memorandum of Decision" as aforesaid, denying the motion for a new trial, denying the motion to change or add to findings and conclusions of law pursuant to section 662, Code of Civil Procedure, and granting respondents' motion to enter the final judgment from which this appeal was taken. It is at once apparent that appellants' motion to proceed under section 662 of the Code of Civil Procedure, and "to reopen the case for further testimony" had already been granted when, by its last-mentioned order, the court denied the same.

From the recital contained in the final judgment it is apparent that the court entered the same on the ground of "more than sixty days having elapsed since the entry of said interlocutory judgment and said restoration not having been made to said Park Water Company".

Manifestly, it can not be held that appellants should have made restoration during the time their motion for a new trial, following the entry of the interlocutory judgment, was under submission, and after they had been granted leave, pursuant to section 662 of the Code of Civil Procedure, to present proposed amendments to the findings of fact, interlocutory judgment, and after their motion to reopen the case for further testimony and to submit "authority in re attorney fee" had been granted.

[11] From what we have hereinbefore said, it follows that the interlocutory judgment is supported by the evidence, and that the court was clothed with jurisdiction to enter the same.

[12] The very purpose of section 662 of the Code of Civil Procedure is to permit a court to correct its own errors in ruling upon a motion for a new trial, without incurring the delay and expense incident to a new trial or appeal. And from the order of February 24, denying appellants' motion for a new trial, it must be assumed that the trial court had determined that there were no errors to correct, no changes or additions to be made in the findings, no modification to be made in the judgment, and that additional testimony was therefore not required. But, with this concession it is also evident that the final judgment should not have been entered until sixty days had elapsed from and after the aforesaid order of February 24, 1947, denying the motion for a new trial and setting aside the order made pursuant to section 662 of the Code of Civil Procedure. The final judgment, however, was entered March 17, 1947, less than thirty days after the aforesaid order of February 24, 1947.

For the foregoing reasons, the judgment is reversed and the cause remanded with directions to the court below to afford appellants sixty days from and after the remittitur is lodged therein, within which to comply with the terms of the interlocutory judgment entered herein, and thereafter to enter an appropriate final judgment, based upon appellants making or refusal to make restoration in compliance with the interlocutory judgment. Appellant to recover costs on appeal.

YORK, P. J., and DORAN, J., concur.

ROSENFELD v. VOSPER et al.

Civ. 16094.

District Court of Appeal, Second District,
Division 3, California.

July 9, 1948.

Rehearing Denied July 29, 1948.

Hearing Denied Aug. 30, 1948.

1. Appeal and error ⇨989

Plaintiff's testimony which would support a different set of facts than those found by trial court must be disregarded by appellate court on plaintiff's appeal from adverse judgment.

2. Appeal and error ⇨989

When finding of fact is attacked as not supported by any substantial evidence, power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support finding.

3. Appeal and error ⇨931(7)

If one correct finding supported by substantial evidence will support a judgment, it will be presumed that trial court predicated its judgment upon such finding and that it is not necessary to make findings on other issues raised by pleadings.

4. Attorney and client ⇨167(4)

Trial ⇨397(2)

In attorney's action against client to recover fees of alleged value of \$18,000, findings that plaintiff rendered service to defendant pursuant to express contract in which he agreed to render services for \$1,000, and that plaintiff had spent \$67.32 for defendants which had not been repaid to him, supported judgment for plaintiff in sum of \$1,067.32, and rendered it unnecessary for trial court to make any finding on issues relative to reasonable value of plaintiff's services.

5. Parties ⇨52

Denial of plaintiff's motion to join additional parties defendant after trial of case had been reopened for purpose of receiving additional evidence was not error, where it was shown that neither of parties sought to be joined as defendants owned any of the properties involved in action and that they were connected with transaction forming basis of action only as they were agents of present defendants or employees thereof.

6. Judges ⇨49(1)

Denial of plaintiff's motion to strike defendants' answer, refusal to require defendants' counsel to produce certain books and records, refusal to bring party into court as witness because witness was ill and refusal of plaintiff's request to join additional parties defendant constituted rulings of trial judge on matters properly submitted to him and did not constitute any basis for claiming prejudice, since even erroneous rulings against a litigant formed no ground for prejudice.

7. Appeal and error ⇨674

Plaintiff's claim that judgment was result of bias and prejudice against plaintiff based on claim that trial judge first awarded plaintiff sum of \$3,250, at suggestion of one of defendants' counsel, and thereafter upon his own motion, set aside prior decision was without support in the record.

8. Appeal and error ⇨900

In absence of showing to contrary, appellate court must assume that trial judge performed his duty without bias or prejudice.

9. Judges ⇨49(1)

Objection to conduct of trial judge upon ground that in preparation of findings trial judge conferred with defendants' counsel relative to preparation thereof failed to establish that judgment was result of prejudice against plaintiff, where at time case was submitted trial judge stated to counsel for both parties that whichever party might be ordered to prepare findings should be free to consult with him in preparation of them.

10. Judges ⇨49(1)

Mere fact that one of defendants' counsel and trial judge were members of same fraternal organization did not of itself show that trial judge was prejudiced for defendants, and in absence of such showing it would be presumed that trial judge was not influenced because of his membership in fraternal organization.

11. Judges ⇨49(2)

Statements of trial judge, after he had listened to several days of final arguments, that he viewed favorably testimony of sev-

eral witnesses did not constitute a showing of bias and prejudice against plaintiff.

12. Appeal and error ⇨972

Trial ⇨18, 106

Trial judge has duty to control course of trial and confine argument within reasonable lengths, and in absence of showing of abuse of discretion in such matter, trial court's designation of limits of argument will not be set aside on appeal.

13. Judges ⇨49(1)

Objection that trial judge unduly restricted time of counsel for argument at time of reargument failed to establish that judgment was result of trial judge's bias and prejudice against plaintiff.

14. Judges ⇨49(2)

Statements given by trial judge to newspaper reporters relative to case, after rendering his final decision and filing it with clerk, failed to indicate bias or prejudice against plaintiff.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Action by Adolph B. Rosenfield against Sidney C. Vosper and others to recover attorney's fees. From an insufficient judgment, the plaintiff appeals.

Affirmed.

Adolph B. Rosenfield, in pro. per.

Boone & Satchell, of Long Beach, for respondents.

McCOMB, Justice Assigned.

Plaintiff appeals from a judgment in his favor awarding him \$1,000.00 as compensation in an action to recover attorney's fees of the alleged value of \$18,000.00. The case was tried before the court without a jury.

History of the Litigation

The action was commenced by plaintiff March 7, 1939, to recover from defendants the sum of \$18,000.00 allegedly due for attorney's fees. After a trial before the court without a jury, a judgment was entered for plaintiff in the sum of \$12,567.32.

On appeal this judgment was reversed and a new trial ordered. (*Rosenfield v. Vosper*, 45 Cal.App.2d 365, 114 P.2d 29.)

On the second trial before the court without a jury, a judgment was awarded plaintiff in the sum of \$1,000.00. Upon motion for a new trial plaintiff filed affidavits of bias and prejudice against the trial judge. Upon a hearing of this question the trial judge was held qualified, but the order was reversed upon appeal. (*Rosenfield v. Vosper*, 70 Cal.App.2d 217, 160 P.2d 842.)

Thereafter the motion for a new trial was heard by a judge other than the one who had tried the case and such motion was denied. The present appeal from the judgment has ensued.

Facts

Disregarding contrary evidence the record discloses these facts:

A Long Beach initiative zoning ordinance prohibited oil drilling in the Harbor District within 500 feet of a school or hospital, and required that but one well could be drilled on not less than any one acre of contiguously owned land. Defendants each owned approximately two acres of land, all within 500 feet of the Seaside school. In addition, their west acre was not contiguous, being bisected by the Dellamore lot, which was leased for drilling by the General Petroleum Corporation under a blanket lease covering property adjoining defendants' land. Permits to drill were required from the Long Beach Harbor Board and state authorities.

[1] For several years plaintiff had been the attorney for defendant Vosper, and for several months prior to December 29, 1937, had represented him and the other defendants and had drawn several leases for them at an agreed price of \$250.00 per lease. In December, 1937, defendants had a conference relative to the steps necessary in order to obtain permits to drill for oil upon the land. At this conference plaintiff agreed to obtain the permits for the sum of \$1,000.00. Plaintiff's testimony, which would support a different set of facts, must be disregarded by us. (In re Estate of Isenberg, 63 Cal.App.2d 214, 146 P.2d 424.)

Questions

First: *Are the findings of the trial court supported by substantial evidence?*

This question must be answered in the affirmative.

Finding I: That defendants owned the parcels of property described therein.

Plaintiff does not question the sufficiency of the evidence to sustain this finding.

Finding II: That during the latter part of December, 1937, plaintiff and defendants entered into a verbal agreement under the terms of which defendants agreed to pay and plaintiff agreed to accept the sum of \$1,000.00 for all services necessary to obtain the legal right to drill an oil and gas well on each of the parcels of land mentioned in Finding I.

Witness Sam Bernstein testified that at a meeting between plaintiff and defendants in the latter part of December, 1937, plaintiff agreed that he would do all the work necessary to obtain permits for drilling an oil well on each of the parcels of land described in Finding I. This testimony was substantial evidence to sustain the foregoing finding.

Finding III: That plaintiff was paid \$1,000.00 and that he rendered services to defendants in connection with the obtaining for them of a permit and the legal right to drill for oil and gas upon each of the parcels of property mentioned in Finding I.

Plaintiff himself gave direct testimony supporting each of the facts found in this finding.

Finding IV: That plaintiff was paid in full for all services rendered by him to defendants up to June 13, 1938. A check in the sum of \$250.00 was received in evidence. It was endorsed by plaintiff and stated that it paid for all services rendered by him to date.

This evidence constituted substantial evidence to support this finding of fact.

Finding V: That between June 2, 1938, and June 13, 1938, plaintiff and defendants entered into an oral agreement amending their previous oral agreement referred to in Finding II. By the terms of the amended agreement, plaintiff agreed to accept \$250.00 in full payment of all services rendered

by him to defendants to June 13, 1938, and he further agreed to continue to render services to defendants in an effort to obtain the right to drill oil wells on both parcels of land mentioned in Finding I, and to accept the sum of \$1,000.00 for all services rendered by him subsequent to June 13, 1938 in connection therewith.

Witness Sam Bernstein testified that between June 2nd and June 13th, and again on June 13, 1938, plaintiff agreed to accept and did accept \$250.00 in full payment for all services rendered by him to defendants to June 13, 1938, and that plaintiff agreed to render all subsequent services required in order to obtain permits to drill oil wells on each of the two parcels heretofore mentioned for an amount not to exceed \$1,000.00. This testimony constituted substantial evidence to sustain this finding of fact.

Finding VI: That pursuant to the agreement between the parties, as amended, plaintiff did continue to render services to defendants subsequent to June 13, 1938, and that for such services there is due and owing plaintiff from defendants the sum of \$1,000.00, which sum is unpaid.

Plaintiff's own testimony and entries in his register constitute substantial evidence to sustain the finding relative to the services rendered by him. Defendants in their answer expressly admitted that such sum is unpaid. Thus it is evident that this finding is sustained by substantial evidence.

Finding VII: That on or about June 2, 1938, a dispute arose between the parties as to the amount due plaintiff, which dispute was settled by plaintiff accepting \$250.00 in full for all services rendered by him to defendants to June 13, 1938, and that a check in the sum of \$250.00 in payment of such services was given to plaintiff.

Witness Sam Bernstein testified that a dispute having arisen between the parties as to the amount of money due plaintiff on or about June 2, 1938, plaintiff agreed to accept the sum of \$250.00 in full for services rendered by him to defendants to June 13, 1938. The witness Zukor testified that plaintiff did accept a check in the sum of \$250.00 which contained an endorsement: "In full legal fees to date in the

matter of Vosper, et al." This evidence supports the finding.

Finding VIII: That plaintiff had expended on behalf of defendants the sum of \$67.32.

This finding is supported by plaintiff's uncontradicted testimony.

[2] In view of the fact that each of the questioned findings find substantial support in the evidence received in the instant case, and of the established rule that the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact (In re Estate of Winzeler, 42 Cal.App. 2d 246, 248, 108 P.2d 720; In re Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424), it would serve no useful purpose to here set forth contradictory and conflicting testimony which, had it been believed by the trial court would have sustained a different set of findings. (Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183.

Second: *Are the findings subject to plaintiff's strictures that: (1) there are no findings on material issues; (2) the findings are too vague, equivocal and ambiguous to be understood; (3) the findings are irreconcilably contradictory; and (4) the findings do not support the judgment?*

[3] This question must be answered in the negative. In a case where one correct finding supported by substantial evidence will support a judgment, it will be presumed that the trial court predicated its judgment upon such finding, and it is not necessary to make findings upon other issues raised by the pleadings. (See American National Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188, Ann.Cas.1917C, 744; Hill v. Donnelly, 56 Cal.App.2d 387, 392, 132 P.2d 867.)

Applying this rule to the facts of the instant case, it appears from Finding V, which is clear and unambiguous, that the trial court found that between the dates of June 2, 1938, and June 13, 1938, the parties entered into an oral agreement in which appellant agreed to accept the sum of \$250.00 in full payment and satisfaction of services rendered by him to June 13, 1938, and that plaintiff further agreed to render services

to defendants in an effort to obtain the right to drill oil wells on both parcels of land mentioned in Finding I for the sum of \$1,000.00. In Finding VI it is found that plaintiff did render the services and has not been paid for them; that there is thus due him the sum of \$1,000.00. In Finding VIII it is found that plaintiff spent \$67.32 for defendants which has not been repaid to him.

[4] These findings clearly support the judgment for plaintiff in the sum of \$1,067.32. It is apparent that the trial court's finding and judgment are predicated upon the theory that plaintiff rendered services to defendants pursuant to an express contract in which he agreed to render services for the sum of \$1,000.00. Hence it becomes entirely immaterial as to the reasonable value of the services rendered defendants by plaintiff, and it was not necessary for the trial court to make any finding on the issues relative to the reasonable value of such services.

[5] Third: *Did the trial court commit prejudicial error in denying plaintiff's motion to join additional parties defendant?*

After the trial of the case it was reopened for the purpose of receiving additional evidence. At this time plaintiff sought to have Sam Bernstein and Lillian R. Zukor brought in as parties defendant. This motion was denied.

This ruling was correct. The record fails to show that either Sam Bernstein or Lillian Zukor was in any way liable or responsible for the payment of attorney's fees to plaintiff. It likewise shows that neither one of them owned any of the properties involved and that they were connected with the transaction only as they were agents of defendants or employees thereof. Hence there is a total absence of any showing that either of the parties was a proper or necessary party defendant, and there is no showing that plaintiff has been prejudiced by the trial court's ruling.

Fourth: *Was the trial court's judgment the result of bias and prejudice against plaintiff?*

This question must likewise be answered in the negative. Plaintiff urges that the trial court's judgment against him was predicated upon bias and prejudice as evidenced by these acts:

(1) The trial court denied plaintiff's motion to strike defendants' answer, particularly the portion thereof which alleged that defendants had tendered payment into court of \$1,000.00.

(2) The trial court declined to require defendants' counsel to produce certain books and records.

(3) The trial court first awarded plaintiff the sum of \$3,250.00 at the suggestion of one of defendants' counsel and that thereafter, upon its own motion, set aside its prior decision.

(4) That in the preparation of findings the trial judge conferred with defendants' counsel relative to the preparation thereof.

(5) The trial judge and one of the counsel for defendants were members of the same fraternal organization.

(6) The trial judge refused to bring a party into court as a witness because the witness was ill.

(7) The trial judge denied plaintiff's request to make Sam Bernstein and Lillian Zukor parties defendant.

(8) That upon the reargument of the case the trial judge expressed a favorable opinion on the testimony of certain witnesses.

(9) The trial judge unduly restricted the time of counsel for argument at the time of the reargument.

(10) The trial judge, after rendering his final decision and filing it with the clerk, gave to the newspaper reporters a statement relative to the case.

[6] The first, second, sixth and seventh objections of counsel constitute rulings of the trial court on matters properly submitted to it, and do not constitute any basis for claiming bias or prejudice of the trial judge, since the rule is established that even erroneous rulings against a litigant form no ground for bias or prejudice. (McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 11, 155 P. 86.)

[7,8] The third objection to the conduct of the trial judge is wholly without support in the record. The record fails to disclose that the trial court in the first instance awarded plaintiff \$3,250.00 at the suggestion of one of counsel for defendants, or the reasons why he set aside such decision and made a subsequent award of only \$1,000.00 to plaintiff. As hereinabove set forth such award was supported by the evidence and in the absence of a showing to the contrary we must assume that the trial judge performed his duty without bias or prejudice.

[9] Plaintiff's fourth objection is wholly without merit for the reason that at the time the case was submitted the trial judge stated to counsel for both parties that whichever party might be ordered by the court to prepare findings should be free to consult with him in the preparation of the same. Plaintiff made no objection to this procedure and he has failed to present to this court any reason whereby he was prejudiced as a result of such procedure.

[10] The fifth objection that one of defendants' counsel and the trial judge were members of the same fraternal organization likewise fails to show that there was any bias or prejudice on the part of the trial judge against plaintiff or in favor of defendants. The mere fact that a lawyer and judge may be members of the same fraternal or other organization does not of itself show that the trial judge is biased or prejudiced for or against a party, and in the absence of such showing this court will presume that the trial judge was not influenced because of his membership in some organization, fraternal or otherwise.

[11] As to the eighth objection, statements of the trial judge, after he had listened to several days of final argument, that he viewed favorably the testimony of several witnesses, did not constitute a showing of bias and prejudice. The case had been fully tried, argued, reopened for further argument, and after the argument on resubmission, and after a full and complete consideration of the testimony,

these statements were made. It was a part of his duty to determine which of the conflicting testimony of the witnesses he believed, and his expressions on this subject did not constitute error.

[12,13] Ninth: It was the duty of the trial judge to control the course of the trial and to confine argument within reasonable lengths. In the absence of a showing of an abuse of discretion on such matter, the trial court's designation of the limits of the argument will not be set aside on appeal. In the present case the record discloses that the case had been argued at great length, and that after the case had been initially tried, plaintiff had expressed satisfaction with the courtesy of the court; the consideration which had been given him; and that he had thoroughly enjoyed presentation of the case to the court. Clearly at this point he did not feel that the trial judge was biased and prejudiced against him. The judgment being against him, he succeeded in disqualifying the trial judge from passing upon the motion for a new trial, which motion was passed upon by a judge other than the one who had originally tried the case. Hence plaintiff has failed to point out to the court wherein the judgment of the trial judge was the result of bias and prejudice.

[14] Tenth: Plaintiff's final objection that he was prejudiced by the trial court's making a statement to a newspaper reporter after the final decision in the case had been rendered and filed with the clerk of the court is devoid of merit. The propriety of such conduct is not properly before this court. Clearly however, the decision having been rendered and filed, and having become a matter of public record the trial judge had performed his duties and there was nothing in the statement given to the press which indicated bias or prejudice against plaintiff.

The judgment is affirmed.

SHINN, Acting Presiding Justice, and
WOOD, J., concur.

86 Cal.App.2d 489

SCANNELL v. WOLFF et al.

Civ. 13501.

District Court of Appeal, First District,
Division 2, California.

June 30, 1948.

1. Mandamus ⇨164(2)

The answer to petition for writ of mandate may be used to raise questions of law as well as of fact. Code Civ.Proc. § 1094.

2. Mandamus ⇨163

Judgment entered after general demurrer to petition for writ of mandate was overruled and issuance of peremptory writ directed, was not erroneous on ground that defendants were not allowed right to answer, since under statute defendant had right to answer on return day, and record did not show that defendants made any application to file an answer, either before or after overruling of demurrer. Code Civ. Proc. § 1089.

3. Mandamus ⇨163

On petition for writ of mandate to compel reinstatement of dismissed deputy sheriff, the proper and normal procedure, rather than file general demurrer, would have been for defendants to have filed an answer incorporating a transcript of the hearing held by the sheriff, which was not incorporated in the petition, and raising also the issues of law raised by demurrer. Code Civ.Proc. § 1094.

4. Officers ⇨193

An officer, otherwise disqualified by personal interest, may still act, if his failure to act would necessarily result in a failure of justice.

5. Administrative law and procedure ⇨314
Officers ⇨72(1)

Where sheriff, under charter necessarily had to hear and determine charges of insubordination against his deputy, sheriff could sit in judgment notwithstanding his alleged prejudice and bias against deputy.

6. Administrative law and procedure ⇨513
Officers ⇨72(2)

Civil Service Commission by ordering appeal from sheriff's order dismissing deputy sheriff to be denied meant that deputy's

application for reversal was denied, and not that commission refused to hear appeal and thereby acted beyond its jurisdiction.

7. Administrative law and procedure ⇨461
Officers ⇨72(1)

On sheriff's hearing on charges of insubordination against deputy sheriff, unsworn letters could not be considered. Code Civ.Proc. §§ 1878, 2002.

8. Administrative law and procedure ⇨513
Officers ⇨72(2)

Under San Francisco charter provision that Civil Service Commission on appeal from dismissal of employee by appointing officer can require any "additional evidence" in writing Commission deemed material, other than record of hearing before appointing officer, the quoted term does not include evidence that could not have been admitted on hearing before appointing officer.

See Words and Phrases, Permanent Edition, for all other definitions of "Additional Evidence".

9. Administrative law and procedure ⇨311

In proceedings before administrative officers or boards, the same strictness is not called for or observed as in court proceedings.

10. Administrative law and procedure ⇨513
Officers ⇨72(2)

On appeal to San Francisco Civil Service Commission from dismissal by sheriff of deputy sheriff on ground of insubordination arising from the turning over by deputy to a friend of a confiscated revolver, in possession of deputy under court authorization, and the disappearance from friend's automobile of revolver and subsequent re-appearance in connection with a crime, unsworn written statements of judge and sheriff which deputy had no opportunity to meet, refute, or rebut, were inadmissible under charter provision permitting Commission to require in writing any additional evidence. Code Civ.Proc. §§ 1878, 2002.

11. Officers ⇨72(1)

A letter from sheriff to deputy, accusing deputy of insubordination in disposing of a confiscated revolver in possession of deputy under court authorization and later recovered by police in connection with

a crime, and attached copy of police report giving details, fully informed deputy of charges resulting in dismissal of deputy as required by San Francisco charter.

mond D. Williamson, all of San Francisco, for appellants.

12. Officers ⇨72(1)

That letter from sheriff, to Civil Service Commission to which discharged deputy appealed, reported that dismissal was for insubordination and incompetence, although deputy was charged only with insubordination, was unimportant where facts and circumstances on which accusation was based were fully set forth.

13. Mandamus ⇨187(10)

Where petition for writ of mandate to compel reinstatement of discharged deputy sheriff went only to erroneous charge that sheriff was disqualified for bias and prejudice from hearing charge against deputy, and only part of petition stating case in mandate was that setting out proceedings before Civil Service Commission on appeal, judgment remanding case to sheriff went too far and would be modified so as to remand case to Commission with directions to consider anew the appeal of deputy.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Petition by Daniel Scannell against Harry K. Wolff and others, individually and as constituting the Civil Service Commission of the City and County of San Francisco, Daniel C. Murphy, individually and as Sheriff of the City and County of San Francisco, Harry Ross, individually and as controller of the City and County of San Francisco, and the City and County of San Francisco, a municipal corporation, for a writ of mandate to compel petitioner's reinstatement as a deputy sheriff after his dismissal from that position. From an adverse judgment, defendants appeal.

Affirmed as modified.

Charles P. Scully, of San Francisco, for petitioner-respondent.

John J. O'Toole, City Atty., Bernard J. Ward, Jr., Deputy City Atty., and Ray-

GOODELL, Justice.

The respondent filed a petition for a writ of mandate to compel his reinstatement as a Deputy Sheriff, after his dismissal from that position.

The appellants filed a general demurrer. The order which overruled the demurrer directed a preemptory writ to issue. The judgment which was then entered directed "that any alleged order of the Civil Service Commission dismissing or denying the appeal or any alleged order of said Commission affirming the dismissal of the petitioner be vacated; that the Sheriff file proper charges, hold a full and complete hearing thereon with the right of petitioner to examine and cross-examine witnesses and to make such findings and order that is just and proper and supported by the evidence."

On this appeal no brief was filed on behalf of respondent and there was no appearance for him when the case was called for argument. This is not an implied criticism of respondent's former counsel, for he was no longer in the case.

[1,2] This case was disposed of on the demurrer alone. In mandate cases there is no *statutory* provision for a demurrer to the petition although in practice demurrers are frequently used in mandate cases. Section 1094 Code Civ.Proc. provides: "If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, * * * the court must proceed to hear or fix a day for hearing the argument of the case." It is clear from that section "that the answer may be used to raise questions of law as well as of fact." *Scott v. Superior Court*, 83 Cal.App. 25, 30, 31, 256 P. 603, 605; *Loveland v. City of Oakland*, 69 Cal.App.2d 399, 403, 404, 159 P.2d 70. Appellants point out that judgment was entered "without allowing appellants the right to answer", but they can make no point of that since section 1089 Code Civ.Proc. gives them that right when it says that on the return day they "may answer the petition under oath."

Moreover the record does not show that appellants made any application to file an answer, either before or after their demurrer had been overruled. See *Private Investors v. Homestake Mining Co.*, 16 Cal.App.2d 1, 5, 60 P.2d 146.

[3] The proper and normal procedure would have been for appellants to have filed an answer incorporating a transcript of the hearing held by the Sheriff and raising also the issues of law raised by their demurrer. The transcript of the Sheriff's hearing was not incorporated in the petition for mandate, and there could be no complete record on which to present the case either in the Superior Court or here without it.

However the appeal as it stands presents the single question whether the petition states a case in mandate, for in the absence of an answer the case had to be "heard on the papers of the applicant" (sec. 1094 supra). Four grounds are set forth in the petition and if any one of them is sufficient, then of course the court's action should be sustained.

The facts which gave rise to respondent's dismissal are as follows: he was a jailer in San Francisco, and obtained from a Judge of the Superior Court an order authorizing him to have the possession of a revolver which had been used in the commission of a crime, and confiscated. He turned over the revolver to a friend (not an officer) and while it was in the friend's possession it disappeared from his automobile, presumably by theft. In a holdup later on, this same revolver was dropped, and so it found its way back into the possession of the police. It was traced to the respondent, and when these facts were brought to the attention of the Sheriff he filed written charges against his deputy, accusing him of insubordination, one of the grounds for dismissal specified by the charter. A hearing was held before the Sheriff, at which respondent was represented by counsel, and the Sheriff thereupon dismissed him. Respondent then appealed to the Civil Service Commission from the order of dismissal and a transcript of the proceedings before the Sheriff was filed with the Commission. The Commission did not disturb the Sheriff's order.

[4,5] One of the principal grounds stated in the petition for the writ is that the Sheriff was disqualified from sitting in judgment on respondent's case for the reason that he was prejudiced and biased, and the petition contains allegations of antecedent facts and circumstances (wholly unrelated to the revolver episode) out of which it was claimed "intense animosity" had been engendered by the Sheriff against respondent. It is not necessary to recount these allegations for the petition states no case on this ground. Section 154 of the San Francisco charter provides that "The appointing officer shall publicly hear and determine the charges, and may exonerate, suspend or dismiss the accused". As the Sheriff was the officer who necessarily had to hear and determine the charges, the case falls within the rule of *Caminetti v. Pacific Mutual Life Ins. Co.*, 22 Cal.2d 344, 366, 139 P.2d 908, 920, where it is said, "There is an exception, based upon necessity, to the rule of disqualification of an administrative officer. An officer, otherwise disqualified, may still act, if his failure to act would necessarily result in a failure of justice" (quoting 42 Am.Jur. p. 312).

[6] Another point raised by respondent's petition is that the Commission's action when it "ordered that this appeal be denied" was beyond its jurisdiction "since it was the duty of said Commission to hear such appeal". It did entertain the appeal. Obviously what the Commission's language meant was not that it refused to entertain the appeal but that *respondent's application* for a reversal of the Sheriff's decision was denied. There is no merit in this point.

This brings us to the proceedings on appeal before the Commission. Section 154 of the charter reads: "* * * The civil service commission shall immediately be notified of the charges when made, of the hearing, and of the finding thereon. The finding of the appointing officer shall be final, unless within thirty days therefrom the dismissed employee appeals to the * * * commission. The appeal and all proceedings shall be in writing and shall briefly state the grounds therefor. *The * * * commission shall examine into the case and may require the appointing officer*

to furnish a record of the hearing and may require in writing any additional evidence it deems material, and may, thereupon, make such decision as it deems just. The order or decision of the commission upon such appeal shall be final and shall forthwith be enforced by the appointing officer * * *

 (Emphasis added.)

During the pendency of the appeal the Commission never fixed any time or place for a presentation of the matter. What it did was to send out three letters. One was sent to respondent, in which six questions were asked. These questions were answered, not by him but by his attorney. Another letter was sent to Judge Jacks, who had signed the order releasing the revolver, and a copy thereof was sent to respondent by the Commission 19 days after it had been answered. A third letter was sent to the Sheriff and a copy thereof was sent to respondent 21 days after it had been answered.

Before the letters were sent respondent was given no opportunity to object to them in any way and after they had been answered he was not invited to do or say anything as to the answers, or to make any counter showing.

The petition in mandate states that when respondent's appeal was filed "although it was expressly requested therein that the right to appear and to present oral argument at the time of hearing be granted, no such right was granted although no notice of denial was given." After alleging the sending of the letters it is stated: "That no opportunity was given petitioner to confront Judge Lile T. Jacks or respondent Daniel C. Murphy with respect to the statements contained in their reply letters * * * nor was any opportunity given to petitioner to appear personally and through his counsel and be heard as requested * * *" It is then alleged that the action of the "Commission in denying petitioner the right of hearing and of considering as evidence ex parte statements made out of his presence and without opportunity to confront the individuals making such statements is a denial of due process under both the state and federal constitution; * * *

[7,8] The appellants argue that the Commission was bound to follow the pro-

cedure outlined by the charter, which they say "specifically sets forth how the appeal shall be heard * * *" The charter is anything but specific. It requires that the Commission "shall examine into the case and may require the appointing officer to furnish a record of the hearing". Such record was furnished and was before them (but it was not before the Superior Court, and it is not before us). The charter provides, further, that the Commission "*may require in writing any additional evidence it deems material* * * *" (Emphasis added). The letters sent to the Sheriff and to Judge Jacks show that the Commission required "additional evidence". But while the "additional evidence" asked for and received was in writing, it was unsworn. If such evidence had been tendered at the Sheriff's hearing it would have been rejected as no evidence at all. See Sections 1878 and 2002, Code Civ.Proc., see, also, *People ex rel. Kasschau v. Police Comm'rs.*, 155 N.Y. 40, 49 N.E. 257. It cannot be the law that "additional evidence" may be admitted on appeal when it could not have been admitted on the trial itself. Moreover, had such evidence been tendered at the Sheriff's hearing the accused, who was there represented by counsel, would have had an opportunity to object to it, whereas before the Commission he had no such opportunity, for there was no time or place of hearing and he received the copies of the letters three weeks after they had been sent and almost that long after they had been answered.

In the letter to Judge Jacks he was asked the following questions and in his reply he gave the following answers:

"1. Did Scannell represent to you that he sought the pistol for use in the performance of his duties as a peace officer?" Answer: "Yes".

"2. Did you release the pistol to Scannell because of or by reason of the fact that he was a peace officer and for his use in the performance of his duties as a peace officer?" Answer: "Yes".

"3. Did Scannell represent to you in what manner the pistol was to be used in his work as a peace officer?" Answer: "In his official capacity as Deputy Sheriff".

"4. In your opinion, did the release of the pistol to Scannell as a peace officer by you impose upon Scannell the duty and obligation of safeguarding the custody of the pistol and restricting its use by Scannell solely in the performance of his duties as a peace officer?" Answer: "Yes".

"5. Would you have released the pistol to Scannell if he were not a peace officer?" Answer: "No".

In the letter to the Sheriff he was asked the following questions and in his reply he gave the following answers:

"1. Upon its release to Scannell on order of Judge Jacks did the pistol, in your opinion, become the private personal property of Scannell with no restrictions as to its use and future disposition by him?" Answer: "No".

"2. If the pistol, in your opinion, was not the private personal property of Scannell to use and dispose of as he saw fit, was the pistol, in your opinion, the property of the Sheriff's office, or the Police Department, or the City and County of San Francisco?" Answer: "Ownership of the pistol did not change."

"3. Were you at the time the pistol was released to Scannell by order of Judge Jacks, or at any subsequent time, informed by Judge Jacks or did you discuss with Judge Jacks the circumstances leading up to the issuance of the court order? That is, were any reasons given for its issuance?"

To which he answered: "Judge Jacks stated that he has never issued a court order for the release of firearms except to an officer, and only to be used in line of duty."

"4. Were any representations reported to you as having been made by Scannell as to the reasons why he needed the pistol, its contemplated use, or as to any limitations or conditions attached to the delivery of the pistol, or understood by the Judge and/or Scannell even though not incorporated in the court order?" to which he answered: "Scannell never said anything to me about the pistol at any time."

"5. In your opinion was there any negligence or dereliction or evasion on the part of Scannell in his failure to report to you

or to the Police Department that he had surrendered the pistol into the custody of Shea or that Shea had subsequently lost possession of the pistol?" To which he answered "Certainly there was negligence, dereliction and evasion on the part of Scannell."

Judge Jacks could have been a witness before the Sheriff at his hearing, but with respect to the Sheriff's letter and reply the anomalous situation is presented that the Commission on the appeal acted on "additional evidence" furnished by a witness whose testimony, in the very nature of things, could never have been introduced at the hearing conducted by himself.

[9,10] We are of course mindful of the fact that in proceedings before administrative officers or boards the same strictness is not called for or observed as in court proceedings. In the instant case, presented as it is on simply the appellants' opening brief, with no brief at all on behalf of the respondent, this court cannot be expected to lay down any rules with respect to the character, nature, degree or quality of the "additional evidence" which may be presented on an appeal under section 154 of the charter, or to say what the framers meant when they wrote into that section the requirement that the Commission should "examine into the case". It does appear however that the Commission apparently interpreted the charter provision to mean that as long as the "additional evidence" was *in writing* it need not necessarily be under oath. To this we cannot accede. It does not follow from the charter provision that the commission "may require in writing any additional evidence" that such evidence may be taken without the sanction of an oath or affirmation. Such a fundamental principle of our law as that requiring the testimony of witnesses to be given under oath should not be held to be taken away by mere implication. Evidence in writing is frequently given under oath, i. e. by deposition or affidavit, and if the charter framers had intended to authorize the reception of unsworn evidence in writing we believe that they would have plainly said so. The case is presented only "on the papers of the applicant" (sec. 1094, *supra*) which

means on a general demurrer to the petition. Our function, therefore, is to decide whether in *any* of its allegations the petition is sufficient. The extent of our holding is that so far as the proceedings before the Sheriff are concerned the petition does not state a case for a writ of mandate, but that so far as the proceedings on appeal to the Commission are concerned, it does. In so holding we are influenced somewhat by the recent cases of *Steen v. Board of Civil Service Commissioners*, 26 Cal.2d 716, 160 P.2d 816, and *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 162 P.2d 13. Both of those cases involve section 112(a) of the Los Angeles charter, under which (unlike the San Francisco Charter) the accused gets his hearing before the Civil Service Commission after written charges have been filed (but not tried) by the employee's department. The *Steen* case holds that the unsworn report of an investigator (appointed by the Commission) which report the accused employee had no opportunity to meet, refute or rebut, is insufficient evidence on which to base a dismissal. While in the instant case and under the San Francisco charter the accused employee had his hearing before the Sheriff, the taking of "additional evidence" on appeal amounts, in substance and effect, to a partial continuation of the process commenced in the original hearing, and these unsworn statements of the Judge and the Sheriff are of no higher dignity as evidence than was the unsworn report in the *Steen* case.

The respondent's remaining point is that he was accused of "insubordination" and that the facts do not prove such a case; further, that the order of dismissal adds "incompetence" as a ground of dismissal whereas that ground had not been specified in the accusation. The accusation dated November 8, 1945 addressed to respondent and signed by the Sheriff was in the following language:

"As you know, I received a report from the Police Department about a revolver that was dropped by a hold-up man and recovered by the Police Department.

"In checking the details from the report of the Police Department I find that you

had secured possession of this revolver on November 10, 1943, on a Court order.

"It seems that your action in loaning or disposing of this revolver constitutes insubordination, as provided in Section 154 of the Charter. Therefore, as a result of your action I hereby formally charge you with insubordination and set the date for hearing upon this charge, at Room 333 City Hall, on November 13, 1945, at 2 P.M."

Attached to this accusation (as would appear from the record) there was a copy of a police report giving the details and circumstances of the whole affair.

Section 154 of the charter provides that "No person employed under the civil service provisions of this charter, * * * in a position defined by the commission as 'permanent' shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense * * *"

[11] The letter of November 8, 1945, and the police report attached to it fully informed respondent of the charges against him which is all the charter requires.

[12] The fact that the letter from the Sheriff to the Commission reported that the dismissal was for insubordination *and incompetence* is, in our opinion, unimportant as long as the facts and circumstances on which the accusation was based were fully set forth. This part of the petition *was* vulnerable to demurrer.

[13] As already remarked, the petition in mandate did not bring before the court the transcript of the proceedings before the Sheriff on the trial. The only point raised by the petition in mandate, as far as the trial before the Sheriff is concerned, is that he was disqualified. We have already held that he could not be disqualified, for the reasons stated. The part of the petition, and the only part, which states a case in mandate is that which sets out the proceedings before the Commission on appeal. For this reason it appears that the judgment remanding the case to the Sheriff went too far. The judgment should be modified so as to remand the case to the Civil Service Commission with directions to consider anew the appeal of the respondent as pre-

scribed in section 154 of the San Francisco charter and in such manner as is not inconsistent with the views herein expressed.

As so modified the judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



86 Cal.App.2d 904

**IMPERIAL IRR. DIST. v. HAMERSON
et al.
Civ. 3692.**

District Court of Appeal, Fourth District,
California.

July 26, 1948.

1. Eminent domain ⇨126(1)

Where drainage ditch was so located as to leave 35 foot strip between ditch and property line, and 10 foot service canal was located on strip, and landowners had used remaining 15 feet of strip for pasturage and as service road and turning ground, measure of severance damages for the 35 foot strip was not full value of strip but value of such use as landowners had enjoyed and of which they would be deprived in the future.

2. Eminent domain ⇨126(3)

In action to condemn for drainage ditch a strip of land containing underground concrete drainage pipe line which would be destroyed, cost of replacement of pipe line was not proper measure of damage for destruction of pipe line, and actual damage suffered by landowners through destruction of pipe line should be considered merely as element of value of strip taken and not as separate item.

Appeal from Superior Court, Imperial County; Dean Sherry, Judge.

Condemnation proceeding by Imperial Irrigation District against Vincent L. Hamerson, Ruth C. Hamerson, husband and

wife, and Lorna P. Hamerson Block, as joint tenants. The defendants filed a cross-complaint. From the judgment, the plaintiff appeals.

Reversed.

Harry W. Horton, and George R. Kirk, both of El Centro, for appellant.

A. L. Crawford, of San Francisco, for respondents.

BARNARD, Presiding Justice.

This is an action to condemn an 80-foot strip of land, desired for the installation of a drainage ditch, extending across a 15-acre parcel owned by the defendants. This strip, containing 2.31 acres, is near the north end of defendants' land, leaving another strip, 35 feet wide and containing about one acre, between it and the north property line. For some 25 years a service ditch about ten feet wide had existed along this 35-foot strip, having been used by the plaintiff without any record right of way.

By their answer and cross-complaint the defendants claimed damage through the destruction of an underground concrete drainage pipe which existed throughout the length of the 80-foot strip in question. They also claimed that the proposed ditch would lower the value of the main body of their land. They did not, however, ask for the value of the 80-foot strip which was to be taken, nor for severance damage with respect to the 35-foot strip thus cut off.

Hearing the case without a jury, the court found for the plaintiff with respect to the necessity for taking the 80-foot strip. It was further found that the defendants are the owners of 1250 feet of concrete drain pipe along the 80-foot strip which will be destroyed; that the defendants will be damaged in the sum of \$812.50, the value of this drain; that the value of defendants' lands is \$300 per acre, and they are entitled to \$700 for the 2.31 acres condemned; that the defendants are the owners of the 35-foot strip to the north, which will be rendered valueless to them; that the value of this one acre is \$300 for which the defendants are entitled to judgment; and that the remainder of defendants' land, to the south of the strip taken, will be benefited by the proposed improvement in the

sum of \$630. Judgment was entered giving the defendants damages in the sum of \$1182.50, but making no mention of condemnation and awarding no rights or benefits to the plaintiff. From this judgment the plaintiff has appealed.

It is first contended that the court erred in allowing \$300 damages for the 35-foot strip to the north of the 80-foot strip and which will be severed from the main body of the respondents' land by the construction of the proposed ditch. It is argued that this strip had no value to the respondents since it was already occupied by a service canal which had been in existence for 25 years, and that any claims on the part of the respondents with respect thereto were barred by the statute of limitations, citing *Kafka v. Bozio*, 191 Cal. 746, 218 P. 753, 29 A.L.R. 833.

[1] Not only are the pleadings deficient with respect to the matter of severance damages, but the evidence does not support the finding of damage in the amount of \$300 in this connection, although it indicates that the respondents were damaged in some amount. While this strip was rendered valueless to the respondents the resulting damage was not the entire value of the strip. The evidence shows that the service canal had existed thereon for many years, but that the respondents had made some use of the remainder of the strip as a service road, as a turning ground, and to some extent for pasturage. Their use of this strip had been only partial and limited for many years, and the full value of the land was not the proper measure of their damage. The value of such use as the defendants had enjoyed, and of which they would be deprived in the future, should be determined and allowed as severance damage.

[2] It is next contended that the court erred in allowing damages in the sum of \$812.50 for the destruction of the underground pipe line on the strip sought to be condemned. While the respondents owned this pipe line the evidence that it was of any use or value to them is meager and unsatisfactory. Moreover, the only evidence, as to the amount of damage is an estimate as to what the cost of replacement of such

a pipe line would be, which is not the proper measure of their damage, if any. Not only is there no evidence of the actual damage that would be suffered by the respondents through the destruction of this pipe line but that matter should be considered in connection with, and as an element of, the value of the 80-foot strip taken and not as an entirely separate item. If this pipe line was an improvement to the land taken, which added to its value, it should be considered and included in connection with fixing the value of the land as taken. *Colusa County v. Hudson*, 85 Cal. 633, 24 P. 791.

Proper amendments to the pleadings should be allowed, and the action retried with a decision on all of the issues, including that of condemnation.

The judgment is reversed.

MARKS, J., concurs.



86 Cal.App.2d 677

NAVARRO v. LIPPOLD.

Civ. 16551.

District Court of Appeal, Second District,
Division 2, California.

July 9, 1948.

1. Appeal and error ⇐436, 443

The pendency of an appeal deprives a trial court of jurisdiction to enforce its judgment or to make an order which will destroy the subject of an appeal or place funds involved therein where they will be beyond the control of a final judgment. Code Civ.Proc. § 946.

2. Appeal and error ⇐443

Where during pendency of action in superior court \$1,980.70 was deposited with clerk of superior court, pursuant to stipulation, to be held by clerk "until further order of the court," and thereafter a judgment was entered for plaintiff, from which defendants appealed without filing a stay bond,

and a writ of execution was issued on the judgment and returned partially satisfied, showing unpaid on the judgment \$14,052.98, superior court had no jurisdiction thereafter to make an order directing clerk of superior court to pay the \$1,980.70 deposited with him to plaintiff and to credit amount thereof on judgment. Code Civ. Proc. § 946.

3. Execution ☞77

Issuance of a writ of execution is a purely ministerial act and not a judicial act.

4. Appeal and error ☞436

The perfection of an appeal is completed when formalities prescribed by rules on appeal are complied with, and the appeal stays all further proceedings in the court below, since jurisdiction is thenceforth vested in the appellate court.

5. Appeal and error ☞443

Mandamus ☞54

Superior court's order directing clerk of superior court to pay over to plaintiff a deposit in hands of clerk was beyond court's jurisdiction, where defendants had already appealed, and therefore clerk's refusal to comply with the order was not a violation of any duty or trust enjoined on clerk by virtue of his office or station, and writ of mandate would not lie to compel clerk to comply with court's order. Code Civ. Proc. § 946.

Petition for writ of mandate by Frank B. Navarro against Earl Lippold, county clerk of the superior court of Los Angeles County, to compel the clerk to honor an order of the court directing him to pay to the petitioner a sum of money on deposit.

Writ of mandate denied.

Oral R. Finch, of Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel and William E. Lamoreaux, Deputy County Counsel, both of Los Angeles, for respondent.

McCOMB, Justice.

This is a petition for a writ of mandate to compel the clerk of the superior court of Los Angeles County to honor an order of

said court directing him to pay to petitioner a sum of money which he has on deposit.

The facts are these:

Petitioner was plaintiff in a superior court action and during the pendency thereof, pursuant to stipulation, \$1,980.70 was deposited with the clerk of the superior court to be held by him "until further order of the court." Thereafter a judgment was entered in favor of petitioner from which judgment defendants appealed without filing a stay bond. In due time a writ of execution was issued upon the judgment which the sheriff of Los Angeles County returned partially satisfied, showing due and unpaid on the judgment the sum of \$14,052.98. On March 9, 1948, the superior court made an order directing respondent to pay the sum of \$1,980.70 theretofore deposited with him to petitioner and credit the amount thereof upon the judgment. Respondent has refused to comply with the last mentioned order.

This is the sole question presented for our determination:

Did the appeal deprive the superior court of jurisdiction to make an order directing respondent to pay to petitioner the sum which had been deposited with him?

[1] This question must be answered in the affirmative. The pendency of an appeal deprives the trial court of jurisdiction to enforce its judgment or to make an order which will destroy the subject of an appeal or place funds involved therein where they will be beyond the control of a final judgment. (Los Angeles Pressed Brick Co. v. Higgins, 8 Cal.App. 514, 523, 97 P. 414, 420; Higgins v. Keyes, 5 Cal.App. 482, 483 et seq., 90 P. 972.)

[2] Applying the foregoing rule to the facts of the present case it is apparent that the appeal, even though no stay bond was filed, divested the trial court of jurisdiction, pending the appeal, to make an order relative to the fund which was part of the subject matter of the appeal and which order would place the fund beyond the control of the final judgment in the case.

[3] This rule is a sound one since it preserves the status quo pending the final decision of the appellate court. Such rule is consonant with the code provisions permit-

ting the issuance of a writ of execution if a stay bond is not filed. The issuance of a writ of execution is a purely ministerial act and is not a judicial act. (Donner Finance Co. v. Municipal Court, 28 Cal.App.2d 112, 114, 81 P.2d 1054.) The order in the present case was not a purely ministerial act but was a judicial act which was stayed by the filing of the notice of appeal. By application of this rule neither party will lose any right which he now has when the appeal is finally decided. This is in accordance with the language of section 946, Code of Civil Procedure: "Whenever an appeal is perfected * * * it stays all further proceedings in the court below upon the judgment or order appealed from, or upon matters embraced therein * * * but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from." In the words of Mr. Justice Taggart in Higgins v. Keyes, 5 Cal.App. 482, 484, 90 P. 972, 973: "The deposit 'to abide the judgment of the court' must have read into it 'the Supreme Court.'"

[4, 5] The perfection of an appeal is complete when the formalities prescribed by the Rules on Appeal are complied with, and "stays all further proceedings in the court below" since jurisdiction is thenceforth vested in the appellate court. The issuance of the order directing respondent to pay the deposit to petitioner was a "further proceedings in the court below," and was made one day after an appeal had been perfected. Unlike a writ of execution, the instant order was a judicial act of the court made after it was, by virtue of the code bereft of jurisdiction, and respondent's refusal to comply therewith was not a violation of any duty or trust enjoined upon him by virtue of his office or station.

Hallam Cooley Agency v. Superior Court, 30 Cal.App.2d 20, 85 P.2d 457, cited by petitioner, is not applicable to the facts of the present case. In the cited case it was held that an appeal from an order discharging a writ of attachment did not divest the trial court of jurisdiction to thereafter hear and decide a motion predicated on the ground that certain of the funds under attachment were exempt from attachment under sec-

tion 690.11 of the Code of Civil Procedure, since such order dealt with an entirely separate and distinct situation from the order involving the attachment.

In the instant case the purported order deals with the very subject matter involved in the judgment from which the appeal has been taken.

The alternative writ of mandate heretofore issued is discharged and a writ of mandate is denied.

MOORE, P. J., and WILSON, J., concur.



Ex parte CARR.

Cr. 2321.

District Court of Appeal, First District,
Division 2, California.

July 2, 1948.

Bail ☞75

Where petitioner had been admitted to bail in sum of \$100 pending hearing of her petition for writ of habeas corpus, and it appeared that petitioner did not surrender herself to custody of sheriff after her writ had been discharged and she had been remanded to custody, bail was declared forfeited. Pen.Code, § 1307.

Proceeding in the matter of the application of Katherine Carr, sometimes spelled Catherine Carr, for a writ of habeas corpus.

Order in accordance with opinion.

Peter T. Rice, of Los Angeles, for petitioner.

Anthony Brazil, Dist. Atty., of Salinas, for respondent.

PER CURIAM.

It appearing that the petitioner herein was heretofore admitted to bail in the sum of \$100 pending the hearing of her petition for a Writ of Habeas Corpus, and that said writ was thereafter discharged and

the petitioner was remanded to custody; and

It appearing that said petitioner did not surrender herself to the custody of the sheriff of Monterey County;

It is ordered that said bail is hereby declared forfeited and that the money be paid over to the treasurer of Monterey County under section 1307 of the Penal Code.



87 Cal.App.2d 11

BRAGG et al. v. SMITH et al.

Civ. 3694.

District Court of Appeal, Fourth District,
California.

July 29, 1948.

1. Automobiles ⇨244(44, 59)

Evidence sustained findings that plaintiff was contributorily negligent in abruptly slowing down in four-lane highway but that defendant in overtaking truck had last clear chance to avoid collision.

2. Negligence ⇨83

Continuance of injured party's negligence up to moment of injury is not in itself sufficient to defeat application of last clear chance doctrine, but in fact is present in all last clear chance cases.

3. Automobiles ⇨245(91)

Distance of approximately 100 feet between plaintiff's automobile, abruptly slowing down in four-lane highway, and defendant's overtaking truck was not insufficient as matter of law to enable defendant to have last clear chance to alter course of truck.



Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Hilsron Bragg and another, doing business as Arrowhead Food Products Company, against Milton A. Smith and

others, for damages sustained in automobile collision. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Monroe & McInnis, of San Diego, for appellants.

Vernon F. Bennett and Charles B. Provence, both of San Diego, for respondents.

BARNARD, Presiding Justice.

This action for damages arose out of a collision between an empty Ford truck, owned by the defendant Smith and driven by his employee the defendant Trimble, and a loaded panel truck owned by the plaintiff Robbins and driven by the plaintiff Bragg. For convenience, we will refer to these drivers, respectively as the defendant and the plaintiff.

The collision occurred at about 7:40 A. M. on a clear day in June on U. S. Highway 101, about a mile north of Encinitas and within the intersection formed by Highway 101 with a dirt street known as Marcheta. At this point Highway 101 is straight and level, runs north and south, and is divided into four 10-foot lanes with a dirt shoulder along its easterly side which varies from five to seven feet in width. To the east of this shoulder is a row of trees. Marcheta, some distance to the east of Highway 101, is from 22 to 27 feet wide but as it meets the highway it fans out with gradually curving curbs, particularly on its south side, so that it is about 100 feet wide as it joins the east side of the highway. The defendant was very familiar with this intersection, having passed along this part of the highway many times a day for several months.

On the day of the accident the plaintiff was driving north on the easterly of the two lanes provided for northbound traffic at a speed of from 40 to 45 miles an hour, and the defendant was following him in the same lane at about the same speed. The plaintiff had picked up a Marine some distance down the road and as they were approaching Marcheta, the Marine asked to be let off at that intersection. The plaintiff looked in his rear view mirror and seeing nothing gave a slow-down and stop signal with his hand and started to slow

down, with the intention of stopping immediately north of the intersection. He traveled 200 to 250 feet while this signal was showing, and was gradually edging over toward his right-hand side of the road. He was going about five miles an hour and his right front wheel was just coming over the shoulder of the road when the collision occurred. His truck was knocked forward and to the east, where it ran into the second tree north of the intersection. The plaintiff was knocked unconscious and suffered some injuries, and the car was badly damaged.

It appears, without conflict, that the impact occurred in the east lane of the highway at a point which is about two-thirds of the way through the actual intersection of the highway with the easterly branch of Marcheta, but which is slightly south of what would be the center line of Marcheta if that road did not fan out as it joins the highway. It was 38 feet from the point of impact to the rear end of plaintiff's truck as it rested against the tree. The defendant's truck left dual skid marks on the pavement, entirely in the east lane of the highway, but veering slightly to the left at the north end. These skid marks extended from the point of impact southerly for a distance of 60 feet, to a point about opposite the point where the fanned-out entrance to Marcheta begins. The damage to the two vehicles shows that the right half of the front of the defendant's truck collided with the left half of the rear of the plaintiff's truck.

The court, sitting without a jury, found that the defendant was negligent in the operation of his truck on this occasion and that the plaintiff was also guilty of negligence which would otherwise have amounted to contributory negligence. It was then found that the defendant had the last clear chance to avoid the collision, that he negligently failed to take advantage of this last clear chance, and that the collision proximately resulted from his negligence and failure to use ordinary care to avail himself of a last clear chance to avoid the collision. Judgment was entered awarding, as against both defendants, \$1210 to plaintiff Robbins for damage to his truck and \$2734.20 to plaintiff Bragg for his personal injuries.

From this judgment the defendants have appealed.

[1] The sole point raised is that the doctrine of last clear chance was inapplicable under the circumstances here appearing, and that the court erred in applying that doctrine and in entering a judgment based thereon. While, as a factual matter, it could well have been found that the plaintiff was not negligent the court's finding to the contrary is supported by some evidence and it cannot be said that the question was entirely one of law. It must be assumed that the plaintiff was also negligent, and the question presented is as to whether or not the other necessary elements of the doctrine in question here appear.

The defendant's theory at the trial was that the plaintiff had passed him shortly before the accident, had come back into the east lane when about 100 feet ahead of his truck and had then abruptly slowed down, and that the defendant could not turn to his left because a third car was then passing in the second lane and could not turn to his right into Marcheta because the plaintiff's truck was in his way. The court believed the plaintiff's testimony that he had not just passed the defendant's truck and that he had at all times material here been in the east lane. This was corroborated by a witness who was standing on the opposite side of the highway at the time, and this witness rather thoroughly exploded the theory that a third car interfered with the defendant's turning into the second lane.

[2] The main contentions on this appeal are that the last clear chance doctrine was not applicable until the plaintiff arrived at a point where he could no longer escape injury by exercising ordinary care, and then not unless the defendant had a clear chance to avoid the accident after he actually knew that the plaintiff was in a position of danger. It is argued that the plaintiff could have escaped injury up to the last by observing in his rear view mirror that the defendant was approaching and by then stepping on his accelerator. It is well settled that the fact that the negligence of the injured party continues up to the moment of the injury is not in itself sufficient to defeat the application of the doctrine. In

fact, the continuing negligence of the plaintiff is present in all last chance cases. *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P.2d 915.

The contention that the defendant did not actually know that the plaintiff would not get out of his way and was in a position of danger, in time to have had a clear chance to avoid the collision, is based on the argument that the plaintiff stopped suddenly in front of him, that he had only a split second in which to act, and that he could not have turned either to his right or to his left because a vehicle was in his way in both directions. The question presented is, at best, one of fact rather than one of law. There is evidence that the plaintiff did not stop abruptly and that he was slowing down over a space of several hundred feet. Even the defendant, although his version of the happenings just prior to the collision was not accepted by the court, testified that when the plaintiff was about 100 feet in front of him he observed him pulling over to his right. After the defendant says he saw plaintiff edging to the right the defendant had 150 to 200 feet to go before reaching the point of the impact, according to his own testimony. The evidence indicates that the defendant had a considerable opportunity to observe that the plaintiff's truck was slowing down. The evidence is also sufficient to indicate that the defendant actually knew, when he was at least 100 feet away, that the plaintiff was in a position of danger. After he applied his brakes sufficiently to leave skid marks on the pavement his truck traveled 60 feet, and there was necessarily a reaction period after he observed the imminence of the danger before he could get his brakes into effective operation. It is admitted in appellants' brief that this truck would go some 45 or 49 feet during this period. After knowing that the danger of a collision was imminent he continued in practically a straight line when, as clearly appears from the evidence, he could easily have avoided the accident by turning to his left in the second lane, or by turning to his right into the broad entrance to Marcheta. There was nothing in the way of his turning to his left in the second lane, as amply shown by the evi-

dence, and he was under no necessity of making a sharp right angle turn into Marcheta, as argued in the brief. As the trial judge said in his oral opinion, "The approach to Marcheta Street was such that the opportunity to turn into that street by a very gradual turn indeed was fully open. Now then, the evidence shows that the point where the skid marks started was approximately abreast of the southernmost point of the fan-out which Marcheta Street makes in coming into Highway 101. It would, therefore, appear that after realizing the imminence of the danger, and that it was wholly improbable either by reason of being oblivious to it or by reason of decrease of his speed, that Bragg could avoid an accident, Trimble had a clear opportunity without making any sharp turn to have turned to his right up Marcheta Street and avoided the whole difficulty."

[3] The defendant actually discovered the situation and realized the danger while it was still possible to avoid the collision by the use of ordinary care on his part. The opportunity was clearly open to him to avoid the accident by turning either to his right or to his left. While it may be true that he had to act quickly, it is not unusual for a motorist to be confronted with such a necessity and it cannot be said, as a matter of law, that a distance of approximately 100 feet was not sufficient to enable him to have a clear chance to slightly alter the course of his vehicle. Common experience is to the contrary, and the evidence here is sufficient to support the court's finding that a last clear chance to avoid the accident existed after the defendant actually knew that the plaintiff was in a position of danger from which he would be unable to escape by any action which he could then take. *Cady v. Sanford*, 57 Cal.App. 218, 207 P. 45.

The dispute here is as to the applicability of certain well established principles of law and not as to what those principles are, and it is unnecessary to review the many cases cited.

The judgment is affirmed.

MARKS, J., concurs.

BOHART v. WILTON et al.

Civ. 16373.

District Court of Appeal, Second District,
Division 1, California.

July 22, 1948.

Rehearing Denied Aug. 11, 1948.

Hearing Denied Sept. 13, 1948.

1. Evidence $\S$ 471(2)

In action for damages based on an alleged eviction, testimony of tenant on cross-examination that he knew he would have to vacate room when a prior tenant returned was improperly excluded as calling for a conclusion.

2. Landlord and tenant $\S$ 180(6)

In action against owner for damages based on alleged eviction of tenant who rented room from third party, evidence that third party acted as owner's agent was insufficient for the jury.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by R. E. F. Bohart against Mary Doe Wilton and Marie Mayberry for damages based on an alleged eviction. From the judgment, plaintiff appeals.

Judgment affirmed.

Jerrell Babb and Geo. W. Rochester, both of Los Angeles, for appellant.

Mindlin & Levy, of Los Angeles, for respondents.

DORAN, Justice.

This is an action for damages based on an alleged eviction.

The complaint alleges that, "defendants promised and agreed and executed to plaintiff herein an oral lease, wherein and whereby Apartment 4 of the apartment house located at 2128 South Western Avenue was rented for a month to month tenancy at the rental rate of \$19.00 for each month". That plaintiff paid the rent and occupied the premises until October 20, 1946, at which time it is alleged that, "during the absence of plaintiff from said premises, and without his consent and against his will, defendants wrongfully entered said apart-

ment and evicted and excluded plaintiff therefrom by removing the padlock from the door, taking and removing all of his personal effects, hereinafter described, out of said apartment and placing another padlock upon said door, and took possession of said apartment and placed another tenant in possession." It is then alleged that plaintiff, "having chronic bronchitis and a heart ailment, and during the time plaintiff was seeking lodgings, by reason of the wrongful and unlawful acts of defendants, he was forced to walk the streets unprotected from the night air, and contracted a severe cold to the impairment of his frail health and was confined to his bed, where he suffered and is still suffering from the result of the wrongful and unlawful acts of defendants by the eviction as aforealleged, to his damage." All of which, it is further alleged, was done "with the intent, design and purpose on the part of defendants to embarrass, injure and pain said plaintiff". Wherefore, the complaint concludes plaintiff demands judgment for \$5,245.00, and 37¢ each and every day until possession is restored.

The trial was had with a jury and at the conclusion of plaintiff's case a motion for a non-suit was granted. Plaintiff appeals from the judgment that followed.

Quoting from appellant's brief, "It is the Appellant's contention that the trial court committed reversal errors of law upon an undisputed record of facts. The issues resolve themselves into certain basic questions:

"1. Does the Appellant, in a cause of action of unlawful eviction, have the legal right to pray for judgment in damages for injuries to his health directly caused by said unlawful eviction?

"2. Does the Appellant, in a cause of action for unlawful eviction have the legal right to compensation for pain and injury as a part of exemplary and punitive damages to be included in a judgment if he prevails in proving an unlawful eviction?

"3. Can the trial court, when the issues of fact are being tried by a jury, invade the province of that jury and decide the issues of fact by way of sustaining a motion for nonsuit?"

Quoting from appellant's brief, "Respondent Grace B. Wilton had a room for rent at 2128 South Western Avenue, Los Angeles, and told Respondent Marie Mayberry she could rent it for \$19.00 per month and Mrs. Mayberry told Mr. Coepley she had a room to rent. Then Mr. Coepley took the Appellant to Mrs. Mayberry and Appellant paid her \$19.00 for first month's rent and \$7.50 for broker's fee and cleaning. Mrs. Mayberry gave the money to Mrs. Wilton who rents and collects rents from all the tenants of the building. The rent was paid July 19, 1946, and tenancy began on July 20, 1946, and Appellant paid the rent each month up to and including November 20, 1946. On the evening of October 20, 1946, he returned to his apartment and found his padlock had been removed off the door, and another padlock put on. Respondent Mayberry and a Mr. Cihok went over, after Mr. Cihok had told Mayberry he had opened the door, and Mayberry and Cihok went into Appellant's room and removed his personal property". It further appears that the room had previously been leased to Cihok but that during Cihok's absence of a few months respondent Mayberry, at the request of appellant's friend Coepley, had rented the room to appellant. When Cihok returned, appellant's possessions were removed. In this regard, appellant testified to a conversation with Mayberry and Cihok after the "eviction" as follows:

"A. She said she had merely rented a room to me as a personal favor to Mr. Coepley, and I was supposed to be in there only sixty days and I didn't get out, and so Mr. Cihok had a lease signed by Mrs. Wilton that was made in July, and she had absolutely no right whatever to rent the room to me at all, but she had rented it as a favor to Mr. Coepley and me because she thought I was a nice fellow, but when the sixty days was up and another thirty days they decided, Mr. Cihok wanted the room back, he had a lease on it, he was the legal tenant, and they moved my stuff out while I was gone."

On cross-examination appellant testified to a conversation with Mrs. Mayberry had between about the middle of August and the

middle of September while driving in an automobile in part as follows:

"Q. By Mr. Mindlin: It was some time during the drive, Mr. Bohart, you and Mrs. Mayberry had a conversation about the room? A. Yes.

"Q. And did she tell you during this drive the room belonged to Mr. Cihok who was out of town? A. She referred to it as Cy's room.

"Q. And did she during this drive ask you if you had looked for another room? A. No.

* * * * *

"Q. By Mr. Mindlin: Did she tell you when Mr. Cihok was expected back in the city? A. No.

"Q. How did that subject come up? A. She just said it was Cy's room and he would be coming back some time; she didn't say when.

"Q. And was the matter dropped then, or did she say anything further about the room? A. Dropped.

"Q. You didn't ask her what would happen to you when Mr. Cihok would come back? A. No.

"Q. You did know you would have to vacate the room when Mr. Cihok came back?

"Mr. Rochester: I object to that as calling for a conclusion.

"The Court: The objection is sustained."

[1] The ruling was error and the evidence improperly excluded. Appellant testified to another conversation had with respondent Mayberry over the telephone as follows:

"Q. Now, after you had mailed her this money order around September 19th and prior to October 20th, during that period did you have any further conversation with Mrs. Mayberry about the room? A. Yes.

* * * * *

"Q. By Mr. Mindlin: What was said in the course of your telephone conversation? A. I told her I needed clean linen, and she said she wouldn't give more clean linen and that was Cy's room and I would have

to get out sooner or later and she wouldn't give me any clean linen.

"Q. What else was said? A. That was all that was said, and I hung up."

[2] The cross-examination of appellant was constantly and prejudicially restricted and handicapped by invalid objections and erroneous rulings obviously due to a misunderstanding as to the distinction between proper cross-examination and impeachment, a misunderstanding which, incidentally, is not uncommon among judges and lawyers generally. Nevertheless, it is evident, from a review of the record, that the court's ruling on defendants' motion was proper. Without going into further detail, it is sufficient to note the trial court's determination that no agency existed is supported by the record, which conclusion disposes of appellant's other contentions.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; CARTER, J., dissenting.



87 Cal.App.2d 8

HUSTON v. HUSTON.

Civ. 16574.

District Court of Appeal, Second District,
Division 2, California.

July 28, 1948.

1. Appeal and error ¶478

Where defendant filed no answer to plaintiff's verified petition for a writ of supersedeas and defendant's sole response consisted of a brief in opposition containing unverified statements of alleged facts and arguments, all statements of purported facts in conflict with the verified petition would be disregarded by the District Court of Appeal.

2. Divorce ¶312

In divorce action, supersedeas would issue to stay all proceedings upon order awarding custody of minor child to de-

fendant and to permit custody to remain in plaintiff until final determination of appeal from the order where sum of \$20,000 fixed for undertaking on appeal was excessive and an abuse of trial court's discretion in absence of evidence that plaintiff intended to remove the child from the state.

Action by Arba Lewis Huston against Geneva Huston for divorce. From an order modifying the decree and awarding full custody of a child of the marriage to defendant, plaintiff appeals. On plaintiff's petition for a writ of supersedeas.

Petition granted in accordance with opinion.

Benjamin D. Brown, of Los Angeles, for appellant.

Julius Blank of Los Angeles, for respondent.

WILSON, Justice.

Plaintiff-appellant has petitioned this court for a writ of supersedeas to suspend proceedings pursuant to a judgment of the superior court awarding custody of the minor daughter of the parties to defendant-respondent.

In October, 1945, an interlocutory decree of divorce was granted to plaintiff and sole custody of the child was awarded to him. He has had custody ever since that date until May 20, 1948. Prior to the latter date a hearing was had on an order to show cause why the interlocutory decree should not be modified, the result of which was an order entered on March 19, 1948, awarding the custody to defendant, from which plaintiff immediately appealed. Subsequently defendant moved the court for an order fixing the amount of the undertaking to be given by plaintiff pending the appeal. On May 5, 1948, the court made an order that an undertaking to stay proceedings was required and fixed the amount at \$20,000. At the same time, the child being present, the court ordered her to be "forthwith committed to the custody of the juvenile hall department." The evidence showed that plaintiff owned property in Los Angeles County valued at over \$50,000. The court

stated that it had not been shown that plaintiff intended to leave the State of California pending the appeal, and the only reason given for fixing so large an amount was the court's belief that the appeal would not be successful and that plaintiff might thereupon leave the state.

Plaintiff alleges in his petition that a writ of supersedeas and temporary stay of proceedings is necessary for the reasons (1) that on a prior occasion after the separation of the parties defendant removed the child from this state and she was returned only after an order of the court was made therefor, and (2) if defendant now obtains custody it is likely that she will again remove the child from the jurisdiction of the courts of this state, thus depriving plaintiff of his rights pending appeal and of the fruits of the appeal in the event that the order should be reversed.

[1] Defendant has filed no answer to plaintiff's verified petition for a writ of supersedeas and all allegations therein stated and above related will therefore be deemed by this court to be true. Defendant's sole response consists of a brief in opposition to the issuance of the writ containing both statements of alleged facts and argument. Since such response is not verified all statements of purported facts that are in conflict with the verified petition will be disregarded.

When the petition for a writ of supersedeas was filed this court issued an order to show cause why the writ should not issue and stayed proceedings in the superior court pending a hearing on the order upon the posting of an undertaking by plaintiff in the sum of \$500. Disregarding the stay of proceedings the trial judge directed that the child remain in the custody of the juvenile authorities until the determination of the proceeding here. For the purpose of giving effect to our order it became necessary to issue a second directive that the child be delivered to plaintiff and that the superior court desist from attempting to enforce its own order until final judgment herein.

The sum of \$20,000 fixed for the undertaking on appeal was arbitrary, excessive and an abuse of the discretion of the court.

Not only was there no evidence that plaintiff intended to remove the child from this state and no evidence from which an inference to that effect could be drawn, but the court stated that no such showing had been made. The court merely surmised that plaintiff might leave the state if the order of the trial court should be affirmed.

[2] Upon the showing made to this court plaintiff's petition for a writ of supersedeas should be and is granted staying all proceedings on the order made with reference to the custody of the child until final determination of the appeal from the order, the undertaking heretofore given by plaintiff to remain in force.

MOORE, P. J., and McCOMB, J., concur.



86 Cal.App.2d 900

PEOPLE v. WARNICK.

Cr. 4223.

District Court of Appeal, Second District,
Division 2, California.

July 26, 1948.

1. Criminal law ⇨1023(10)

Where trial court did not pronounce judgment but suspended proceedings and granted probation, purported appeal from judgment of conviction and sentence would be dismissed.

2. Gaming ⇨96

In prosecution for occupying room or inclosure with paraphernalia for recording bet on horse race, prosecution need not show that a race was actually run or that any bet was made. Pen.Code, § 337a, subs. 2, 4.

3. Gaming ⇨75(1)

Occupancy of room or inclosure with betting paraphernalia constitutes statutory offense, not the actual making of bets. Pen.Code, § 337a, subs. 2, 4.

4. Gaming $\Rightarrow$ 96

In prosecution for recording and registering bets on horse race, it is not necessary to show that race upon which bets were being taken was in fact run. Pen.Code, § 337a, subsds. 2, 4.

5. Gaming $\Rightarrow$ 98(3, 5)

Evidence sustained conviction of registering bets on horse race and occupying room for such purpose. Pen.Code, § 337a, subsds. 2, 4.

6. Gaming $\Rightarrow$ 98(5)

In prosecution for occupying room for purpose of registering and recording bets on horse races, purpose of occupancy could be proved by circumstantial evidence. Pen.Code, § 337a, subsds. 2, 4.

7. Criminal law $\Rightarrow$ 260(11)

When circumstances shown by evidence reasonably justify finding of guilt, reviewing court will not disturb such finding.

8. Criminal law $\Rightarrow$ 386

In prosecution for occupying room for purpose of recording and registering bets on horse races, evidence of wagers taken over telephone by police officers who had forced entry into defendant's apartment was admissible. Pen.Code, § 337a, subsds. 2, 4.



Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Morris Warnick was convicted of occupying a room with papers and paraphernalia for recording and registering bets on horse races, and of recording and registering bets on horse races, and he appeals.

Order denying motion for new trial affirmed, and purported appeal from judgment and sentence dismissed.

Max Solomon, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

WILSON, Justice.

[1] Defendant was charged in two counts with having violated section 337a of

the Penal Code, in one a violation of subdivision 2 of that section, occupying a room with papers and paraphernalia therein for the purpose of recording and registering bets and purported bets on horse races, and in the other a violation of subdivision 4, recording and registering bets on horse races. He pleaded not guilty to both counts and waived trial by jury. By stipulation the cause was submitted on the transcript of the evidence given at the preliminary hearing. The court found him guilty on both counts and granted leave to file an application for probation upon the hearing of which proceedings were suspended and he was placed on probation for three years. He made a motion for a new trial which was denied. He has appealed from the order denying his motion for a new trial and has purportedly appealed from an alleged judgment of conviction and sentence. Since the court did not pronounce judgment but suspended proceedings and granted probation that appeal will be dismissed. *People v. Murphy*, 60 Cal. App.2d 762, 765, 141 P.2d 755; *People v. Brown*, 78 Cal.App.2d 773, 778, 178 P.2d 464; *People v. Guerrero*, 22 Cal.2d 183, 184, 137 P.2d 21.

The only point raised by the appeal is that the evidence is insufficient to sustain the verdict of conviction.

[2-4] With reference to the charge under subdivision 2 of section 337a of the Penal Code, the offense is complete when it is proved that the defendant occupied a room or enclosure with paraphernalia used for the purpose of recording a bet on the result or purported result of a horse race or purported horse race. The prosecution is not required to show that a race was actually run or that any bet was made. *People v. Hinkle*, 64 Cal.App. 375, 380, 221 P. 693; *People v. Carroll*, 54 Cal.App. 684, 686, 202 P. 885; *People v. Ghio*, 82 Cal. App. 28, 32, 34, 255 P. 205; *People v. Vertlieb*, 22 Cal.2d 193, 197, 137 P.2d 437. It is the occupancy of a room or enclosure with betting paraphernalia for the purpose mentioned that constitutes the offense, not the actual making of bets. *People v. Manning*, 37 Cal.App.2d 41, 43, 98 P.2d 748; *People v. Gilson*, 71 Cal.App.2d 584, 586, 163 P.2d 98; *People v. Abraham*, 67 Cal.

App.2d 425, 427, 154 P.2d 450; *People v. Kabakoff*, 45 Cal.App.2d 170, 173, 113 P.2d 760; *People v. D'Angelo*, 60 Cal.App.2d 73, 78, 140 P.2d 113. Likewise when the prosecution is under subdivision 4 for recording and registering bets it is not necessary to show that the race upon which bets were being taken was in fact run. *People v. Sutherland*, 59 Cal.App. 462, 463, 210 P. 965; *People v. Ghio*, *supra*; *People v. Reifenstuhl*, 37 Cal.App.2d 402, 404, 99 P.2d 564.

[5] Tested by the foregoing rules the evidence sustains defendant's conviction. On the day of his arrest officers obtained a key to defendant's apartment from the landlady. When they inserted the key in the lock they found that the door was bolted. One of the officers knocked on the door and identified himself. Receiving no answer after waiting about a half a minute he forced the door and all the officers entered the apartment where defendant was found. While the officers were in the apartment the telephone bell rang eight or nine times. One of them answered the calls and received wagers over the telephone. The telephone instrument was in the kitchen where the officers first saw defendant. They searched the apartment for papers with negative result. One of them observed a paper bag in a flower bed directly below the kitchen window of the apartment which was found to contain papers which defendant's counsel stipulated were betting markers and betting paraphernalia. He also stipulated that the written matter on the papers was in defendant's handwriting.

Contrary to defendant's contention the corpus delicti was established by the evidence above outlined and defendant's connection with the crimes charged was shown by his handwriting on the betting markers and by the fact that they were found beneath the window of the room in which defendant and his telephone instrument were found by the officers. The only in-

ference that can be drawn is that the betting markers were dropped from the window by defendant when he was informed that an officer was demanding admittance to his apartment. There is the further inference that the betting markers were written and bets were received on or about the date of defendant's arrest.

[6-8] Defendant contends that the finding of the betting paraphernalia beneath his window did not prove that his apartment was occupied for the purpose of recording and registering bets on horse races. There are the additional facts that the betting markers were in his handwriting; he failed to answer the summons of the officer; the delay enabled him to dispose of the evidence by throwing it from the window; the telephone bell rang repeatedly and bets were received over the telephone by the officer in his apartment and in his presence. It was not necessary that the purpose for which the room was occupied be proved by direct evidence, since the circumstantial evidence was ample to establish the essential element of the crime. *People v. D'Angelo*, *supra*; *People v. Tuttle*, 27 Cal.App.2d 647, 649, 81 P.2d 571; *People v. Tepper*, 36 Cal.App.2d 525, 527, 97 P.2d 1002. When the circumstances shown by the evidence reasonably justify the finding of guilt the finding will not be disturbed by the reviewing court. *People v. D'Angelo*, *supra*; *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. The telephone conversations were admissible. *People v. Vertlieb*, 22 Cal.2d 193, 196, 137 P.2d 437; *People v. Kelley*, 22 Cal.2d 169, 172, 137 P.2d 1; *People v. Joffe*, 45 Cal.App.2d 233, 235, 113 P.2d 901; *People v. Reifenstuhl*, 37 Cal.App.2d 402, 405, 99 P.2d 564.

The order denying defendant's motion for a new trial is affirmed. The purported appeal from an alleged judgment and sentence is dismissed.

MOORE, P. J., and McCOMB, J., concur.

86 Cal.App.2d 545

**In re YOKOHAMA SPECIE BANK. LIM-
ITED.**

**KAWAHARA et al. v. YOKOHAMA SPE-
CIE BANK, LIMITED, et al.**

Civ. 13727.

District Court of Appeal, First District,
Division 2, California.

July 2, 1948.

1. Banks and banking ⇐18

Claimants, who had not filed verified claims in proceeding for liquidation of California branch offices of Japanese bank or filed suit thereon against liquidator, though notice to creditors had been published pursuant to statute, and whose claims did not appear on books of bank as valid claims, were not entitled to intervene in proceeding on liquidator's petition for leave to pay dividends on approved claims, since they had no justiciable right which they could seek to enforce adverse to liquidator's petition. Gen.Laws, Act 652, §§ 7, 135c, 136; Code Civ.Proc. § 387.

2. Banks and banking ⇐80(2)

Statute requiring claims against bank in liquidation to be presented within four months after publication of notice to creditors is not a statute of limitations calling for a plea but establishes a condition precedent operating as a bar against assertion of any claim not presented as required, so that pleading failed to state a cause of action based on such claim in absence of allegation of presentation of claim within time prescribed by statute or valid excuse for failure of presentation. Gen.Laws, Act 652, § 136.

3. Parties ⇐38

The right to intervene is statutory and is controlled by statute and is not absolute. Code Civ.Proc. § 387.

4. Banks and banking ⇐80(9)

Granting parties a hearing to determine merits of petition for leave to intervene in proceeding on liquidator's petition for leave to pay dividends on approved claims against bank in liquidation was not error and where it developed on the hearing that

parties seeking to intervene had no justiciable interest in the litigation and that intervention would merely delay distribution of funds to those legally entitled to prompt distribution, petition for leave to intervene was properly denied. Gen.Laws, Act 652, §§ 135c, 136; Code Civ.Proc. § 387.

5. Parties ⇐42

Any unreasonable delay in filing a petition for leave to intervene is a sufficient ground for denial of petition. Code Civ. Proc. § 387.

6. Parties ⇐44

Superior Court has jurisdiction to examine into petition for leave to intervene to determine whether petitioner is one entitled to intervene under statute and whether there has been unreasonable delay in making the application, questions of whether petitioner has an interest in matter in litigation and whether there has been unreasonable delay being questions of fact which must be determined by the court before leave to intervene is granted. Code Civ.Proc. § 387.

7. Parties ⇐42

A right to intervene, regardless of statutory limitations, should generally be asserted within a reasonable time and intervenor must not be guilty of unreasonable delay after knowledge of the suit. Code Civ.Proc. § 387.

8. Banks and banking ⇐80(9)

Denial of petition by alleged creditors of bank in liquidation for leave to intervene in proceeding on liquidator's petition for leave to pay dividends on approved claims was justified on ground of unreasonable delay, where petition for leave to intervene was filed only one day prior to hearing of liquidator's petition and more than two years after publication of notice to creditors to present claims against bank. Gen.Laws, Act 652, §§ 135c, 136; Code Civ.Proc. § 387.

9. Appeal and error ⇐143

Parties, whose petition for leave to intervene in proceeding on liquidator's petition for leave to pay dividends on approved claims against bank in liquidation was denied, were not parties to order granting

liquidator's petition and could not appeal therefrom. Gen.Laws, Act 652, §§ 135c, 136.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Proceeding in the matter of the Yokohama Specie Bank, Limited, a banking corporation, in liquidation, wherein Maurice C. Sparling, Superintendent of Banks of the State of California, and Liquidator of the Yokohama Specie Bank, Limited, filed a petition for distribution of dividends on approved claims and K. Kawahara and others sought leave to intervene. From an order denying leave to intervene and an order for distribution of dividends, intervenors appeal.

Appeal from order for distribution of dividends dismissed and order denying leave to intervene affirmed.

Alfred Gitelson and Robert Ashton, both of Los Angeles, and Dinkelspiel & Dinkelspiel, of San Francisco, for appellants.

Mary Eschweiler, Office of Alien Property, Arthur J. de Lorimier, Asst. U. S. Atty., and William Petros, all of San Francisco, Fred N. Howser, Atty. Gen., Miriam E. Wolff, Deputy Atty. Gen., S. M. Saroyan and Shirley, Saroyan, Shearer & Sullivan, all of San Francisco, and (Loeb & Loeb and Walter S. Hilborn, all of Los Angeles, of counsel), for respondents.

NOURSE, Presiding Justice.

Petitioners appeal from the order denying their petition to intervene in a proceeding in which the liquidator of the San Francisco and Los Angeles offices of the above bank petitioned for leave to pay an 80% dividend on claims against those offices, and from the order granting such petition of the liquidator.

From the petition of the liquidator it appears that the Yokohama Specie Bank (hereafter called the Bank) was a Japanese corporation authorized to do a deposit banking business in California pursuant to section 7 of the Bank Act. Deering's Gen.Laws, Act 652. It maintained in California a principal office in San Francisco

and a branch office in Los Angeles. Immediately after the outbreak of the war with Japan in December, 1941, the Superintendent of Banks took possession of the Bank's California offices under sections 135c and 136 of the Bank Act. Subsequently he became conservator of them and on March 13, 1945, the San Francisco superior court terminated the conservation proceedings and ordered liquidation under section 136, supra, the Superintendent of Banks then becoming liquidator. On June 1, 1945, the liquidator gave notice in accordance with the statute that claims against the two California offices should be filed within four months after June 1, 1945.

Section 7 of the Bank Act contains provisions requiring a foreign bank to assign a certain part of its capital to the business in this State and to keep its California business and the capital, funds and deposits, accounts and transactions belonging to it separate and apart as if the California business were a separate corporation. Section 136 contains provisions requiring all claims against a corporation of which the Superintendent has taken possession to be presented in writing, verified, within four months after the first publication of notice; any claim not so presented is declared forever barred (with an exception, however, for "any deposit claim, appearing upon the books of said bank to be a valid claim"; such claim if presented after the time fixed shall be entitled to share in any dividends declared subsequent to the presentation.) If the Superintendent of Banks rejects a claim presented he must serve notice of rejection on the claimant who must bring action within six months after service.

The liquidator's petition for distribution of dividends on approved claims was filed July 14, 1947; hearing was set for July 28th but on request of appellants was postponed to August 5, 1947. On August 4, 1947, appellants filed their petition for leave to intervene for themselves and as representing others similarly situated, all holders of "yen certificates" which total the sum of more than \$10,000,000. They allege they are creditors of the California offices of the Bank because of United States money deposited therein for which

they were given as evidence "Fixed Deposit Certificates" (in yen) a specimen of which is affixed to the petition. This specimen certifies that a certain amount in yen has been remitted in the name of the client to the head office in Yokohama to stand there for a fixed period of—months at an interest of—%, principal and interest to be payable when due only at the head office in Japan upon surrender of the certificate; the contract to be governed by the laws of Japan. The certificate, however, "may be purchased at the request of the depositor, but at the option of the purchaser, by a branch office abroad, the place of payment, however, remaining unchanged." The petition alleges that there were oral agreements that the amounts so deposited at a California office would be repaid when due at such California office in United States money, and that this would also be done in the meantime on demand of depositor; that this had been done regularly for many years and that a custom to that effect had been formed between the bank and its depositors. That some holders of such yen certificates had filed claims with the Superintendent of Banks but that he has not approved them. That there were more than 5000 depositor creditors similarly situated with a total amount of deposits due and unpaid of over \$10,000,000. It is not alleged that the four individual petitioners, or in general those whom they wished to represent, have followed the procedure of section 136 of the Bank Act, have timely filed claims, which have been rejected, or that they have timely brought or bring action upon those rejected claims.

The next day at the hearing the liquidator did not file an opposition to the petition but answered orally that the petitioners had not complied with the provisions of the Bank Act and were not depositors in the California branches but in the Yokohama home office; that they could have made dollar deposits in the California branches, but preferred the yen deposits in Yokohama because of the much higher rate of interest. The California branches acted in these transactions as agents of the home office as any other bank could have done. Petitioners did not object to the oral answer but, when the liquidator wished to develop

his position by witnesses, their attorney declared, "Your Honor, we were not prepared to contest factual matters at this time." However, the court ordered the liquidator to go ahead. No further objections to the proceedings or the hearings of witnesses were made, and petitioners cross-examined witnesses and made an offer of proof that the books and records of the California offices show who received yen certificates and whether they still were outstanding, which offer was rejected by the court.

The evidence of the officials in charge of the San Francisco and Los Angeles branches showed, that there were no yen accounts in either office; that a person who wanted to make a yen deposit would sign an application, give dollars, the amount of yen would be figured out according to the rate of exchange and yen certificates would be immediately issued and booked as "Drafts sold", the amounts on which account would in due time be transferred to the home office. If a holder wanted to cash a yen certificate, the California branch would purchase it in dollars at the rate of exchange, pay it, and book it as "Bills Bought," also finally for the account of the home office. No individual accounts were set up in any California office for any of the purchasers of yen certificates, whereas the purchaser of a dollar account would have an individual account in his name in one of the California offices. Four or five holders of yen certificates presented claims during the four months presentation period but they and the public were informed that there were no funds in the hands of the liquidator with which to pay yen deposits. None of these individual petitioners was among those who presented claims; they did not bring action, and their names do not appear on the California books except one who appears with a dollar account, the claim as to which was allowed. It was stipulated that the purchasers of yen deposits were not given individual notice as depositors of the time for presentation of claims under section 136, Bank Act.

After memoranda of points and authorities had been filed by petitioners and in opposition by the liquidator and by certain creditors of the California branches the court made its order denying petition for

leave to intervene on the basis of findings in substance as follows: 1. Petitioners have been guilty of unreasonable delay and laches in asserting their claims, causing prejudice to the liquidator and creditors of the California offices. 2. The yen certificates do not represent deposits in the California offices of the Bank and petitioners are not depositors in them. 3. The claims of the petitioners do not appear as valid in the books of the California offices and petitioners have no accounts therein. 4. The yen certificates represent deposits in the Yokohama office of the Bank and are payable there. 5. * * * 6. The California offices regularly issued yen certificates as agents of the Yokohama office for its account and the funds they so received were transferred to the Yokohama office on the interoffice accounts. 7. Branch offices of the Yokohama office, including the California offices, had the option of purchasing yen certificates; many of said certificates issued by the San Francisco or Los Angeles offices of the bank for the account of the Yokohama office were purchased by other branches of said bank, but were never charged to the account of the California branches of the bank; the San Francisco and Los Angeles offices often purchased yen certificates but all such purchases were charged against the account of the Yokohama office. 8. The four month period for presentation of claims under the Bank Act expired on October 1, 1945; none of the petitioners filed a claim; claims on yen certificates filed by others were rejected and no suit was instituted on any of them. 9. All excess assets of the California offices of the Bank remaining after payment of allowed claims of creditors of said offices, have been vested in the Alien Property Custodian and his powers have been transferred to the Attorney General of the United States.

Appellants contend that the court below erred in not first and separately deciding appellants' right to intervene on the basis of the allegations of their petition which prima facie show a direct interest in the pending proceedings. They alleged that they were depositors in the California branch offices and as such were entitled to participate in the intended distribution.

No pleading in opposition had been filed. They argue that the right of a party with a sufficient interest to intervene is absolute and a matter of right; that it was against due process to go into the merits of petitioners' right together with those of the principal proceedings before appellants' right to intervene had been decided and they had had opportunity to plead and to prepare for trial in the principal proceedings, and that the question whether appellants' claims were barred by the statute of limitations or laches cannot be investigated and decided on the petition to intervene, citing *Maas v. Sullivan*, 124 Misc. 295, 207 N.Y.S. 181. Moreover, also on the merits they contend they were entitled to participate in the California assets, that their claims were not barred, and that, as holders of certificates of deposit, they were depositors of the Bank and come under the depositors exception to the four months term of presentation of the Bank Act. To complete the statement of the questions raised, we here state without comment the minor points advanced by petitioners: The petition constituted presentation prior to the intended distribution so that they were entitled to participate. The practice of the California offices as to the issuance and purchase of yen certificates caused these transactions to be dollar transactions with these offices. Examination of the books and records would show these transactions and also that the records contain the date, number and amount of certificates of each transaction. The statutory requirement that the claim appear on the books as valid need not be fulfilled by a listing by name; it is sufficient that the certificates held are listed as having been sold by the California offices. The money received by the California branches in these transactions was not actually sent to Japan but only accounted for by book entries. The treatment of dollar certificates and yen certificates was the same—both were paid and repaid in dollars. Petitioners were such indispensable parties that the court should have ordered them made parties of its own motion.

Respondent Bank and its liquidator argue:

A. The right to intervene is not absolute but can be lost by unreasonable delay and

laches and is left to the sound discretion of the trial judge. The delay in the present case is not explained by appellants either below or on appeal.

B. The intervention proceedings try to circumvent the procedure of section 136, Bank Act, meant to provide an orderly and speedy distribution of assets in liquidation, which procedure is comprehensive and exclusive. Action can only be brought on a claim rejected. Before rejection any action is premature. The procedure as to claims under the Bank Act is analogous to the filing of claims in Probate. In California a complaint against an executor fails to state a cause of action unless it is alleged that the claim has been presented within the time allowed by the Probate Code § 700. As their claims were barred by failure of timely presentation they had no interest entitling them to intervene. The statutory requirement of presentation within four months is not a statute of limitations but a substantive condition precedent (citing *Zuroff v. Westchester Trust Co.*, 273 N.Y. 200, 7 N.E.2d 100, 109 A.L.R. 1401, under an almost identical statutory provision), without fulfillment of which there is no right whatever against the liquidator.

C. The petition of appellants with the conditions of the appended yen certificates clearly showed on its face that appellants were not depositors in the California offices of the Bank but in the Yokohama office. Custom and usage cannot vary the terms of a clear and unambiguous contract. The parol evidence rule debars evidence of the alleged oral agreements in conflict with the express terms of the yen certificates. The evidence proved that appellants were not local dollar depositors; payment and repayment were only in dollars according to the changing rate of exchange. As they were not depositors in the California offices they had no right to participate in distribution from the assets of those offices and did not come under the exception to the four month presentation requirement for depositors with valid book claims; claims on yen certificates should be asserted against the Office of Alien Property only.

D. As the petition did not state facts entitling intervention the court should deny it both below and on appeal, even without

a demurrer. If the procedure in the court below did not conform to standard practice the defect was waived by failure to object to and cooperation in it. *Felice v. City of Inglewood*, 84 Cal.App.2d 263, 192 P.2d 317. Appellants were not prejudiced as the court decided after submission of points and authorities and the decision could never have been otherwise as the facts which appellants alleged and those they offered to prove, even if true, would not establish an interest entitling them to intervene.

E. The appeal from the order granting the liquidator's petition for leave to pay a dividend must be dismissed as appellants are not parties to these proceedings.

It would serve no useful purpose to compose an extended treatise concerning the major and minor points raised by the respective parties. Academically some of them appear debatable, but none of them can stand against the unescapable conclusion, that, for the three reasons hereinafter noted, there was no prejudicial error in the proceedings under review, and therefore the order should not be disturbed.

[1] (1) On June 1, 1945, the liquidator caused notice to creditors to be published in full accord with the provisions of section 136 of the Bank Act. None of the petitioners for leave to intervene filed a verified claim based on his yen certificate and no holder of a yen certificate has filed suit against the liquidator based on a yen certificate. For these reasons none of the petitioners had any right to intervene in these proceedings. None had a justiciable right which he could seek to enforce adverse to the liquidator's petition for leave to pay dividends to the legitimate creditors. By the express terms of section 136 of the Bank Act a claim is forever barred which has not been presented within four months after the first publication of notice. Appellants must concede that the terms of the statute were not met either as to filing a claim or in filing a suit within six months after rejection of claim. Now the appellants here are not seeking recovery on a rejected claim—they have chosen a proceeding not authorized by the Bank Act the effect of which is to prevent or delay distribution of the assets in which they can assert no triable interest.

It should be noted that, under section 136 of the Bank Act, if appellants' claims appear on the books of the corporation as valid claims they are entitled to share in the dividends notwithstanding a failure or delay in presentation. This right to share in dividends does not necessarily entail a right to intervene in these proceedings. The undisputed evidence is that appellants' claims do not appear on the books of the corporation as valid claims. In so far as the interests here sought to be protected are concerned, appellants appear on the books of the corporation, when they appear at all, only as purchasers of yen certificates—a simple transaction of purchase and sale in which both parties got what they bargained for—a transaction which is not challenged on the ground of fraud, or any similar ground, and one which could not be attacked in this proceeding.

[2] Appellants mistake the issue on their failure to file claims under section 136 of the Bank Act as presenting a question of the bar of the statute of limitations calling for a plea. This is not the effect of the statute. To the contrary it establishes a condition precedent operating as a prohibition against assertion of the right and pointing directly to the failure of the petition to state a cause of action. As such it is at one with those statutes calling for filing a claim against an estate in probate, a county, or other public agency. In cases involving those statutes it has been uniformly held that the pleading fails to state a cause of action unless it alleges presentation of a claim within the time fixed in the statute or a valid excuse for failure of presentation. *Hays v. Bank of America*, 71 Cal.App.2d 301, 304, 162 P.2d 679; *Rhoda v. Alameda Co.*, 52 Cal. 350; 7 Cal.Jur. sec. 113; 4 Cal.Jur. Supp. sec. 113; *Zuroff v. Westchester Trust Co.*, 273 N.Y. 200, 7 N.E.2d 100, 109 A.L.R. 1401, a case arising under a provision of the New York Bank Act similar to section 136.

(2) This presents the question whether a petition for leave to intervene may be denied when it appears that the petitioners are not and cannot become interested parties in the pending litigation. The appellants contend that the right of a party to intervene is absolute "if he has an interest

therein." *Elliott v. Superior Court*, 168 Cal. 727, 145 P. 101, and similar cases are cited in support of the argument, but they do not in truth support it. But the condition of "interest" is the criterion upon which the cases put the "right" of intervention. It would be a queer rule indeed that would require a court to permit any one to delay and impede a legal proceeding when he has no possible chance of gaining by his intervention. Here it affirmatively appears from the allegations of the petition and the undisputed evidence taken at the hearing that the petitioners have no rights as claimants to delay distribution to those who are recognized as lawful creditors.

[3,4] The premise upon which appellants rest their case is that intervention is "an absolute right", and it is true that some of the cases have used the expression inadvertently and loosely. But it is a false premise. The right is statutory and is controlled by the statute. Section 387, Code of Civil Procedure provides that a person "may" intervene, and that intervention takes place when a third person is "permitted" to become a party, and that the application for leave may be "filed by leave of the court." Now the fact that "leave" must be requested and that the court has power to grant or deny the request negatives all conception of an "absolute right." Since the court has the power to grant or deny, and since no other procedure is presented, we cannot say that the court here was in error when it gave the parties a hearing to determine whether the petition had merit. If the leave had been denied arbitrarily, we can see where appellants might present a case of abuse of discretion. But here the record shows the contrary. On the hearing it developed that appellants had no justiciable interest in the litigation and that their intervention would have served no end except to delay the distribution of the funds to those who were legally entitled to a prompt distribution.

[5] (3) For another reason the trial court properly denied leave to intervene. Notice to creditors was given June 1, 1945. These petitioners were charged with knowledge that this would be followed by the liquidator's request for leave to make dis-

tribution. The petition for leave to intervene was not filed until August 4, 1947, one day prior to the hearing of the liquidator's application. It is settled that any unreasonable delay in filing a petition for leave to intervene is a sufficient ground for a denial of the petition. *Allen v. California Water & Tel. Co.*, 31 Cal.2d 104, 187 P.2d 393, and cases cited. And see 20 Cal.Jur. 518, 520; and the early case of *Hocker v. Kelley*, 14 Cal. 164, where the Supreme Court expressly denied appellants' theory that intervention was "an absolute right."

We should not be understood as holding that appellants have no cause of action against the home bank or against either of its branches located in this State. That question does not arise in this litigation and we do not decide it. Here the sole question is whether appellants have the right to delay distribution to the qualified creditors while their independent claims for relief are being litigated.

[6] The controlling issue is the power of the superior court to deny a petition for leave to intervene when it appears that the petition if granted would delay the main proceeding and also that the petitioner could not under any circumstances become a proper party to the proceeding. On this issue appellants argue that the court erred in taking evidence which supported his order denying the petition. We are satisfied that a reasonable and liberal interpretation of section 387 of the Code of Civil Procedure permits the superior court to examine into the petition to determine whether the petitioner is one entitled to intervene under the statute and whether there has been unreasonable delay in making the application. The question whether the petitioner "has an interest in the matter in litigation" is a question of fact which must be determined by the court before "leave" to file is granted. The statute does not require that leave to file must be granted on the face of the petition alone. If the court can act more intelligently by giving the

parties a hearing, we know of no authority which prevents such procedure.

[7] On the question of delay that too is a question of fact. Here the superior court took evidence without objection of the petitioners. On that evidence it found that petitioners have been guilty of unreasonable delay and laches in asserting their claims, causing prejudice to the liquidator and creditors of the California offices. On the issue of laches the appeal is controlled by *Allen v. California Water & Tel. Co.*, supra, 31 Cal.2d 104, 108, 187 P.2d 393, 395, where the court said: "Aside from the statutory limitation upon the time of intervention, it is the general rule that a right to intervene should be asserted within a reasonable time and that the intervenor must not be guilty of an unreasonable delay after knowledge of the suit. *Hibernia etc. Society v. Churchill*, 128 Cal. 633, 636, 61 P. 278, 79 Am.St.Rep. 73; *Mack v. Eummelen*, 31 Cal.App. 506, 160 P. 1096; 20 Cal.Jur. pp. 520-522, Sec. 25; 39 Am. Jur. pp. 943-945, sections 71, 72; *School District of City of Ferndale v. Royal Oak Township*, 293 Mich. 1, 291 N.W. 199, 127 A.L.R. 668, 672." See *Willett v. Jordan*, 1 Cal.2d 461, 465, 35 P.2d 1025; 39 Am.Jur. pp. 944, 945.

[8] Since the evidence here supports the finding of the superior court that the petitioners were guilty of unreasonable delay and that their intervention would seriously prejudice the distribution proceedings we find that there was no error in the order denying their petition. Other questions do not require further consideration.

[9] Appellants are not parties to the order granting the liquidator leave to pay dividends and cannot appeal therefrom. *Braun v. Brown*, 13 Cal.2d 130, 133, 87 P.2d 1009; 20 Cal.Jur. 529.

The appeal from the order for distribution is dismissed. The order denying leave to intervene is affirmed.

GOODELL and DOOLING, JJ., concur.

32 Cal.2d 240

**HENIGSON v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N et al.**
L. A. 1996A.

Supreme Court of California.

July 28, 1948.

1. Appeal and error ⇨879

Parties who have not appealed cannot attack trial court's findings, and the only objections thereto which can be received are those urged by appellant.

2. Master and servant ⇨14½

Statute providing that, if any licensee sells, transfers, or gives away any interest in or right to participate in profits of employment agency without Labor Commissioner's consent, agency's license shall immediately become void, was designed to protect public from uncontrolled subletting of the right to carry on a theatrical agency business. Labor Code, § 1595.

3. Master and servant ⇨14½

Contract whereby owner of moving picture agency agreed to give general manager thereof as contingent compensation one-half of certain sums received directly or indirectly by agency or owner, providing that aggregate compensation payable to general manager should not exceed \$104,000 per annum, did not involve "right to participate in the profits" within statute requiring approval of such contract by Labor Commissioner. Labor Code, § 1595.

4. Executors and administrators ⇨87**Master and servant ⇨26**

Where owner of moving picture agency in entering into employment contract with general manager, retained right to compromise claims of agency against third party to which general manager was entitled to one-half, after owner's death, executors of his estate acting in good faith and exercising due care could compromise agency's claim against a third party, and general manager would be bound by their agreement and would be entitled only to one-half of monies received by the compromise.

5. Master and servant ⇨70(1)

Where employment of general manager of moving picture agency under contract providing for a contingent compensation of

one-half of certain sums received directly or indirectly by agency, and providing that aggregate compensation payable to general manager should not exceed \$104,000 per annum, continued for one year, and during such time general manager received \$26,000 in salary, general manager could not recover an amount in excess of \$78,000 in action seeking to recover contingent compensation allegedly due him.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Henry Henigson against Bank of America National Trust & Savings Association and others, as executors of Myron Selznick, deceased, and others, for a declaratory relief to determine plaintiff's rights under a contract between plaintiff and defendants' deceased, wherein Bank of America National Trust & Savings Association and others, as executors of Myron Selznick, deceased, filed a cross-complaint against Hunt Stromberg and others. From an adverse judgment, the plaintiff appeals.

Reversed and remanded.

Prior opinion 187 P.2d 846.

Loeb & Loeb and Herman F. Selvin, all of Los Angeles, for appellants.

Roth & Brannen and Frank M. Gunter, all of Los Angeles, for respondents.

EDMONDS, Justice.

During his lifetime, Myron Selznick conducted a theatrical agency licensed under the provisions of the Labor Code. Henry Henigson, a former employee of the organization, sued to establish his rights under a contract made by him and Selznick. After the commencement of the action, Selznick died, and the litigation has continued upon a claim for compensation filed with the executors of the decedent's estate. The principal question for decision which is presented by Henigson's appeal from an adverse judgment concerns the legality of the contract.

Henigson's employment commenced in December, 1941. He had the title of vice-president and general manager, but the trial court found that "his position was not dif-

ferent from that of any other Selznick employee. * * * He was one and only one of a supporting staff of employees with whom Selznick had surrounded himself." The agreement as to the terms and conditions of the employment was not stated in writing until some months later. This writing was never signed by either of them, but they acted under its provisions.

By the terms of the contract, Selznick employed Henigson to render services in an executive capacity and agreed to pay him a fixed salary of \$300 per week and contingent compensation of "one-half ($\frac{1}{2}$) of all sums of money or other consideration, in any form, received directly or indirectly by us, or by Myron Selznick, individually, or by any of our affiliated or associated enterprises or companies, from any deal relating either directly or indirectly to a so-called 'independent set-up.'" An independent set-up was defined as "any deal or arrangement as a result of which there will be produced or financed or distributed a motion picture and from which deal or arrangement there will accrue to ourselves or to Selznick sums of money, proceeds, bonuses, shares of profit, or other consideration, other than the usual commissions normally payable to us as commission by our clients." Henigson was to receive not less than \$200 per week "as a non-repayable advance against such contingent compensation."

After specifying that the contingent compensation should be computed on an annual basis, the agreement provided that "the aggregate compensation payable to you hereunder (direct and contingent) shall not in any event exceed" \$104,000 per annum. In computing the amount of contingent compensation, no deduction was to be made for Selznick's ordinary and current expenses connected with the operation of the agency business, or for extraordinary legal or other expenses in connection with independent set-ups, without Henigson's consent.

The agreement was deemed to have commenced January 1, 1942. It might be terminated by either party at any time but, notwithstanding such termination, Henigson's right to contingent compensation should extend beyond the date of termina-

tion and until Selznick had received all commissions and other considerations in any form from all independent set-ups originating during the period of employment. And finally, "if subsequent to the termination of your employment hereunder any such independent set-up be changed or modified, or a new contract be entered into in replacement or substitution of the contract relating to any original set-up covered by this agreement, you shall nevertheless continue to be paid your contingent compensation hereunder in connection with such changed, modified, substitute or replacement deal, for such period as we would have been obligated to pay the same had such set-up continued as originally constituted."

Henigson performed services under the agreement until December 31, 1942, when, with the consent of Selznick, he terminated the employment. He had received \$26,000 as salary and the guaranteed minimum contingent compensation payable under the contract for that period. Selznick had not then received any money from an independent set-up entered into by him and Hunt Stromberg during Henigson's employment by which Selznick was to receive 10% of Stromberg's profits, and one motion picture made by Stromberg is alleged to have returned a profit in excess of one million dollars.

The principal purpose of Henigson's suit in its original form of declaratory relief was to establish his right to a share of the money due to Selznick from this independent set-up. After Selznick's death, his executors and Stromberg entered into a compromise agreement by which the estate acquired an interest in five motion pictures to be produced by Stromberg, he to have the right to re-invest the profits from one picture in the next one. Henigson was not a party to this compromise.

The trial court, based upon a finding of fact that notice of the Henigson employment contract had not been given to the Labor Commissioner, as required by section 1595 of the Labor Code, made the following conclusions of law: (1) That between May 2, 1942, and the end of that year, Selznick had no license to carry on his business, although it was, in fact, carried on; (2) during that time, the business

was not being lawfully conducted, and no valid rights or claims were acquired which otherwise might have been the basis for Henigson's contingent compensation; and (3) the employment agreement between Henigson and Selznick is ended and Henigson has no right or claim thereunder against Selznick or his estate.

An alternative finding declares that if the conclusions as to the asserted illegality of the Henigson-Selznick contract are erroneous, then the following are the rights and duties of the parties: (1) Upon the death of Selznick the agreement between him and Stromberg was terminated; (2) Selznick's executors then became vested with a cause of action against Stromberg for the reasonable value of services performed until Selznick's death, less any sum already paid; (3) Henigson had an interest in that cause of action and the executors are the trustees of his interest; (4) if the executors acted in good faith and exercised ordinary care, they did not require the consent of Henigson to execute the compromise agreement; (5) Henigson has no claim against or lien on property held by Stromberg, although he might sue in a representative capacity if the executors did not act with due care or in good faith; and (6) Henigson's recovery should be limited to \$78,000, which is the difference between \$26,000 paid to him and the contract limit of \$104,000 per year.

Henigson contends that the contract of employment is not one which comes within those specified by section 1595 of the Labor Code. In any event, he argues, Stromberg's liability arose under a contract executed prior to the contract of employment. He is not bound by the compromise agreement but at the time of Selznick's death he had a fixed right to one-half of the amount due to Selznick. A contrary determination it is said, would allow unjust enrichment of the Selznick estate. The final point is that Henigson's right to recovery should not be limited to \$78,000.

The executors take the position that there never was a binding contract, and, if there were such a contract, it is invalid under section 1595 of the Labor Code. They also argue that Henigson's theory as to a vested right upon the death of Selznick is an en-

tirely new one which is raised for the first time on appeal and, in any event, Henigson's recovery cannot properly exceed \$78,000.

[1] The trial court, in making its alternative conclusion of law to the effect that if the determination as to legality of the contract under the Labor Code was erroneous, certain rights accrued to Henigson, clearly found that, aside from any statutory impediment, Selznick made a binding contract with him. "It is well settled that parties who have not appealed cannot attack the findings; the only objections thereto which can be received being those urged by appellant." *Kane v. Eastman*, 110 Cal. App. 753, 759, 295 P. 63, 65; see also, *Ray v. Parker*, 15 Cal.2d 275, 282, 101 P.2d 665; *California Canning Peach Growers v. Williams*, 11 Cal.2d 233, 238, 78 P.2d 1161; *Klauber v. San Diego St. Car Co.*, 98 Cal. 105, 32 P. 876. Therefore, whether or not Henigson has any rights which may be enforced against the Selznick estate depends upon the applicability of section 1595 of the Labor Code.

That statute reads: "If any licensee sells, transfers, or gives away any interest in or the right to participate in the profits of the employment agency without the written consent of the Labor Commissioner the license of the employment agency shall immediately become void and thereupon be surrendered to the Labor Commissioner." The executors contend, and the trial court found, that the Henigson-Selznick contract amounted to a "transfer * * * [of] the right to participate in the profits" of the Selznick agency, and therefore that Selznick's license became void and no rights could accrue under the contract. Henigson's position is that the contract does not involve a "right to participate in the profits" within the meaning of the statute.

The only case in which this language has been considered is *Warner v. Marchetti*, 52 Cal.App.2d 172, 125 P.2d 838, 840. In that case Warner, a talent scout, made a contract with a licensed agent whereby the agent agreed to pay Warner one-half of any commissions received from the employment of persons introduced to him by Warner. In defending a suit based upon

this contract, the agent argued that it violated section 1595 of the Labor Code and Warner could enforce no rights arising under its provisions. Contrary to this contention the court said: "There is nothing in the record herein which would substantiate the claim that respondent was financially interested * * * As a talent scout, respondent was an independent contractor whose task was completed when she discovered a potential artist and introduced such artist to appellant or to any other agent in the field. She has no contractual relations with the prospect and has no control over the business transactions by which the agent seeks to procure employment for such prospect. Her only interest is in the payment to her of the commission agreed upon in the event she produces and introduces to the agent a potential moving picture personality."

[2, 3] The executors seek to distinguish the Warner case upon the ground that it involved an independent contractor, whereas Henigson was an employee of the agent and had control or active participation in the negotiations leading to the agreement from which the commissions were derived. There is no basis for such a distinction. In both cases the agent agreed to split his commissions from a restricted portion of the agency business and each agreement concerned the gross receipts, not technically "profits." In neither case did the plaintiff have control of the negotiations with the third party from whom the revenue was obtained although, in both instances, the agent agreed to pay contingent compensation for such services as were given. Obviously, section 1595 of the Labor Code was designed to protect the public from uncontrolled subletting of the right to carry on a theatrical agency business, but a contract to share in the amounts received by an agent from a third party under the conditions denominated by Selznick and Henigson as an independent set-up is beyond the scope of statute.

The basic premise of the judgment, therefore, is erroneous, and the alternative determination, based upon findings of fact, must be considered in determining the rights of the parties. The trial court found

that, if the Henigson-Selznick contract were valid, Selznick's executors "became vested with a cause of action against Stromberg for the reasonable value of the services." It was to satisfy this cause of action that the executors entered into the compromise agreement. Henigson contends that, as he was not a party to the settlement, he is not bound by it. He argues that if Selznick's estate had a vested interest, he had a similar right to one-half of the value of that cause of action. But although by his contract with Selznick, Henigson acquired an interest in money received from Stromberg by Selznick, he has no right to money not yet paid to Selznick.

[4] The trial court characterized Selznick's executors as "trustees for Henigson" and declared that if they acted in good faith and exercised reasonable care in making the compromise with Stromberg, Henigson is bound by their agreement. It is clear that by the terms of his contract with Henigson, Selznick could have modified or replaced the original agreement and Henigson would merely have had a right to "continue to be paid [his] contingent compensation thereunder in connection with such changed, modified, substitute or replacement deal." This being the extent of Henigson's rights under the contract, Selznick's executors, without the consent of Henigson, could make a similar modification or compromise of the rights arising under the contract. In view of the express provisions of the employment contract, he does not stand, as he claims, in a position similar to that of a broker working on a commission who has a right to compensation which cannot be defeated by any subsequent compromise of his principals. Accordingly, if on a retrial of the action, the court finds that the executors acted in good faith and exercised due care in compromising their claim against Stromberg, Henigson is bound by their agreement and he is entitled to one-half of any moneys received by the compromise within the maximum amount specified by the contract.

[5] The contract limited the aggregate compensation payable to Henigson, direct and contingent, to the maximum sum of \$104,000 per annum, and the trial court

found that he is entitled to no more than that amount for the services which he rendered. The terms of the contract are entirely clear. Henigson's employment by Selznick continued for one year. It is the duration of the employment and not the time of payment which determines his rights. Having received \$26,000 during the year of his employment, he is entitled to such amount, not exceeding \$78,000, as may be due to him by accruals of the contingent compensation.

The judgment is reversed and the cause is remanded for further proceedings in accordance with this opinion.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE JJ., concur.



32 Cal.2d 222

CASTLE v. SCHULMAN.

L. A. 20228.

Supreme Court of California, in Bank.

July 13, 1948.

1. Counties ⇨22

The Improvement Act of 1911 providing for issuance of county improvement bonds to become a lien upon property affected, and for foreclosure upon default by owner of the property in payment of the bond, makes the owner of the real property an "indispensable party" to the foreclosure action. Streets and Highways Code, §§ 5000 et seq., 6500 et seq., 6610 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Indispensable Party".

2. Counties ⇨22

The notice required to be filed with the county treasurer of the pendency of any action for recovery on an improvement bond is not for the purpose of giving constructive notice to others of pendency of the action but merely to stop the treasurer's

receipt of moneys on account of the bond and to prevent his cancellation of entries without authorization from the owner. Streets and Highways Code, § 6619.

3. Counties ⇨22

Under the Improvement Act of 1911, county improvement bondholder was entitled to decree of foreclosure and sale though he did not join holder of a later bond issued by the city of Los Angeles on the same property where county bondholder followed statutory requirements and made the owner of the property a party to the foreclosure action. Streets and Highways Code, §§ 5000 et seq., 6500 et seq., 6610 et seq.

4. Counties ⇨22

The judgment in a prior bond foreclosure action does not extinguish the rights of a lienholder who is not made a party to the action.

5. Judgment ⇨707

An action in foreclosure is not one strictly in rem but is also in personam, and persons having an interest in the property actually or constructively known are not affected by the judgment unless they have been joined in the action.

6. Municipal corporations ⇨583

A foreclosure and sale of property through court proceedings under a defaulted street improvement bond which was a prior lien on the property did not automatically eliminate junior lien of another street improvement bond on the same property where junior lienholder was not made a party to the foreclosure action. Streets and Highways Code, §§ 5000 et seq., 5021, 5373, 6500 et seq., 6610 et seq., 6618.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action to Richard Castle against Irving Schulman to quiet title to realty. From an order granting a new trial, plaintiff appeals.

Order affirmed.

Prior opinion, 185 P.2d 360.

Ernest A. Oswald, of Los Angeles, for appellant.

Max Bergman and Leo Goodman, both of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the plaintiff from an order granting a new trial in an action to quiet title to a lot in the city of Los Angeles. Findings and judgment had been made and entered in favor of the plaintiff. The defendant's motion for a new trial was granted on the ground that the decision was against law. The facts were stipulated.

On February 26, 1931, the treasurer of Los Angeles county issued bond No. 170, Los Angeles County Improvement No. 499, covering the lot the title to which is the subject matter of the action. That bond thereupon became a lien on the property. The plaintiff claims title through a commissioner's deed issued in foreclosure action No. 429935 brought in Los Angeles county, after default by the owner of the property in the payment of that bond.

The defendant claims through a certificate of sale of the same lot issued by the treasurer of the City of Los Angeles after a delinquency sale of street improvement bond No. 1990 for the improvement of 114th and other Streets, series 2, issued by the city treasurer on November 25, 1931, and which on that date became a lien on the property.

The foreclosure action on Bond No. 170 was commenced subsequent to the issuance of bond No. 1990, and did not name as a defendant the holder of the latter bond. In the present action the judgment for the plaintiff which was set aside on new trial proceedings was based on the trial court's conclusion that the defendant's rights were terminated by the foreclosure judgment and sale to the plaintiff, notwithstanding the fact that the holder of bond No. 1990 was not a party to the foreclosure action. The question presented by this appeal is whether the defendant's rights were thus foreclosed.

The controlling provisions are contained in the Improvement Act of 1911 (Stats. 1911, p. 768), now sections 5000 et seq., Streets and Highways Code (added by

Stats. 1941, p. 830). Sections 6500 et seq. of the Streets and Highways Code deal with "Default and Sale for Delinquency", that is, the treasurer's delinquency sales under defaulted bonds. Sections 6610 et seq., dealing with "Foreclosure of Bond Lien", with which we are here concerned, provide for the procedure when the holder of a defaulted bond obtains relief pursuant to foreclosure action, which by section 6610 is given as a separate, distinct and cumulative remedy.

Section 6611 permits a foreclosure action to be brought following the expiration of thirty days after service of personal demand for payment upon the owner of the property. Section 6612 provides the venue of the action and, if the owner of the property cannot after due diligence be found, permits service of summons in the manner prescribed by law.

By section 6615 the court is empowered to "cause the premises to be sold as in other cases of the sale of real estate by the process of the court to satisfy and discharge the bond and lien". Section 6617 gives the right of redemption "as in other cases". Section 6618 states that "the action shall be governed and regulated by the provisions of this chapter and by the other provisions of law which are not in conflict" therewith.

Section 6619 requires a written notice of the pendency of any action for recovery on a bond to be filed with the treasurer, after which he may not receive payments on account of the bond or cancel the entries on the bond or execute a discharge thereof without the written consent of the bondholder until judgment has been rendered in the action or it has been dismissed.

Section 6622 provides for cancellation of the bond by the treasurer and section 6623 directs the county clerk to enter judgment or decree of foreclosure upon delivery to him of the treasurer's certificate of cancellation.

Other sections are not material here. It is contended by the plaintiff that the provisions indicate the intent that the owner of the property covered by the bond is the only proper party in the foreclosure action, and that the defendant's rights were

terminated by the decree and sale in the foreclosure action.

[1,2] The foregoing provisions of the Improvement Act of 1911 make the owner of the real property an indispensable party to the foreclosure action. However, there is no provision which states the effect of not joining in the action other interested but not indispensable parties. The notice filed with the treasurer under section 6619 is not for the purpose of giving constructive notice to others of the pendency of the action, but merely to stop the treasurer's receipt of moneys on account of the bond and to prevent his cancellation of entries without authorization from the owner of the bond.

[3] Thus the code provisions are concerned only with the effect of the decree and sale on foreclosure upon the rights of the owner of the property. By following the statutory requirements and making the owner a party in the foreclosure action the plaintiff was entitled to the decree of foreclosure and sale although he did not join the holder of bond No. 1990 in that action.

[4,5] What we are here considering is the effect of the foreclosure judgment and sale on the rights of a lienholder of record who was not joined in the foreclosure action. Since, as noted, there is no provision which threatens of the rights of such other lienholders, their rights must be deemed to be governed by the other provisions of law not in conflict with the statute. (Sec. 6618, Streets and Highways Code.) In the leading case of Wood v. Brady, 68 Cal. 78, 5 P. 623, 8 P. 599, where a similar situation was presented, the elementary rule was held to apply, namely, that the judgment in a prior foreclosure action did not extinguish the rights of a lienholder who was not made a party to the action. In other cases applying the rule it has also been declared that the action in foreclosure is not one strictly in rem, but is also in personam, and persons having an interest in the property actually or constructively known are not affected by the judgment unless they have been joined in the action. (Wood v. Curran, 99 Cal. 137, 33 P. 774; Page v. W. W.

Chase Co., 145 Cal. 578, 79 P. 278; Lee v. Silva, 197 Cal. 364, 240 P. 1015; Wemple v. Yosemite Gold Min. Co., 4 Cal.App. 78, 87 P. 280; Fox v. California Title Ins. Co., 120 Cal.App. 264, 7 P.2d 722.

Neither section 5021 of the Streets and Highways Code defining the "owner" of real property as the owner of the fee, nor section 5373 providing for constructive notice by the recording of the warrant, assessment and diagram, nor cases such as Woodill & Hulse Electric Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A.L.R. 1296, involving questions of priorities in actions to foreclose street assessment liens, avail the plaintiff since they are not concerned with the rules governing the matter of proper parties to actions in foreclosure, nor with the effect of the judgment therein on lienholders who were not made parties thereto.

[6] From the foregoing it follows that the trial court correctly determined that the judgment should be set aside.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



32 Cal.2d 295

McEVOY v. AMERICAN POOL CORPORATION et al.

L. A. 20464.

Supreme Court of California.

July 30, 1948.

1. Negligence ⇨142

The conclusion that certain conduct was negligent involves a finding both of a legal duty to use due care and the breach of such duty by the creation of an unreasonable risk of harm.

2. Negligence ⇨136(24)

Negligence of employer in respect of injuries to guest in automobile of employee

as result of bottle containing chemicals breaking when automobile overturned in collision was for jury, under evidence showing that defendant furnished chemicals for use of employees with knowledge they were highly dangerous without warning employees of such fact, and that defendants knew they were generally carried loosely in the back seat of car or on the floor, and that it was also known to defendants that third persons were carried in cars when they were loaded, and no instructions were ever given to employees that this should not be done.

3. Negligence ⇨61(1)

Defendant's negligent act need not be the sole cause of injury, it being enough that it be a legal cause.

4. Negligence ⇨62(3)

The fact that an intervening act of third person is negligent does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about if the actor at time of negligent conduct should have realized that a third person might so act.

5. Negligence ⇨62(3)

If the realizable likelihood that a third person may act in a particular manner is hazard or one of hazards which makes actor negligent, such an act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent the actor from being liable for harm caused.

6. Negligence ⇨136(25)

If negligent character of third person's intervening act is a factor in determining whether intervening act relieves actor from liability for his antecedent negligence and under the undisputed facts there is room for reasonable differences of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury.

7. Negligence ⇨62(3)

Employer, furnishing employee with chemicals to be carried in car without warning him of dangerous nature thereof and with knowledge that employees carried others in the car at times, was not relieved from liability for negligence in respect of inju-

ries to guest as result of car overturning and bottle containing chemicals breaking with resulting burns in collision with hit-run driver by the intervening conduct of the employee in permitting guest to ride in car or that of the hit-run driver.

8. Negligence ⇨136(24, 25)

Stipulated facts, showing employer furnished chemicals to be carried by employees in car without warning employee of dangerous nature and with knowledge that employee at times permitted guests to ride in car, presented questions for jury on issues of negligence and causation in respect of injuries to guest as result of collision with hit-run driver with result that car overturned and bottles containing chemicals broke with resulting burns.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Personal injury action by Mary McEvoy against the American Pool Corporation and another. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Prior opinion 185 P.2d 864.

Richard K. Gandy and Robert G. Cockins, both of Santa Monica, and Mark E. O'Leary, of Los Angeles, for appellant.

Reginald I. Bauder and Robert E. Ford, both of Los Angeles, for respondents.

GIBSON, Chief Justice.

A judgment of nonsuit was entered on motion by defendants based upon a stipulation as to the facts which plaintiff proposed to prove.

An automobile in which plaintiff was riding and which was driven by her son Jack McEvoy was struck by a hit-and-run driver and overturned while plaintiff and her son were returning late at night from the home of her daughter. Jack was employed by defendants, and the car which he was driving contained jars of chemicals belonging to defendants, which broke and poured over plaintiff's body when the collision occurred, causing severe burns and other injuries. The automobile belonged to Jack, and he

was not on company business at the time of the accident.

Defendants were engaged in cleaning swimming pools and employed eight or nine service men and a service manager. Jack was employed as a service man. The employees were trained by defendants, and each man was required to service eighteen pools twice a week and to respond to emergency calls in the evenings and on Saturdays and Sundays. A service man's equipment consisted of a vacuum cleaner, garden hose, and certain chemicals, some of which were issued in glass gallon jugs. The service man used his own automobile for the transportation of the equipment, and the defendant corporation compensated him for the use of his car. It was necessary to carry sixteen to eighteen gallons of sodium hypochloride and three or four gallons of aqua ammonia in the car, and no racks or equipment of any kind was furnished for use in transporting the chemicals. Sodium hypochloride emits chlorine gas, is highly unstable, and breaks down while in solution into hydrochloric and hydrochlorous acid. Although defendants knew that the chemicals were highly dangerous, the service men were not warned of this fact except that they were told to be careful not to get any of the chemicals in their eyes.

No instructions were given as to the manner in which the chemicals should be transported, and defendants knew that they were generally carried loosely in the back seat of the car or on the floor. The bottles broke on occasion, and this fact was well known to defendants who "just laughed the matter off as being of no importance." It was also known to defendants that third persons were carried in the cars when they were loaded, and no instructions were ever given to service men that this should not be done, or that they should unload their vehicles before carrying passengers. A new load of chemicals was often placed in the cars at the close of work in the evening in order that the employees might start out immediately from their homes in the morning to service pools. Plaintiff had often ridden with Jack when the vehicle was so loaded, and neither was

aware of the dangerous propensities of the chemicals.

Plaintiff contends that the evidence viewed most favorably to her would support a finding that defendants were negligent and that their negligence was the proximate cause of the injuries she received.

[1,2] The conclusion that certain conduct is negligent involves the finding both of a legal duty to use due care and a breach of such duty by the creation of an unreasonable risk of harm. *Crane v. Smith*, 23 Cal.2d 288, 298, 144 P.2d 356; *Routh v. Quinn*, 20 Cal.2d 488, 491, 492, 127 P.2d 1, 149 A.L.R. 215; *Johnstone v. Panama Pacific International Exposition Co.*, 187 Cal. 323, 326, 327, 202 P. 34. According to the stipulated facts, defendants had superior knowledge of the inherently dangerous nature of the chemicals furnished to their service men, and knew that the glass jugs in which the chemicals were issued sometimes broke but treated the matter as being of no importance. Jack, however, "was unaware that the stuff was dangerous." Defendants also knew that their employees often carried third persons in the cars which were loaded with the chemicals. They failed to notify their employees of the danger to third persons and made no attempt to provide safe means of transporting the chemicals or to prevent the practice of carrying passengers. Under these circumstances, it cannot be said, as a matter of law, that defendants as reasonable men should not have foreseen an injury to a person in plaintiff's position or that their conduct showed due care.

[3] Defendants argue that even if they were negligent the sole proximate cause of plaintiff's injuries was either the intervening negligence of Jack McEvoy in leaving the chemicals in the car while driving for pleasure, or the intervening negligence of the hit-and-run driver. It is, of course, clear that defendant's negligent act need not be the sole cause of the injury; it is enough that it be a legal cause. *Merrill v. Los Angeles Gas & Electric Co.*, 158 Cal. 499, 111 P. 534, 139 Am.St.Rep. 134, 31 L. R.A., N.S., 559; *Herron v. Smith Bros., Inc.*, 116 Cal.App. 518, 2 P.2d 1012.

The following rules from the Restatement of Torts with respect to proximate causation have been approved in California (*Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872; *Stasulat v. Pacific Gas & Electric Co.*, 8 Cal.2d 631, 637, 67 P.2d 678), and are applicable in the present situation:

[4] Section 447—"The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act."

[5] Section 449—"If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby."

[6] Section 453, Comment (a): "If the facts are undisputed, it is usually the duty of the court to apply to them any rule which determines the existence or extent of the negligent actor's liability. If, however, the negligent character of the third person's intervening act or the *reasonable foreseeability of its being done* is a factor in determining whether the intervening act relieves the actor from liability for his antecedent negligence, and under the undisputed facts there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury." (Italics added.)

[7] In the light of the foregoing we cannot say, as a matter of law, that defendants are relieved from liability for negligence by the intervening conduct of their employee or the hit-and-run driver. As we have seen, the jury could have found that defendants owed a duty to persons in plaintiff's situation, and they cannot escape responsibility for their failure to perform that duty merely because of intervening acts the likelihood of which they reasonably should have foreseen.

In regard to Jack's conduct in leaving the chemicals in the car, there was evidence that defendants failed to give him adequate notice of the extremely dangerous character of the liquids and that he was unaware that they were dangerous. The jury could have found that defendants had knowledge that their employees did not remove the glass jars from their cars at night before driving for pleasure and that defendants should have foreseen the likelihood of such conduct on the part of Jack on the night of the accident. As for the intervening negligence of the unknown driver, the jury could have found, in view of the frequency of automobile accidents, that defendants should have foreseen that a third person might cause the type of accident which occurred.

Defendants rely on *Harrison v. Harter*, 129 Cal.App. 22, 18 P.2d 436, which they assert is factually similar to the situation presented here. In that case an automobile driven by Harter negligently collided with a truck operated by Harrison, who suffered severe burns as the result of an explosion of an extra can of gasoline carried on the truck. Harter contended that he should be relieved of responsibility for his negligence since the immediate cause of Harrison's injuries was the explosion of the can of gasoline. There was evidence that the can was securely fastened on the truck, and the court held that the implied finding that Harrison was not guilty of contributory negligence was supported by the evidence. The court did not discuss or consider the problem presented here, and the decision does not support defendants' position.

The other cases upon which defendants rely involve facts which differ widely from those present here, and are distinguishable on the ground that the intervening acts were held to be of such a nature that they could not reasonably have been anticipated and that they broke the chain of causation. See *Stasulat v. Pacific Gas & Electric Co.*, 8 Cal.2d 631, 67 P.2d 678; *Marovich v. Central California Traction Co.*, 191 Cal. 295, 216 P. 595; *Oakland Bank of Savings v. Murfey*, 68 Cal. 455, 9 P. 843; *Newman v. Steuernagel*, 132 Cal.App. 417, 22 P.2d 780; *Hale v. Pacific Tel. & Tel. Co.*,

42 Cal.App. 55, 183 P. 280; Catlin v. Union Oil Co., 31 Cal.App. 597, 161 P. 29; Wyckoff v. Pajaro Valley Consol. R. Co., 11 Cal.App. 106, 103 P. 1100.

[8] The stipulated facts on the issues of negligence and causation present questions which should have been submitted to the jury, and it was error to grant a nonsuit.

The judgment is reversed.

SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER, and SPENCE,
JJ., concur.



32 Cal.2d 214

SULLIVAN v. WELLBORN.

L. A. 19996.

Supreme Court of California.

July 13, 1948.

1. Judgment ⇐801

Where judgment declared that first party was owner of certain realty but that second party had a lien on property in a specified sum, and no personal judgment was rendered against first party for such sum and no provision was made for execution or enforcement of lien, an action to foreclose lien was a proper remedy.

2. Judgment ⇐899

The circumstance of the marginal entry of a partial satisfaction of a lien decreed by judgment as the result of execution sale did not justify finding that lien had been satisfied to that extent in light of evidence that lien holder had made purchase at execution sale and that subsequently sale had been set aside and execution quashed.

3. Judgment ⇐898(4)

The statutory procedure for setting aside a satisfaction of a lien or of a judgment when an execution sale is set aside for irregularities is not exclusive and such satisfaction may also be set aside in equity. Code Civ.Proc. § 708.

4. Liens ⇐1

Where, at most, judgment determined that plaintiff's predecessor had some sort of claim against property which was declared to be a lien on property in a specified amount, but there was no provision for payment of lien, no time was set for discharge of lien, and execution would not lie because there was no money judgment, and lien did not imply that any person was bound to perform obligation secured thereby and there was no forbearance, detention, or use of money, lien did not bear interest. Civ.Code, §§ 1915, 2890.

5. Liens ⇐1

Where plaintiff and his predecessor had nothing more than a lien on property, the lien conferred no title, and defendant, as owner of property subject to lien, had right to possession and to receive rents. Civ. Code, § 2888.

6. Execution ⇐281

Lienholder, who took possession of property under an execution sale and continued to collect rents after reviewing court declared sale void and who made no showing that purposes for which money was expended were necessary for preservation and management of property, was not entitled to deduct from gross rentals money expended by him on property and commissions paid to his agent for collection of rents in an accounting for such rents to landowner.

7. Execution ⇐281

Under rule that owner of land, the possession of which is wrongfully detained by another, may recover rents collected during period of detention and have interest thereon at legal rate, at least where rents are fixed in amount, award to landowner of interest on difference between rents collected by lienholder who had taken possession of land and amount of lien was not error.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by S. A. Sullivan, a nominal party only, against Nada Truscott Wellborn to foreclose a lien declared by a judgment, wherein Barry Sullivan was substituted as party plaintiff in lieu of S. A. Sullivan and

wherein defendant cross-complained to quiet title and to recover rents collected by plaintiff. Judgment for defendant, and plaintiff appeals.

Affirmed as modified.

For prior opinion see 185 P.2d 407.

Barry Sullivan, in pro. per., and Harry V. Leppek, both of Los Angeles, for appellant.

W. S. Weatherwax, of Los Angeles, for respondent.

CARTER, Justice.

The litigation culminating in the present controversy was commenced in 1939 by an action in which defendant and cross-complainant here, Nada Truscott Wellborn, obtained a judgment annulling her marriage to Charles Wellborn, hereinafter referred to as first action. In that judgment defendant was declared to be the owner of certain real property but that Charles Wellborn "has a lien" on the property in the sum of \$1,250. No personal judgment was rendered against defendant for said \$1250 and no provision was made for execution or enforcement of the lien. Thereafter, upon motion of Mr. Wellborn in that action, an order was made for the issuance of a writ of execution on said lien. The sheriff sold the property under the writ to Wellborn for \$1,000 and a deed was executed to him. From the \$1,000 sale price was deducted \$51.75, the costs of the sale, leaving a balance of \$948.25. A marginal notation on the judgment reads: "Partially satisfied by Sheriff amount collected \$948.25. Attest L. E. Lampton, County Clerk, by Cora Smith, Deputy. 7/18/40." Attached to the sheriff's return of the sale under execution is a receipt reciting that there was received from the sheriff \$948.25, being the amount received from the sale of the real property in the case of Wellborn v. Wellborn, after deducting costs of \$51.75 and signed by Sullivan (plaintiff here) as attorney for Mr. Wellborn.

Defendant's motion to quash the execution and vacate the sale was denied. On appeal by defendant the order of denial was reversed, the court holding that execution was not available to enforce the lien and that "all the proceedings by the sheriff

were * * * void." *Wellborn v. Wellborn*, 55 Cal.App.2d 516, 131 P.2d 48, 53. After the decision on appeal, Sullivan, plaintiff here, ultimately acquired the interest of Wellborn in the judgment lien. Pursuant to the reversal on the appeal the trial court made an order quashing the execution and declaring the sale void. On an appeal therefrom the order was affirmed. *Wellborn v. Wellborn*, 67 Cal.App.2d 545, 155 P.2d 99. Prior to the reversal of the order denying the motion to quash (*Wellborn v. Wellborn*, supra, 55 Cal.App.2d 516, 131 P.2d 48) but after the sheriff's sale of the property to Wellborn, the latter obtained in an unlawful detainer action, a writ of possession against defendant's tenants of the property, and Wellborn and his successors in interest took possession of the property and collected the rents therefrom. After the sale had been declared void both defendant and Wellborn's successors purported to lease the property to tenants. This resulted in the commencement by Wellborn's successors of three unlawful detainer actions against defendant's tenants. In the meantime, but following the declaration of the invalidity of the sale, defendant brought an action to quiet title to the property and for an accounting for rents against Wellborn and his successors, one of whom is Sullivan, the plaintiff in the case at bar. In that action a preliminary injunction was issued restraining Wellborn and his successors from prosecuting the three unlawful detainer actions. Sullivan appealed therefrom and the order for the injunction was affirmed. *Wellborn v. Wellborn*, 67 Cal.App.2d 540, 155 P.2d 95. What if anything further has transpired in the quiet title action does not appear.

Sullivan commenced the present action to foreclose the lien awarded to his predecessor Wellborn in the judgment in the annulment action, and from an adverse judgment prosecutes the present appeal. In this action defendant cross complained, demanding the rents collected from the property by Sullivan and seeking to quiet her title to the property against the lien. The trial court accorded her that relief. After the findings in this case were filed, Sullivan proceeded by motion in the first action to have the partial satisfaction of the lien

arising from the sheriff's sale expunged, and from an order to that effect an appeal was taken by defendant herein. That appeal has been this day decided. *Wellborn v. Wellborn*, 195 P.2d 792.

In the instant action the court found that the lien had been satisfied to the extent of \$948.25, the amount specified in the partial satisfaction arising out of the execution sale above mentioned; that Sullivan and his predecessors while in possession of the property collected rents in the sum of \$1,445.90, and that defendant should have judgment for that sum deducting therefrom, however, \$301.75, the difference between the \$948.25 satisfaction and the \$1250 amount of the lien; that under such circumstances the lien has been paid in full and therefore should not be foreclosed.

[1] It is conceded that an action to foreclose the lien was the proper procedure to be followed by *Wellborn* and his successors. It was so held in the appeals and collateral proceedings. *Wellborn v. Wellborn*, supra, 55 Cal.App.2d 516, 131 P.2d 48; *Sullivan v. State Bar*, 28 Cal.2d 488, 170 P.2d 888. Thus Sullivan's action to foreclose the lien was a proper remedy.

[2] Sullivan urges that the court was not justified in finding that the lien had been satisfied to the extent of \$948.25. Factually, there is no basis for the court's finding of such satisfaction. It is not contended that the marginal entry of satisfaction and the receipt heretofore mentioned, related to any satisfaction of the lien in any other manner than occurred by reason of the execution sale. The record here establishes beyond doubt that the receipt and satisfaction were the result of, and based upon, the execution sale. The receipt and marginal entry are completely explained and can have no meritorious standing greater than the execution sale. It will be recalled that *Wellborn*, the owner of the lien, who might be likened to a judgment creditor in analogous cases, was the purchaser at the execution sale. No money exchanged hands, except to pay the sheriff's costs of the execution sale. The amount of the sale price was merely credited upon the lien, such credit being the amount specified in the alleged partial sat-

isfaction of the lien. The execution was quashed and the sale set aside as being wholly void. For illustration the court said on the first appeal: "The order for issuance of the writ of execution being void, all the proceedings by the sheriff were likewise void, and plaintiff was entitled to disregard these proceedings and to attack them at any time." *Wellborn v. Wellborn*, 55 Cal.App.2d 516, 525, 131 P.2d 48, 53. The same proposition was sustained on the second and third appeals. *Wellborn v. Wellborn*, supra, 67 Cal.App.2d 540, 155 P.2d 95; *Wellborn v. Wellborn*, supra, 67 Cal.App.2d 545, 155 P.2d 99. Under the foregoing circumstances the satisfaction, as expressed in *Smith v. Reed*, 52 Cal. 345, 348: "was not a satisfaction in fact, because the execution and sale were void, and the owner of the judgment acquired nothing by virtue of the attempted sale under the execution. Not only the execution and sale, but also the apparent satisfaction of the judgment, ought to be set aside as void."

[3] It may be true that a satisfaction of the character here discussed should be set aside under section 708 of the Code of Civil Procedure, yet such satisfaction may also be set aside in equity. *Kinnison v. Guaranty Liquidating Corp.*, 18 Cal.2d 256, 115 P.2d 450; *Merguire v. O'Donnell*, 139 Cal. 6, 72 P. 337, 96 Am.St.Rep. 91; *Scherr v. Himmelmann*, 53 Cal. 312; *Smith v. Reed*, supra.

Here the pleadings of the parties including the cross complaint of defendant and the answer thereto adequately presented for determination by the court the question of the effectiveness of the satisfaction. As we have shown, there was in effect no satisfaction, therefore, the trial court was in error in giving a credit of \$948.25, the amount of the purported satisfaction, on the lien. The questions still remain, however, as to what effect that may have on the judgment, the denial of foreclosure and the sums awarded in the accounting with regard to the rents.

The court found that *Wellborn* and his successors collected \$1445.90 rents from the property after the void execution sale; that defendant is entitled to judgment

therefor with interest thereon from October 1, 1943, deducting therefrom, however, the amount still remaining unpaid on the \$1250 lien after crediting the \$948.25 specified in the satisfaction thereon, that is, \$301.75.

It appears that Wellborn or his successors took possession of the property on October 3, 1941, under the void execution sale and retained possession until October 1, 1943, and collected the rents on the property during that time in the sum of \$1445.90; that he has retained all those rents. He testified that he has not applied them on the lien. Defendant's motion to quash the execution, hereinbefore mentioned, was filed July 31, 1941, and denied. The order of denial was reversed on November 12, 1942. *Wellborn v. Wellborn*, supra, 55 Cal.App.2d 516, 131 P.2d 48. On the basis of the reversal a new motion to quash was granted in November, 1943, and affirmed on January 19, 1945. *Wellborn v. Wellborn*, supra, 67 Cal.App.2d 545, 155 P.2d 99.

Disregarding for the moment the questions of interest on the lien and retained rentals, and claimed deductions from the gross rentals, mathematically defendant would be entitled to have the property free of the lien and a judgment for \$195.90. That would result from subtracting from \$1445.90, the amount of the gross rentals, \$1250, the amount of the lien. Sullivan argues, however, that the lien bore interest from the date of the entry of the judgment (December 20, 1939) declaring it to exist, and that from the rentals collected, deductions of certain expenditures on this property should be made.

[4] The lien did not bear interest. On the first appeal it was declared that the judgment established the lien but that "no personal judgment [was] given, no order for the payment of money made, and no provision made in the judgment for the payment of the lien"; further that execution would not lie for there was no money judgment; that the creation of the lien did not imply that any person was bound to perform the obligation secured thereby (Civ.Code, § 2890) and that no time was set for the discharge of the lien. *Wellborn v. Wellborn*, supra, 55 Cal.App.2d 516, 131 P.2d

48. Considering the matter from the standpoint of interest on a judgment (the judgment declared a lien), it has been intimated generally that interest runs on a money judgment only. See, *Sheehan v. Board of Police Com'rs*, 188 Cal. 525, 206 P. 70; *Nilsson v. State Personnel Board*, 36 Cal. App.2d 186, 97 P.2d 843; *Estate of Lockhart*, 21 Cal.App.2d 574, 69 P.2d 1001. From all that appears in the record there was no personal obligation or debt owed by defendant to Wellborn. At most the judgment declared that he had some sort of an interest or claim against the property which was declared to be a lien on the property. Under the circumstances we do not believe that is such a judgment as would bear interest. In contrast, the court in dividing the community property in a divorce action in *Wuest v. Wuest*, 72 Cal.App.2d 101, 164 P. 2d 32, awarded a money judgment in a specified amount against the defendant and accordingly the court held that the judgment bore interest.

On the subject of interest from a standpoint other than on the judgment, the law is clear that it "is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." Civ.Code, § 1915. As is evident from the foregoing discussion, we have no showing here of forbearance, detention or use of money.

[5] Turning to the rents received from the property by Wellborn and his successors, it is clear that they were not entitled to them. As before seen, Wellborn had nothing more than a lien on the property. By analogy to the real property mortgage cases he, like a mortgagee, in the absence of an agreement, was not entitled to the possession of the property; the right to possession rested in defendant and she was entitled to the rents. *Childs Real Estate Co. v. Shelburne Realty Co.*, 23 Cal.2d 263, 143 P.2d 697; *Kinnison v. Guaranty Liquidating Corp.*, supra. A lien confers no title upon the lienholder. Civ.Code, § 2888. Thus, inasmuch as the execution sale of the property was void and of no effect and the interest of Sullivan and his predecessors consisted only of the lien, defendant was entitled to the possession of the property and to receive the rents therefrom.

[6] Sullivan seeks, however, to deduct from the gross rentals, money expended by him on the property and commissions paid to his agent for the collection of the rents. This he may not do, for he made no showing that the purposes for which the money was expended were necessary for the preservation and management of the property; he continued to collect the rents after the appeal was taken from the order denying the motion to quash the execution sale and the reversal of that order on appeal declaring the sale void. Under these circumstances he is not entitled to be reimbursed for the expenditures. See, *Campbell v. Northrup*, 212 Cal. 45, 297 P. 541; *Benson v. Bunting*, 141 Cal. 462, 75 P. 59; *Conlan v. Sullivan*, 110 Cal. 624, 42 P. 1081; *Malone v. Roy*, 107 Cal. 518, 40 P. 1040; *Mahoney v. Bostwick*, 96 Cal. 53, 30 P. 1020, 31 Am.St.Rep. 175; *Thompson, Real Property*, Perm.Ed., § 5117; *Rest.Restitution*, §§ 73, 74, 158.

[7] Sullivan cannot prevail on his claim that the trial court was in error in awarding to defendant interest on the difference between the rents collected by Sullivan from the date the last rent was collected by him and the amount of the judgment lien. The owner of land, the possession of which is wrongfully detained by another, may, as we have seen, recover the rents collected during the period of detention. The court may award him interest thereon at the legal rate, at least where, as here, the rents are certain and fixed in amount. *Nathan v. Dierssen*, 164 Cal. 607, 130 P. 12; *Furlong v. Cooney*, 72 Cal. 322, 330, 14 P. 12; *Haggin v. Clark*, 51 Cal. 112. The cases, *Samuels v. Singer*, 1 Cal.App.2d 545, 36 P.2d 1098, 37 P.2d 1050, and *Stockton Morris Plan Co. v. Carpenter*, 18 Cal.App.2d

205, 63 P.2d 859, may be distinguished. There the amount of the rent received was not fixed—the recovery was for the reasonable value of the use of the property.

For the foregoing reasons the second paragraph of the judgment is modified to read as follows: "It is further adjudged and decreed that cross-defendant Barry Sullivan holds in his possession the sum of \$1,445.90 belonging to defendant and cross-complainant Nada Truscott Wellborn; that out of the said sum of \$1,445.90 said cross-defendant Barry Sullivan shall retain the sum of \$1250 and shall file a satisfaction of judgment in case No. D182069 for said amount, causing said judgment lien in said case No. D182069 to be satisfied in full of record; that should said cross-defendant Barry Sullivan fail so to satisfy said judgment lien in said case No. D182069 within a period of 30 days after this judgment becomes final, then and in that event the clerk of said Court is instructed and empowered to enter said satisfaction in full as to said judgment lien in said case; that the partial satisfaction of the judgment lien in said case No. D182069, filed and entered on the 18th day of July, 1940, is vacated and expunged." The third paragraph of the judgment is amended to read as follows: "It is further adjudged and decreed that cross-defendant Barry Sullivan shall pay to defendant and cross-complainant Nada Truscott Wellborn the sum of \$195.90 principal, together with interest thereon at the rate of 7% per annum from the 3rd day of October, 1943." As so modified the judgment is affirmed. Each party shall pay his own costs on this appeal.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

32 Cal.2d 221

WELLBORN v. WELLBORN.

L. A. 20035.

Supreme Court of California.

July 13, 1948.

Appeal and error ⇨790(3)

Where it was determined in a companion case that a particular partial satisfaction of judgment lien was to be expunged because it was result of a void execution sale, the issue on appeal from an order quashing the partial satisfaction and reinstating judgment lien became moot and appeal was dismissed.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Nada Truscott Wellborn against Charles Wellborn to annul marriage, wherein plaintiff obtained a judgment granting annulment and a quieting title of realty in her subject to a lien to defendant for a specified sum. From an order quashing a partial satisfaction of lien and reinstating the judgment lien, plaintiff appeals.

Appeal dismissed.

Prior opinion 185 P.2d 410.

W. S. Weatherwax and Lorrin Andrews, both of Los Angeles, for appellant.

Barry Sullivan and Harry V. Leppek, both of Los Angeles, for respondent.

CARTER, Justice.

This is an appeal from an order quashing the partial satisfaction of judgment of July 18, 1940, and reinstating the judgment lien made on motion in the above entitled action after the findings of fact and conclusions of law were filed in *Sullivan v. Wellborn*, 195 P.2d 787, this day decided. Mention is there made of such motion and order. Inasmuch as we have determined in *Sullivan v. Wellborn*, 195 P.2d 787, that such partial satisfaction is to be expunged because it was the result of a void execution sale, the issue on this appeal becomes moot. See, *Smith v. Bear Valley Etc. Co.*, 26 Cal.2d 590, 160 P.2d 1; *Guardianship of Riley*, 72 Cal.App.2d 742, 165 P.2d 555; *Crocker v. Crocker First Nat. Bank*, 60 Cal.

App.2d 725, 141 P.2d 482; *Crouser v. Boice*, 51 Cal.App.2d 198, 124 P.2d 358; *Scoville v. De Bretteville*, 50 Cal.App.2d 633, 123 P.2d 622. The appeal should be, and therefore is, dismissed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



32 Cal.2d 226

RATLIFF v. LAMPTON et al.

L. A. 20248.

Supreme Court of California.

July 23, 1948.

1. Licenses ⇨38

Requirement that license can be revoked only for good cause implies right to notice and hearing, absent clear showing of legislative intent to dispense with that right.

2. Administrative law and procedure ⇨441, 453**Automobiles** ⇨144

Licensee is entitled to notice and hearing before revocation of driver's license, notwithstanding statutes providing for investigation and administrative review. Vehicle Code, §§ 269, 304, 305, 307, 314; §§ 315, 316, as amended by St. 1945, pp. 1729, 1730.

3. Automobiles ⇨144

Department of Motor Vehicles cannot compel immediate surrender of driver's license on ground of having received information that for reasons of public safety licensee ought not to be permitted to drive. Vehicle Code, §§ 306, 314; §§ 315, 316, as amended by St. 1945, pp. 1729, 1730.

4. Licenses ⇨38

Fact that statute authorizes investigation does not denote intention to dispense with hearing before revocation of license, but "investigation" and "hearing" may

mean the same thing. Vehicle Code, § 314; § 316, as amended by St.1945, p. 1730.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearing" and "Investigation".

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Sidney Arthur Ratliff against Edgar E. Lampton, as Director of Motor Vehicles of the State of California, and others, for declaratory judgment as to revocation of plaintiff's automobile driver's license. From a judgment for plaintiff, defendants appeal.

Affirmed.

Prior opinion 187 P.2d 421.

Fred N. Howser, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for appellants.

Arthur C. Fisher, of Los Angeles, for respondent.

GIBSON, Chief Justice.

The Director of Motor Vehicles issued an order revoking plaintiff's license to drive an automobile, asserting that it appeared from the records of the department that he was "unable to operate a motor vehicle safely upon the highways because of physical or mental disability or lack of skill as shown by examination or other evidence; and in particular because he is subject to a condition causing momentary lapses of consciousness or control." Plaintiff was notified that the order of revocation was effective immediately, that his license must be surrendered, and that he could demand a hearing at any time within 60 days. The order was issued January 2, 1946, and approximately 40 days later plaintiff, without having surrendered his license, made written demand for a hearing. He was

told that he must first surrender his license and that upon its receipt a date for hearing would be set. Plaintiff then brought this action for declaratory relief, and the court entered judgment restraining revocation of his license pending a hearing to determine whether it should be revoked. Defendants have appealed.

The question is whether the department was authorized to revoke the license without giving plaintiff an opportunity to be heard. The answer is to be found in the pertinent provisions of the Vehicle Code as amended in 1945 which were in force when the order was issued.

We are not concerned with those provisions which make it mandatory upon the department to revoke or suspend the privilege of any person to operate a motor vehicle upon the highway upon receipt of a record showing that he has been convicted of certain specified offenses. Vehicle Code, §§ 304, 305, 307, 315(a) 3. In such cases the facts have already been determined in the criminal proceeding. A different situation is present, however, where, as here, the department must make an independent determination of facts as a basis for its action, and this was recognized by the Legislature in the detailed, albeit somewhat confusing, provisions of the 1945 code relative to investigation, reexamination, hearing and review.

Section 306¹ provided that the department could revoke a license upon any of the grounds which authorized the refusal to issue a license. One of those grounds was inability to operate a motor vehicle safely because of a physical or mental defect. Veh. Code, § 269.

Section 314² authorized the department to conduct an investigation to determine whether a license should be suspended or revoked upon a showing by its records of the existence of certain grounds for revocation, among which was "any ground

¹ "306. Grounds Permitting Revocation or Suspension by the Department. The department may revoke a license upon any of the grounds which authorize the refusal to issue a license and may also suspend or revoke a license upon conviction of the licensee of operating a vehicle

195 P.2d—50½

on a highway while under the influence of intoxicating liquor."

² "314. Investigations by Department. (a) The department may conduct an investigation to determine whether the license of any person should be suspended or revoked or whether restrictions or

* * * for which a license might be refused." The department was also authorized to reexamine the licensee and to "peremptorily suspend" the license if he failed to submit to a reexamination. The department could suspend or revoke if it determined that "good cause" existed therefor, but it was provided that "No such order of suspension or revocation * * * shall become effective until 10 days after the giving of written notice thereof to the person affected."

Section 315³ provided that a person was entitled to demand a hearing before the *director* within 60 days after notice of suspension or revocation by the *department*. The hearing might be held before the director or representatives appointed by him and was to be conducted as nearly as practicable according to the rules of procedure governing civil actions. It was further provided that an application for a hearing should not operate to stay any action of the department.

other conditions should be imposed and may make such investigation upon receiving information or upon a showing by its records:

"(1) That the licensee has been involved as a driver in any accident causing death or personal injury or serious damage to property.

"(2) That the licensee has been involved in three or more accidents within a period of 12 consecutive months.

"(3) That the licensee is an habitual violator of the traffic laws.

"(4) That the licensee is an habitual reckless, negligent or incompetent driver of a motor vehicle.

"(5) That the licensee has permitted an unlawful or fraudulent use of such license.

"(6) That any ground exists for which a license might be refused.

"(b) In any such event the department may require the reexamination of the licensee, and shall give 10 days' written notice of the time and place thereof. In the event the licensee refuses or fails to submit to such reexamination, the department may peremptorily suspend the license of such person until such time as the licensee shall have submitted to such reexamination.

"(c) Whenever the department determines upon any such investigation or reexamination that good cause exists therefor, it may suspend the privilege of any person to operate a motor vehicle upon a highway or revoke such privilege or may impose reasonable terms and conditions of probation which shall be relative to the safe operation of a motor vehicle by the licensee. No such order of suspension or revocation or the imposition of terms or conditions of probation shall become effective until 10 days after the giving of written notice thereof to the person affected.

"The department shall have authority to modify the terms or conditions of probation whenever good cause appears therefor."

3 "315. Procedure Upon Refusal, Sus-

pension or Revocation of License or Issuance of Probationary License—Hearings. (a) A person shall be entitled to demand in writing a hearing before the director or his representative within 60 days after the department:

"1. Has refused to issue such person an operator's or chauffeur's license;

"2. Has given notice of the imposition of terms or conditions of probation;

"3. Has given notice of the suspension or revocation of his privilege of operating a motor vehicle upon a highway or of an operator's or chauffeur's license issued to such person, unless such action by the department is made mandatory upon the department by the provisions of this code.

"(b) If a hearing is demanded in writing within the period of 60 days the department shall fix a time and place therefor in the county wherein said applicant or licensee resides and shall give said person 10 days' notice of the time and place fixed for such hearing. An application for a hearing shall not operate to stay any action by the department referred to in subdivision (a) of this section.

"(c) The hearing shall be conducted by the director or his representative or representatives, not exceeding three in number, who shall be appointed by the director and shall be officers or employees of the department. It shall be conducted as nearly as practicable according to the rules of practice and procedure governing the trial of civil actions and witnesses shall be summoned and oaths administered as provided in Section 353 of the Political Code. The person demanding such hearing shall have an opportunity at the hearing to present evidence with relation to the action taken by the department (for the consideration of the director or his representative).

"(d) Upon the conclusion of such hearing, the representative or representatives of the director shall prepare findings and may make a recommendation to the director."

Section 316⁴ provided that following the hearing the director, upon review of the records, evidence, and findings, should render his decision sustaining, modifying, or reversing the order of suspension or revocation.

[1,2] There was no express provision in the code which authorized the department to revoke plaintiff's license without first giving him an opportunity to be heard, and where, as here, a license can be revoked only for good cause, this requirement carries with it the right to notice and hearing as a condition to revocation unless there is a clear showing of legislative intent to dispense with that right. *Carroll v. California Horse Racing Board*, 16 Cal.2d 164, 168, 105 P.2d 110; see *La Prade v. Department of Water & Power*, 27 Cal.2d 47, 50, 162 P.2d 13; *Covert v. State Board of Equalization*, 29 Cal.2d 125, 131, 173 P.2d 545. The fact that the Vehicle Code provided for an administrative review subsequent to revocation does not alter this rule. We should not imply legislative intent to deprive a person of his license without a prior opportunity to be heard unless compelled to do so by the plain language of the statute, regardless of whether there is a right to an administrative review after revocation.

[3] In their opening brief defendants took the position that the department, upon receiving information that, for reasons of public safety, plaintiff ought not be permitted to drive, it was authorized by section 306 to revoke his license summarily and compel him to surrender it forthwith. This position is clearly untenable and was apparently abandoned by defendants on the oral argument. Section 306 merely stated grounds authorizing suspension or revocation, and it did not purport to provide the procedure to be followed. The rules relating to the conduct of investigations and

hearings were set forth in sections 314, 315 and 316, and the action taken by the department was governed thereby. It is clear, therefore, that the defendant had no authority to compel an immediate surrender of plaintiff's license, since section 314 expressly provided that no order of revocation or suspension should become effective until 10 days after notice.

[4] The next question is whether section 314 must be interpreted as depriving plaintiff of the right to be heard prior to revocation. Defendants argue that the investigation referred to in section 314 was intended to take the place of a hearing, and that if the department determined, as a result of its investigation, that grounds existed for revocation, it could take summary action. An investigation, however, need not be conducted ex parte, and the fact that a statute authorizes an investigation does not denote an intention to dispense with a hearing. The words "investigation" and "hearing" may mean the same thing. *Steen v. Board of Civil Service Com'rs*, 26 Cal.2d 716, 723, 160 P.2d 816. Moreover, an intention to require a hearing was shown by the provision in section 314 which authorized the department to revoke a license only when it "determines upon any such investigation * * * that good cause exists therefor." As we have seen, under the decision in the *Carroll* case, "the determination of 'just cause' necessarily requires a fair consideration of any evidence offered by the accused." 16 Cal. 2d at page 167, 105 P.2d at page 111. The purpose of the 10 day provision may have been, as stated by defendants, to give the licensee an opportunity to arrange his affairs before being deprived of his right to drive a car. In any event the postponement of the effective date of the order does not evidence a legislative intent to dispense with the right to a hearing.

⁴"316. Proceedings Following Hearing. (a) The director, upon review of the records, evidence and of the findings, if any, shall render his decision sustaining, modifying or reversing the order of suspension or revocation or the refusal to issue a license or the order imposing terms or conditions of probation or he may suspend the prior action of the department and direct that probation be

granted to such person and fix the terms and conditions of such probation.

"(b) At any time within one year after action by the director under the foregoing provisions of this section the director upon receipt of application may again review any order made by him under this section and may sustain, modify or reverse any such order."

It does not follow, as contended by defendants, that the provisions of sections 315 and 316 become surplusage if section 314 is interpreted as requiring a hearing before revocation. The procedure prescribed by sections 315 and 316 was formal in character, and they could be construed as providing for a review by the *director* of the determination made by the *department* in a less formal hearing conducted by it under section 314. The licensee was given 60 days after notice of revocation by the department within which to apply to the director for a hearing, and it was provided that the hearing so held should be conducted as nearly as practicable according to the rules governing the trial of civil actions. If the hearing was held by representatives instead of by the director, they were required to make findings and recommendations to him, and under the provisions of section 316 these findings were to be reviewed by the director who should then render his decision sustaining, modifying or reversing the order of suspension or revocation.

When read together, these sections may be construed as providing for an investigation and hearing conducted by the department which would afford the licensee an opportunity to present evidence under the rule in the Carroll and Steen cases. If the department determined as a result of such investigation and hearing that good cause existed therefor, it might suspend or revoke, but the order would not become effective until 10 days after notice of the action taken. At any time within 60 days after such notice the licensee was entitled to have the action of the department reviewed in a more formal hearing before the director or his representatives, in which the final decision was to be made by the director. The action of the department in suspending or revoking a license would not be stayed, however, by an application for a hearing, and the order would become effective at the expiration of the 10 day period notwithstanding the pendency of a review by the director. Although the procedure prescribed was somewhat cumbersome and the provisions were in many respects uncertain, the lack of a simple, clearly defined plan cannot be used to justify a

judicial determination of a legislative intent to dispense with the right to be heard before revocation.

Nor do we find anything in the legislative history of these provisions which requires acceptance of the construction which defendants would have us place upon them. Prior to 1945 it was reasonably clear that the statute provided for a hearing before an order of revocation could become effective. The only changes made by the 1945 amendments which are pertinent here were to increase the time from 10 to 60 days within which to apply to the director for a hearing, and the addition of the express provision relating to a stay. These changes cannot be construed as an expression of legislative intent to deprive a person of the right to be heard before his license is revoked. In considering the legislative history, it is significant to note that in 1947 sections 314, 315 and 316 were entirely recast, and that they now expressly provide that a person is entitled to a hearing before the effective date of a notice of revocation.

Finally defendants seek to justify their interpretation of the code provisions upon reasons of public policy and assert that the power of summary revocation is necessary for the protection of people using the highways. A similar argument was made in the Carroll case, and it was there held that the contention is one which might well be directed to the question of constitutionality where there is an express legislative denial of the right to a hearing, but that it cannot be used to imply a legislative intent to deny such right before revocation. It is contrary to commonly accepted principles of justice to revoke a license for cause without giving the person charged an opportunity to be heard before a decision is made, since the determination necessarily requires a fair consideration of any evidence offered by the licensee. *Carroll v. California Horse Racing Board*, 16 Cal.2d 164, 167, 168, 105 P.2d 110. Whether such summary procedure might be justified under the police power in the interest of public safety and welfare in some instances we need not decide, but if the Legislature considers action of that kind necessary, the intention to dispense

with notice and hearing should be plainly stated in unequivocal language. We find no such intention expressed in the statute under consideration here.

The judgment is affirmed.

SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER, and SPENCE,
JJ., concur.



32 Cal.2d 233

**ABRAMS v. AMERICAN FIDELITY &
CASUALTY CO.**

L. A. 20495.

Supreme Court of California, in Bank.

July 27, 1948.

1. Insurance ☞146(1)

Generally, provisions tending to defeat main object of insurance contract are not to be implied.

2. Insurance ☞539(5), 612(2)

A requirement for notice of loss can be made condition precedent to recovery on policy, and in such event insured's failure to give notice may defeat recovery in absence of waiver or estoppel, but failure to give notice will not defeat recovery unless such requirement is made a condition precedent or forfeiture is provided.

3. Insurance ☞539(1)

The statutory minimum period of 20 days for giving insurer notice of accident would not be read into automobile liability policy in place of void provision requiring insured to give insurer notice of accident within five days. Insurance Code, § 551.

4. Insurance ☞539(1)

Where automobile liability policy required insured to give insurer notice of accident within reasonable time, a delay of 41 days in giving notice was not as a matter

of law so unreasonable as to prejudice insurer.

5. Insurance ☞665(7)

Evidence warranted finding that delay of 41 days in giving notice of accident to insurer was not as a matter of fact prejudicial to insurer issuing automobile liability policy requiring insured to give insurer notice of accident within reasonable time.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Paul Abrams against the American Fidelity & Casualty Company to recover the amount of a judgment theretofore recovered by plaintiff against one A. Visser. Judgment for plaintiff, and the defendant appeals.

Affirmed.

Prior opinion 186 P.2d 999.

Reginald I. Bauder, of Los Angeles (Robert E. Ford, of Los Angeles, of counsel), for appellant.

Forrest A. Betts, Chase, Rotchford, Downen & Chase, Crider, Runkle & Tilson, Jones, Thompson & Kelly and Kenneth Murphy, all of Los Angeles, amici curiae.

Charles A. Son and Joseph D. Taylor, both of Los Angeles, for respondent.

SCHAUER, Justice.

In April, 1941, plaintiff recovered judgment against one A. Visser for bodily injuries received as the result of the alleged negligent operation of a truck by Visser. On the date of the accident Visser was insured by defendant in the instant case, American Fidelity and Casualty Co., against liability arising out of the operation of the truck. The judgment against Visser became final and was not satisfied, and plaintiff, in December, 1941, instituted this action against defendant insurer to recover on the insurance policy and the judgment. (See Ins. Code,¹ § 11580, subd. (b) (2).) The insurer defended on the ground

¹ Ins.Code, § 11580, subd. (b) (2), "A policy insuring against losses [of the type involved here] * * * whether or not actually containing such provisions,

shall be construed as if [it embodied provisions including] * * * (b) * * * (2) A provision that whenever judgment is secured against the insured in an action

that Visser failed to give it prompt notice of the accident as assertedly required by the policy,² the trial court rendered judgment in plaintiff's favor, and defendant insurer appeals. We have concluded that upon the evidence presented, the judgment must be affirmed.

The accident in which plaintiff was injured occurred on December 25, 1940, in the state of Utah, while Visser, the operator of the truck causing the injuries, was in that state on a business trip. Visser's truck collided with a sedan plaintiff was driving. The following day Visser mailed to one Fred Kerr, Gardena, California, "an insurance broker employed by Mr. Visser to secure" the liability policy issued by defendant insurer, a post card which reads as follows: "Dec. 25. Dear Mr. Kerr: I had an accident this morning 14 miles north of Beaver, Utah on Hi-way 91. Please inquire at the Sherriffs office in Beaver Utah for all particulars. My policy number is No. 36803. I remain as ever A. Visser." Kerr telegraphed to the office of the sheriff in Beaver, asking for a collect reply telegram giving details of Visser's accident, but failed to receive a reply. Visser returned to California from Utah during the latter part of January, 1941, and Kerr then learned for the first time that the accident had involved another person, who might claim damages from Visser. Kerr thereupon, by a letter dated January 31, 1941, notified the insurer's Los Angeles office of the fact, date and place of the collision and of plaintiff's name. The letter reached the insurer on February 4, forty-one days after the accident occurred, and was the first notice received by it concerning the accident.

The subject policy contains the following provisions as to notice to defendant insurer in case of accident: "Upon the occurrence of an accident or an alleged accident, covered under this Policy, the Assured shall give immediate written notice thereof with the most complete detailed information obtainable at the time to the Company, at its Home Office in Richmond,

Virginia, or to its nearest Branch Office or to its duly authorized agent; if a claim is made on account of such an accident or if any suit is brought against the Assured to enforce such a claim the Assured shall forward to the Company immediately every written communication, or information as to any verbal communication, and every process, pleading and paper relating to any claim and/or proceeding. The words 'Immediate' or 'Immediately' as used herein shall be construed to mean not exceeding five days."

[1-3] Defendant insurer concedes that that portion of the quoted policy provisions which purports to require notice to it within five days after an accident is violative of section 551 of the Insurance Code. That section reads as follows: "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a lesser period shall be valid." Plaintiff contends that inasmuch as the five-day notice provision of the policy is void, there remains in the policy no requirement that the assured give defendant insurer any notice whatsoever of the accident. Defendant, on its part urges that although it cannot rely upon the policy's five-day notice requirement, the twenty-day period provided in section 551 must be read into and adopted as part of the policy. In this connection defendant cites *Coolidge v. Standard Acc. Ins. Co.* (1931), 114 Cal.App. 716, 721, 300 P. 885, 887, in which the court stated that "Under section 2633a of the Civil Code [now Ins. Code, § 551], the provisions of an insurance policy which require an assured to immediately notify the company of the occurrence of an accident will be deemed to have been sufficiently complied with if the notice is actually given within twenty days from the happening of the casualty." However, the policy involved in the *Coolidge* case contained no provision defining "immediately" to mean either "not exceed-

brought by the injured person * * * then an action may be brought against the insurer, on the policy and subject to its terms and limitations, by such

judgment creditor to recover on the judgment."

² See provisions of policy, *infra*.

ing five days" or any other particular period of time, and consequently the sentence quoted from that opinion is not persuasive here. Moreover, neither the statute nor the insurance policy involved in the instant case states that the twenty-day statutory period shall become a part of a policy which contains an invalid requirement of notice within a shorter period. The omission of the statute in this respect is in direct contrast to the express provision of section 11580, heretofore quoted in part in Footnote 1. Generally speaking, provisions tending to defeat the main object of the contract are not to be implied. (See 29 Am.Jur. 180, et seq., § 166.) Likewise, while a requirement for notice can be made a condition precedent to recovery, in which event, in the absence of waiver or estoppel, failure of the insured to give the notice may defeat recovery on the policy (*Aronson v. Frankfurt, etc., Ins. Co.* (1908), 9 Cal.App. 473, 99 P. 537; see also 29 Am.Jur. 828, § 1105), it is also said that unless such a requirement "is made a condition precedent or a forfeiture is provided for, the failure to give notice * * * will not defeat recovery." (29 Am.Jur. 825, § 1100.) Under the circumstances defendant's contention that the statutory minimum period shall be deemed written into the policy in place of the void provision to constitute a condition precedent or basis for forfeiture will not be indulged.

[4] Defendant next contends that even if the statutory notice period is not adopted into the policy, the policy still requires that the insured give "immediate written notice" of any accident covered by the policy; that since the policy's definition of "immediate" as meaning "not exceeding five days" is void the expression "immediate" notice must be construed to mean notice within a reasonable time; that the forty-one day period which elapsed between the accident here involved and the receipt of notice thereof by defendant was so reasonably long as to constitute prejudicial delay to defendant as a matter of law; and that therefore the judgment in plaintiff's favor must be reversed. It is our view, however, that even though we assume, without deciding, that the policy issued by defendant to Visser required notice within a reason-

able time after an accident, nevertheless the delay of forty-one days which occurred here was not so great that the trial court was precluded from finding as a fact, as the court did, that defendant was not prejudiced thereby; i. e., the court was not required to conclude as a matter of law that prejudice resulted. The finding of the court is that "the defendant was not prejudiced by any delay on the part of the assured in giving notice of the happening of said accident; that the witnesses to the happening of said accident were only the parties involved and the defendant secured written statements as to the facts of said accident from them within twenty days of receipt of said notice; that on account of conditions at the time and place of the accident there was no road marks indicating the circumstances under which said accident happened; that the defendant was informed of all of the material facts of the claim made by the plaintiff on A. Visser within such a length of time after the happening of the accident that the defendant was not prejudiced in the defense of said action by reason of the failure of said A. Visser to give an earlier notice."

[5] Defendant urges that the finding that "defendant secured written statements" from the "witnesses within twenty days of receipt of" notice of the accident is "false." Evidence introduced is to the effect that the only witness, aside from plaintiff and Visser, was one Heber Thacker, who was riding as a helper in Visser's truck, and that within twenty days after receiving the notice defendant had in its possession either the original or copies of statements made by plaintiff, Visser and Thacker concerning the accident; consequently defendant's attack on the finding as to statements obtained by it cannot be sustained. No other attack is made on the sufficiency of the evidence to sustain the findings of the court.

Defendant next urges that the cases of *Hynding v. Home Acc. Ins. Co.* (1932), 214 Cal. 743, 752, 7 P.2d 999, 85 A.L.R. 13; *Burbank v. National Casualty Co.* (1936), 15 Cal.App.2d 483, 486-487, 59 P.2d 589; *Burbank v. National Casualty Co.* (1941), 43 Cal.App.2d 773, 781-782, 111 P.2d 740.

Purefoy v. Pacific Automobile Indem. Exch. (1935), 5 Cal.2d 81, 88, 53 P.2d 155; Distributors Packing Co. v. Pacific I. Co. (1937), 21 Cal.App.2d 505, 509, 70 P.2d 253; and Arthur v. London Guar. & Acc. Co. (1947), 78 Cal.App.2d 198, 201, 177 P.2d 625, have established that in this state the forty-one days' delay in notifying it of the accident conclusively prejudiced it in any defense to plaintiff's action against Visser.

In the Hynding case the insured breached a cooperation clause of the policy by failing to attend and testify at the trial of the action brought against him by the injured person, and such breach was held to prejudice defendant insurance company and relieve it from liability under the policy. In both of the Burbank cases the statutory twenty-day notice provision applied and was breached by the insured; moreover in neither of those two cases did the court find, as it has found in the instant case, that defendant insurer was not prejudiced by the delay in receiving notice of the accident. In the Purefoy case three and one-half months elapsed before the insurer learned of the accident (and then only from the attorney of the injured persons) and fifteen months elapsed before the insured communicated with the insurer; the trial court found that the delay prejudiced the insurer and rendered judgment for the insurer which this court affirmed. Although in our opinion we stated (page 88 of 5 Cal.2d, page 159 of 53 P.2d) "that prejudice must be presumed in such situations," that statement must be understood as having reference to the facts of that particular case, the real basis for the decision being our statement in the preceding paragraph (page 87 of 5 Cal.2d, page 158 of 53 P.2d) "that prejudice sufficiently appeared, and the court below so found." Certainly we made no suggestion, and none

must be implied, that such presumption or inference is a conclusive one which cannot be overcome by evidence that no actual prejudice occurred. The ultimate conclusion in each case must depend on its own facts. In the instant case pertinent evidence was introduced and the trial court, acting within the compass of its functions, found that no prejudice resulted.

In the Arthur case the opinion recites (page 201 of 78 Cal.App.2d, page 626 of 177 P.2d), that the insurer "established" that by reason of an eleven months' delay in notifying it of the accident, it was "unable to make an effective investigation of the accident and was thereby prevented from discovering the two men who were riding" in one of the vehicles involved "at the time of the collision." The action of the trial court in granting the insurer's motion for judgment notwithstanding the verdict against it was, on the record then before the court (there being apparently no conflict in the evidence), upheld on appeal.

We hold that where, as here, there is no valid contractual agreement requiring notice within a specific (other than a reasonable) period and the trial court finds, upon sufficient evidence, that a forty-one day delay in notifying the insurer concerning an accident did not prejudice it in defending an action against the insured arising out of the accident, such finding will not be disturbed on appeal. Any implications which may be found to the contrary in *Distributors Packing Co. v. Pacific I. Co.* (1937), *supra*, 21 Cal.App.2d 505, 509, 70 P.2d 253, are disapproved.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

86 Cal.App.2d 762

HERMAN v. CAMPBELL et al.

CAMPBELL v. HERMAN et al.

Civ. 16109.

District Court of Appeal, Second District,
Division 3, California.

July 14, 1948.

Rehearing Denied Aug. 9, 1948.

Hearing Denied Sept. 8, 1948.

1. Landlord and tenant ⇨80(3)

Where tenant under long term lease failed to meet his obligations in payment of rent, taxes and assessments, and landlord unsuccessfully put forth extreme effort to enforce performance by tenant and declared lease terminated by reason of such defaults, rights of sub-tenant who became such with full knowledge of facts were terminated by termination of basic lease.

2. Landlord and tenant ⇨80(3)

An owner of property who permits it to be occupied by another upon the condition that compensation therefor be paid in specified amounts and at specified times, and who is unable to collect the sums due him, cannot justly be deprived of both possession and the agreed compensation by one who claims under the defaulting tenant.

3. Landlord and tenant ⇨80(3)

The right of subtenant to possession of premises as against original landlord terminates with lease or term of original tenant, and since subtenant holds premises subject to performance of terms and conditions impressed upon estate by provisions of original lease, his rights are generally held to be terminated when original landlord declares a forfeiture of original tenant's term based upon original tenant's nonperformance of obligations imposed on him.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action for declaratory judgment by Patricia Herman against Leroy Campbell, also known as Roy Campbell, individually and as trustee for Wilbur W. Campbell and as

trustee of the estate of Delia Mae Campbell, deceased, A. Otis Birch and others, wherein the first named defendant filed a cross-complaint against Patricia Herman and A. Otis Birch. From the judgment, Patricia Herman appeals.

Affirmed.

Sturzenacker & Isenberg, of Hollywood, for appellant.

Syril S. Tipton and William M. Wallace, both of Los Angeles, for respondent Roy Campbell.

George Acret, of Los Angeles, for respondent A. Otis Birch.

SHINN, Acting Presiding Justice.

Plaintiff brought this action seeking a declaratory judgment that she is the holder of a valid and subsisting sublease upon certain real property in the city of Los Angeles, is rightfully in possession and entitled to remain in possession for the duration of the term of the lease. Roy Campbell, for himself and as trustee, filed a cross complaint praying for restitution of the premises and damages for the use and occupation thereof by plaintiff. Findings and judgment were in favor of the cross complainants and the judgment awarded them possession of the premises and also damages in the sum of \$2,295, and the further sum of \$225 per month until plaintiff should surrender possession. This appeal is by plaintiff and cross defendant.

The premises in question are located on the northwesterly corner of Twelfth Street and Grand Avenue, and are improved with buildings occupied as rooming houses. In 1928, Wilbur Dudley Campbell and his wife, then owners of the property, leased the same to one Van Vrankin for a term of 99 years. Roy Campbell, individually, and as trustee, is the successor in interest of the former owners; defendant A. Otis Birch acquired the leasehold interest of Van Vrankin. On November 1, 1938, Birch subleased one of the buildings to plaintiff who later acquired the furniture contained in the other buildings and secured from Birch an extension of lease upon the premises for a term ending October 31, 1948. She has not failed to perform her obligations under her sublease from

Birch. The latter, however, defaulted in the payment of rental and other sums under the basic lease. The court made extensive findings, none of which is challenged for insufficiency of evidentiary support. It was found that on February 15, 1946, Birch was in default in the payment of rent under the basic lease in a sum in excess of \$160,000; that in March of 1944, and on several occasions thereafter, Campbell served Birch with written notice of default; that the defaults of Birch in payment of rent were not corrected; that on March 14, 1946, Campbell served Birch with another written notice of default and the same not having been cured, on or about March 21, 1946, he served Birch with a notice that he exercised his option to terminate the lease by reason of such defaults and failure to cure the same; that said Birch relinquished all interest in the premises and right to the possession, and no longer claims any right, title or interest in or to the same, but that plaintiff and cross defendant refused and still refuses to deliver up possession of said premises. It was alleged in the complaint that in 1935 and later, Campbell had brought numerous actions against Birch, 17 in number, for rent which had fallen due under the lease, and it was in evidence that many judgments for rent had been obtained against Birch and remained unsatisfied. It was found that on or about March 22, 1946, Birch paid to Campbell approximately \$80,000 on account of the judgments outstanding against him. It was also found that these judgments have been satisfied of record. It was alleged by plaintiff that the termination of the basic lease was the result of a conspiracy between Campbell and Birch, the purpose of which was to oust plaintiff from the premises. All of these allegations were found to be untrue. Appellant's sole contention here is that Campbell did not terminate the lease because of the defaults of Birch but that it was voluntarily surrendered by Birch, from which premise it is argued that appellant's sublease was not affected by the surrender of the basic lease. The findings as a whole negative the factual basis of this argument. The facts found are set forth in 49 separate findings covering in

large part matters that were immaterial or not in issue. There was a finding that defendant Campbell acted in good faith in declaring Birch to be in default and in electing to terminate the lease. It was further found that practically all of Birch's indebtedness under the lease of about \$160,000 had been reduced to judgment by March 21, 1946; that Birch had been unable to pay said rentals or any part of said judgments other than to pay \$80,000 on account thereof on March 21, 1946; that the lease provided for termination in case of default; and that Campbell "did declare a forfeiture of said lease under the aforesaid provisions for forfeiture and by reason of the aforesaid defaults and judgments." Other findings relate to the efforts that had been made by Campbell to collect the judgment by the levy of garnishments and other proceedings. In an amendment to the answer of Birch it was alleged, and the court found it to be true, "That the plaintiff took the sublease and the extension thereof sued upon herein and attached as exhibits to her complaint with full knowledge that said lease was hopelessly in default and with full knowledge that the defendant was unable to pay said rentals and said judgments and with the express understanding that she would assume the risk of such lease being forfeited and that she would rely solely upon her expectation and hope that said Campbells would not declare said lease forfeited. That the plaintiff thereby and expressly waived all claim of liability against this defendant by reason of any forfeiture of said lease and in equity and good conscience should be and is estopped from asserting any claim against this defendant by reason of such forfeiture."

[1, 2] The case presented by the record is the following: A lessee under a long term lease is unable to meet his obligations in the payment of rent, taxes, assessments, etc.; the lessor puts forth extreme effort to enforce performance by the lessee, all without success; he gives successive notices of default but defers for several years to exercise the right to terminate the lease, obviously for the reason that he considered it would be to his disadvantage to termi-

nate it; eventually, being unable to enforce performance, he does declare the lease terminated by reason of the defaults of the lessee and not otherwise; the sublessee, who became such with full knowledge of the facts, claims the right to remain in possession for the full term of her sublease, notwithstanding the termination of the basic lease. If, indeed, these facts present any serious question as to whether the rights of the sublessee were terminated with the termination of the basic lease the obvious and inescapable answer is that they were so terminated. The law provides no answer different from that which would be given by any one slightly informed as to the methods pursued in such matters in the world of business. An owner of property who permits it to be occupied by another upon the condition that compensation therefor be paid in specified amounts and at specified times, and who is unable to collect the sums due him, cannot justly be deprived of both possession and the agreed compensation by one who claims under the defaulting lessee. We have the additional circumstance here that the sublessee entered into the sublease with full knowledge that her sublessor was seriously in default under the basic lease, voluntarily and advisedly running the risk that the same would be terminated by the owner. Appellant cites *Buttner v. Kasser*, 19 Cal. App. 755, 127 P. 811, saying that the facts there were almost identical with those of the present case. The facts were not at all similar. The *Buttner* case was one in which a sublessor voluntarily surrendered his lease to his lessor without the consent of the sublessee. It was held that the latter was not bound by the surrender. The principle there stated, with citation of numerous authorities, was that (19 Cal.App. at page 760, 127 P. at page 813): "A tenant may surrender his estate to his landlord, but if he have since its commencement created some minor interest out of it, or have made an underlease, he cannot, by surrendering, destroy the charge or affect

the estate of the underlessee." This, of course, is not our case. The court remarked in the *Buttner* case, 19 Cal.App. at page 760, 127 P. at page 813: "It is not doubted but that upon a re-entry for forfeiture of the lease held by the sublessor the rights of the sublessee under his sublease will terminate." All of the other cases relied upon by appellant involved the voluntary surrender of leases and not their forfeiture or termination by reason of defaults of a lessee.

[3] The law which governs the instant case is stated in 32 Am.Jur. 344, as follows: "The right of the sublessee to the possession of the premises as against the original lessor terminates with the lease or term of the original lessee, and since a subtenant holds the premises subject to the performance of the terms and conditions impressed upon the estate by the provisions of the original lease, his rights are generally held to be terminated when the original lessor declares a forfeiture of the original lessee's term based upon the latter's nonperformance of obligations imposed on him. Thus, if the original tenant has incurred a forfeiture of his lease, and for that reason the landlord annuls the lease, the landlord is entitled to the possession as against the sublessee." And further, at page 746: "Where a cause of forfeiture has arisen, the fact that the lessee consents to the enforcement of the forfeiture does not render the transaction a surrender as distinguished from a forfeiture so as to bring it within the rule that a lessee cannot by a surrender affect the estate or the interest of third persons held under him" etc. (See, also *Brock v. Desmond & Co.*, 154 Ala. 634, 45 So. 665, 129 Am.St.Rep. 71; 16 RCL 878.) These principles are elementary in the law of contracts and the law of real property.

The judgment is affirmed.

WOOD, J., and McCOMB, J., assigned, concur.

BROWNE v. ULRICH et al.

Civ. 16209.

District Court of Appeal, Second District,
Division 1, California.

June 23, 1948.

Hearing Denied Aug. 19, 1948.

1. Municipal corporations ⇨567(1)

Complaint alleging, without explanation, that street improvement bond had theretofore been foreclosed and alleging no facts which would show whether lien of such bond was still in effect or whether it had been discharged failed to state a cause of action for foreclosure of lien of such bond.

2. Municipal corporations ⇨567(1)

In action to foreclose lien of street improvement bond, complaint failed to properly allege judgments mentioned therein in absence of allegation that judgments were duly given or made or any of the allegations which are implied in the use of the word "duly". Code Civ. Proc. § 456.

3. Municipal corporations ⇨564

Action to foreclose lien of street improvement bond which was commenced more than four years after maturity of last installment of lien was barred by four-year statute of limitations. Street and Highways Code, § 6610; Code Civ. Proc. § 337, subd. 1.

4. Pleading ⇨49

The prayer of complaint may be resorted to for the purpose of ascertaining plaintiff's theory of action and the kind of relief to which he considers himself entitled.

5. Municipal corporations ⇨564

Where prayer of complaint showed action was to foreclose lien of street improvements bond, reference in complaint to judgment in quiet title action declaring that property was still subject to lien of bond did not make the action subject to statute of limitations applicable to actions on judgments instead of four-year statute of limitations. Code Civ. Proc. §§ 336, subd. 1, 337, subd. 1; Street and Highways Code, § 6610.

6. Equity ⇨66

Defendant seeking no affirmative relief was not required to offer to do equity

as a prerequisite to right to invoke four-year statute of limitations as a bar to action to foreclose lien of street improvement bond. Code Civ. Proc. § 337, subd. 1; Street and Highways Code, § 6610.

Appeal from Superior Court, Los Angeles County; Louis W. Kaufman, Judge.

Action by Marda R. Browne against E. W. Ulrich and others to foreclose the lien of a street improvement bond. Judgment for plaintiff, and named defendant and others appeal.

Judgment reversed.

John A. Jorgenson, of Los Angeles, for appellants.

Ernest A. Oswald, of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

This is an action to foreclose a lien. The complaint contains the following allegations:

Paragraph I alleges that certain persons are sued under fictitious names.

Paragraph II alleges that the defendant Bank of America National Trust and Savings Association is a national banking association.

Paragraph III alleges that the defendants Ulrich and Jorgenson are the owners of certain described real estate.

Paragraph IV alleges that the defendant Bank of America claims some interest in the property and that the claim is without right.

Paragraphs V, VI and VII read as follows:

"V. That plaintiff is the assignor of Fred R. Salter of all his right, title and interest in and to that certain Judgment in Action No. 463398 of the Records and files of the Superior Court of the State of California, in and for the County of Los Angeles; that plaintiff is now the owner of said Judgment.

"VI. That said judgment provides among other things that the defendants in that action owned title to the heretofore described real property subject to the lien of Bond No. 78, Series 2, issued for the

paving and improving of D Street and portions of other streets in the City of Los Angeles; and that said Street Improvement Bond was issued pursuant to the 'Improvement Act of 1911 [St.1911, p. 730].'

"VII. That said Street Improvement Bond had theretofore been foreclosed in an action entitled M. E. Oswald v. Grace G. Williams, et al., No. 409724 of the records and files of the Superior Court of the State of California, in and for the County of Los Angeles."

Paragraph VIII sets forth the due dates and amounts of interest due.

Paragraph IX alleges that Exhibit "A" attached to the complaint is a copy of the bond referred to.

Paragraphs X and XI read as follows:

"X. That pursuant to Section 6460 of the Streets and Highway Code said principal and interest coupons bear penalties at the rate of 1% per month until paid.

"XI. That pursuant to Section 6504 of the Streets and Highway Code the principal unpaid balance of a Street Improvement Bond in default bears interest at the rate of 7% compounded semi annually from date of default until date of payment."

The complaint then prays that the amount due upon the lien of the street improvement bond be determined and that the described real property be sold to satisfy the lien of the street improvement bond.

The answer denied the material allegations of the complaint, set up various statutes of limitations as a bar, alleged that the bond referred to in plaintiff's complaint had been paid, and that it had been surrendered to the Treasurer of the City of Los Angeles, who had cancelled it.

The court awarded judgment for the principal sum of the bond in the sum of \$174.22 and penalties and interest in addition, which raised the amount of the judgment to \$827.33, and ordered that the real estate be sold to satisfy the judgment.

[1] We have set forth the allegations of the complaint in such detail for the reason that at the trial appellant urged, and strenuously contends here, that the complaint did not state facts sufficient to con-

stitute a cause of action. A reading of the complaint shows the correctness of appellant's contention. The complaint is denominated "Foreclosure of Lien", alleges in paragraph VI that the real property is subject to the lien of Bond No. 78, Series 2, issued pursuant to the Improvement Act of 1911, pleads all of the interest and penalties due under said bond, and prays for a determination of the amount due under said street improvement bond, and asks for a sale of the property "to satisfy the lien of said Street Improvement Bond". Yet in that very same complaint, in paragraph VII, plaintiff alleges without explanation that said Street Improvement Bond "had theretofore been foreclosed". Also, there is an absolute failure in this complaint to allege any facts which would show whether or not this lien is still in force and effect or whether it has since been discharged, in whole or in part, by payment or otherwise.

It is alleged that plaintiff "is the assignor of Fred R. Salter of all his right, title and interest in and to that certain Judgment", etc., but nowhere is there any allegation as to what interest, either at the time of the assignment or any other time, that Salter had or what he had to assign. It appears from the bond, alleged to be a copy, that it is payable to Geo. H. Oswald. No assignment of the bond from Oswald to Salter or to the plaintiff is alleged. Paragraph VI, which attempts to allege a judgment, shows that the judgment merely stated that the property was subject to the lien of the bond, but did not state who was the owner or holder of the lien. There is no allegation that either Salter or the plaintiff had any interest in the judgment in Oswald v. Williams et al., referred to in paragraph VII.

In addition to all the defects in the complaint just recited, an attempt is made to allege two judgments. The first of these judgments is referred to in paragraphs V and VI, which we have set forth in full. So far as the allegations of these paragraphs are concerned, there is no allegation as to who was the plaintiff in that action or as to who the defendants were, or as to when it was rendered, or that it is final, or as to whether or not the lien referred to

therein is satisfied. So far as the foreclosure judgment is concerned, here again there is no allegation as to its date, what its provisions are, whether or not it is final, or that there is any connection between M. E. Oswald, referred to in that paragraph, and the plaintiff or Geo. H. Oswald, the payee of the bond, or either of the Oswalds and Fred R. Salter or the plaintiff here.

Section 456 of the Code of Civil Procedure reads as follows: "In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction."

[2] In regard to neither of the judgments to which reference is made is there any allegation as to its having been duly given or made and none of the allegations which are implied in the use of the word "duly" appear.

In *Edwards v. Hellings*, 99 Cal. 214, 33 P. 799, language appears which is applicable here: "This court has been quite liberal in condoning defective and vulnerable pleadings, but the frontiers of liberality in this respect have not yet been pushed far enough to take in everything * * *. In this state there are several well-known methods of pleading a judgment; and, if the pleader desires simplicity, he need only follow section 456, of the Code of Civil Procedure and aver that the judgment was 'duly given.'"

[3,4] Appellant is also correct in his contention that this action is barred by the statute of limitations. This is an action to foreclose the lien of a street improvement bond. The allegations of the complaint which we have heretofore considered in detail clearly show this to be a fact. The prayer may be resorted to for the purpose of ascertaining plaintiff's theory of action and the kind of relief to which he conceives himself entitled. *McPheeters v. McMahon*, 131 Cal.App. 418, 21 P.2d 606; *Sullivan v. Compton*, 61 Cal.App.2d 500, 143 P.2d 357.

The relief requested is as follows:

"Wherefore Plaintiff Prays:

"1. That the Court determine the amount now due upon the lien of said Street Improvement Bond.

"2. That said lien be determined to be a first lien upon said real property.

"3. That a Commissioner be appointed to sell said real property at public auction and that said Commissioner, after the time allowed by law has expired, execute a deed to the purchaser at said foreclosure sale.

"4. That said real property be ordered sold to satisfy the lien of said Street Improvement Bond."

The date of the Street Improvement Bond thus sought to be foreclosed is February 4, 1931. The date of the maturity of the last installment of this lien was January 2, 1941. This action was filed August 20, 1946. The lien sued on was one under the Improvement Act of 1911 (Div. 7, Street and Highways Code), Section 6610 of which provides that an action to recover the amount due thereon must be brought within four years after the due date of the last installment, which is the same period of limitation as that prescribed by subdivision 1 of Section 337 of the Code of Civil Procedure. Both of these statutes of limitations were pleaded by the defendant, although the trial court made no finding whatever in regard to them.

[5] Respondent contends that this is an action based upon the judgment in the case of *Salter v. Ulrich*, Superior Court, and that the provisions of Section 336, subdivision 1, of the Code of Civil Procedure, apply. This contention is refuted by the complaint and the judgment in the instant case, which is one to foreclose a street improvement bond lien and not to foreclose any lien created by that judgment.

This is clearly shown by the judgment in *Salter v. Ulrich*, the only part of that judgment which is pertinent reads as follows: "That at the time said E. W. Ulrich purchased said real estate on July 7, 1936, plaintiff's street bond was still a lien on said property, and said E. W. Ulrich took said property by that sale and the subsequent deed aforesaid, subject to the lien of said bond."

We, therefore, see, as stated, that the judgment in that case created no lien. It merely declared in a quiet title action that a lien existed. There can be no doubt, and appellant cites cases to show, that it required a separate action to foreclose this street lien which this judgment declared was on this property. Whatever statute of limitation is appropriate to such an action would apply. Certainly if a judgment made the declaration that a party owned property subject to a mortgage, the mere fact of such declaration would not in any way change the statute of limitations which could be pleaded as a bar in an action to foreclose the mortgage. The respondent cites as authorities which support his position a series of cases of which *Burns v. Hiatt*, 149 Cal. 617, 87 P. 196, 117 Am.St. Rep. 157, is typical. This case holds that the grantee of the mortgagor, who took subject to the lien of the mortgage, can not maintain an action to quiet his title against the mortgagee nor recover the possession from him without paying or offering to pay the mortgage debt, notwithstanding it is barred by the statute of limitations. It is apparent that these cases do not support respondent's position at all. To be parallel to the instant case, these cases would have to hold that in an action to foreclose the mortgage in question, the statute of limitations could not have been set up as a bar. These cases make no such holding nor is there any intimation that such is the case.

As his final point in his brief, respondent sets up Point IV, which reads as follows: "Statutes of limitations are strictly construed against the pleader, and as the pleader here is seeking equity without offering to do equity, the construction of the court below should be affirmed."

[6] The answer to that is that the appellant here is not seeking equity and is asking for no relief. All he is doing is pleading the statute of limitations and in so doing he is not required to offer to do equity. Inasmuch as the question of equity has been referred to, it may be noted that the respondent sought to recover and did recover in interest and penalties over and above the amount of the principal obliga-

tion of \$174.22 upon which the suit was brought, the sum of \$653.11.

Judgment is reversed.

DORAN, Acting Presiding Justice, and WHITE, J., concur.



87 Cal.App.2d 1

In re MacPHERSON'S ESTATE.

BELL et al. v. MacPHERSON et al.

Civ. 16455.

District Court of Appeal, Second District,
Division 1, California.

July 28, 1948.

Wills Ⓒ490

In proceeding to determine interest in the estate under holographic will providing among other matters that "what loose money and Bons I want divided among my niseses and nephews", the allowance of introduction of evidence to interpret "Loose money" and "bons" in accordance with statute was not error. Probate Code, §§ 102, 105, 106.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceedings in the matter of probate of the holographic will of Elizabeth German MacPherson, deceased, wherein Merle G. Bell and others filed separate petitions for determining interests in the estate, opposed by Malcolm MacPherson, surviving husband of deceased, and wherein the Security-First National Bank of Los Angeles, administrator with will annexed was made a party. Judgment for petitioners, and contestant appeals.

Affirmed.

Marlan Proctor and Walter B. Gieselman, both of Burbank, for appellant.

Alfred J. McGuire, of Los Angeles, for respondents Merle G. Bell, Leslie Richard Bell, Vernie T. Bell, Eleanor F. Beight, Wanda Humphrey, Wilma Pratt, and William Bell.

Meserve, Mumper & Hughes and E. Avery Crary, all of Los Angeles, for respondents, Emily Mackin, James Chambers, Elizabeth Hutchinson, George Ferguson, Isabella Ferguson Kinney, Marian Ferguson Jess, Thomasina Ferguson McMaster, Agnes Ferguson Dixon, and Thomas Ferguson, Jr.

DORAN, Justice.

This is an appeal from the judgment.

The holographic will which is the basis of the action is as follows:

"January 12, 1941

"What loose money and Bons I want divided among my niseses & nephews and the home I have compled goes to my husband -his day, and then it goes to Mrs. Bessie Pierce, 941 Woolman, Butte Montana if she is gone divided up among my relitives.

"Mrs. Elizabeth German Mac Pherson

"My sisters children lives Belfast Ireland the last I heard"

A brother, together with nieces and nephews, joined in a petition for determining interests in the estate in which it was contended that "by her last will and testament and the use of the terms therein 'what loose money and bons I want divided among my niseses and nephews' she meant to devise and bequeath to her said nieces and nephews all of her money, postal savings certificates, stocks, and bonds, and other securities which she owned at the time of making the will, including securities secured by real property to her nieces and nephews, the petitioners herein."

Opposition to said petition was filed by the surviving husband of deceased in which it was contended that the testator, "by making reference to 'bons,' applied said term only to bonds in their strictest sense, and did not in any manner intend or mean to refer to other types of securities whatsoever; that the Court find that by using the term 'loose money' said decedent re-

ferred to only such money as was found on her person or in and around her home at the time of her death, and in no way referred to the money on deposit in the safety deposit box; that by use of the term 'niseses and nephews,' said decedent was referring only to such nieces and nephews as are in Ireland."

The court found in part as follows: "That the word 'loose' as used in the first line of the Will of the said Elizabeth German MacPherson, deceased, is surplusage, and the words 'money and Bons' as used by the testatrix in her Will, bequeathes all money, securities and deposits to nieces and nephews who take per capita."

Quoting from appellant's brief: "This appeal is now taken by the surviving spouse from the judgment on the ground that the Court committed prejudicial error in allowing the introduction of evidence to interpret 'loose money' and 'bons', and on the further ground that the evidence which was introduced at the time of trial was not sufficient to change or alter the meaning of the words as set out in said holographic will so as to cause 'loose money' to mean all money, and so as to cause 'bons' to mean all securities." It is also argued that the evidence does not support the findings.

Quoting again from appellant's brief: "Appellant herein contends that the testatrix's intention can be ascertained from the words of the holographic will, and that it must be strictly construed; that there is no imperfect description, mistake, error or omission as referred to in Section 105 of the Probate Code, and the trial court has committed prejudicial error in allowing the introduction of evidence to explain the same." Section 105 of the Probate Code provides that "when there is an imperfect description" or an uncertainty arises upon the face of a will, "mistakes may be corrected and certain evidence is admissible for the purpose of ascertaining the testator's intention. In this connection, appellant argues, "Can it be reasonably stated that, 'loose money' or 'bons' amount to an imperfect description of what is being willed?" Then follows the argument as to what these words obviously refer to according to appellant's viewpoint.

Respondent, on the other hand, points out that if appellant prevails then, "the nieces and nephews would receive only 2½% of the estate," and "the further fact that two-thirds of her estate would pass intestate under Appellant's theory, makes it necessary to resolve every reasonable interpretation of the Will against intestacy, as provided by Section 102 of the Probate Code."

Respondent also relies on section 106 of the Probate Code which relates to interpretation of wills.

It appears evident from the foregoing that the trial court was confronted with the necessity of resorting to the authority of section 105 of the Probate Code. Ability to determine the intention of a testator in such circumstances without the aid of the additional evidence authorized under section 105 would indeed be an extraordinary talent. The action of the court in this regard therefore, was not error. The evidence received was appropriate and sufficient to support the findings.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.



86 Cal.App.2d 791

PEOPLE v. TURNER et al.

Cr. 4210.

District Court of Appeal, Second District,
Division 1, California.

July 19, 1948.

1. Homicide ⚔116(4)

The law of self-defense is based on reasonable appearance of imminent peril of death or serious bodily injury.

2. Homicide ⚔276

Whether resort to self-defense was necessary or proper is a fact question for jury or trial judge.

CAL.REP.195-196 P.2d-19

3. Criminal law ⚔1159(2, 4, 6)

Where evidence, circumstantial or otherwise, shows that crime has been committed and was perpetrated by defendant, reviewing court will not retry the case nor attempt to determine weight of evidence or credibility of witnesses.

4. Criminal law ⚔1159(2)

Before appellate tribunal may reverse for insufficiency of evidence, it must clearly appear that upon no hypothesis whatever was there evidence of sufficient substantiality to support conclusion of duly constituted arbiter of facts, even though facts and circumstances might reasonably be reconciled with innocence of accused.

5. Homicide ⚔244(1)

Conflicting evidence sustained conviction of manslaughter on issue of self-defense. Pen.Code, § 192, subd. 1.

6. Criminal law ⚔351(10)

False or misleading statements by defendant to arresting officers or others with relation to material facts, for purpose of misleading or warding off suspicion, are admissible to show consciousness of guilt, and though not conclusive, may strengthen inferences of guilt arising from other facts.

7. Criminal law ⚔1144(13)

Reviewing court must view conflicting evidence in light most favorable to the prosecution, after determination of guilt.

8. Criminal law ⚔59(5)

One may aid or abet commission of crime without having previously entered into conspiracy to commit crime. Pen. Code, §§ 31, 971.

9. Homicide ⚔29

Mere presence of accused at scene of homicide is not sufficient to make him a participant, and failure to prevent the crime does not necessarily make him guilty, but his presence may be a circumstance tending to support finding that he is a principal. Pen.Code, §§ 31, 971.

10. Homicide ⚔234(5)

Evidence sustained conviction of sister as principal for inciting, encouraging or aiding brother in killing of sister's com-

mon-law husband in heat of passion. Pen. Code, § 192, subd. 1.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Maydell Turner and Johnnie Nickson were convicted of manslaughter, and they appeal from a judgment and order denying a new trial.

Affirmed.

Horace Appel and J. V. McDermott, both of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendants were charged with the crime of murder. After the entry of not guilty pleas and waiver of trial by jury, the cause proceeded to trial before the court. Both defendants were found guilty of the crime of manslaughter, a lesser and necessarily included offense. Following the denial of their motion for a new trial, judgment was pronounced against them. From such judgment and order denying their motion for a new trial, both defendants prosecute this appeal.

As the sole ground urged by both appellants for reversal of the judgment and order is that the evidence is insufficient to sustain their convictions, it becomes necessary to set forth in some detail the evidence adduced at their trial.

Appellant Maydell Turner occupied Room 19 in an apartment house located at 123 North San Pedro Street in the City of Los Angeles, with the deceased Oran Young, as man and wife, although unmarried. Appellant Nickson, who was the brother of appellant Turner, lived at 509 Banning Street, which was approximately four or five blocks from the residence of his sister.

The deceased and appellant Nickson were both employed by the Los Angeles County Forestry and Weed Abatement Division and they usually went to work to-

gether, leaving the former's apartment at approximately 7 a. m. They finished their daily work at 4:30 p. m. and would generally arrive at the apartment of deceased and appellant Turner about 5:15 p. m. Appellant Nickson, upon arrival at the apartment, would usually leave his lunch pail with his sister.

On June 23, 1947, this procedure occurred and appellant Nickson went to the deceased and appellant Turner's apartment, left his lunch pail there, drank a can of beer, remaining in the apartment approximately fifteen minutes with his sister and deceased, after which he went to his own home on Banning Street. He remained there for approximately one hour and a half, returning to the foregoing Room 19, where he drank two more cans of beer. At that time there were present in the apartment two or three people other than appellant Turner and the deceased, among them being one Sam Sutton, who had gone into the apartment to obtain the return of a tool which he had loaned to the deceased.

The witness Charles Washum resided at 123 North San Pedro Street with his wife in Room 36. He had been there for two and a half years and was acquainted with both appellants and the deceased for some time. At approximately 7:35 o'clock on the evening of June 23, 1947, the witness Washum was sitting in his room drinking a half pint of whiskey with his wife and one Charles "Hogjaw" Stewart. Washum saw some one standing out in the hall, arose and looked into the hallway where he observed appellant Nickson standing in front of the apartment of the witness Washum. The latter said, "Hello Johnnie", and appellant Nickson replied, "Hello", to him, and then put his head inside Washum's door, saying, "I am watching a little something", or "In a few minutes I want to speak to somebody and I will be through in a few minutes", or "I am staying here a few minutes", or some words to that effect. Washum, his wife and guest then resumed their consumption of whiskey, and approximately ten minutes later heard the firing of a gun, which according to the witness Washum, sounded "like a cap gun". Washum, his wife and guest, saw appellant Nickson running down the hall, whereupon they

all went into the hall when they heard two more shots fired, saw a gun passed to appellant Nickson by appellant Turner, which the former placed in his right hand pocket and started to run, going approximately twenty feet when he turned around, went back to the door of Room 19, had some conversation with appellant Turner, obtained some money from her, and then ran down the hall and disappeared. The witness Washum heard a total of five shots. His room was approximately forty feet down the hall from Room 19. According to his testimony, the gun was passed after the shots were fired. A few moments later, Washum went down to Room 19 where he saw appellant Turner standing over the deceased who was still living, and he heard her say, "I told you it would happen if you drew a knife on me", or some words to that effect. Washum then returned to his own room, but shortly thereafter again went to Room 19 when he saw the deceased lying on a bed. This witness saw no knife in the room, nor were the investigating officers able to locate a knife in the room. When the police arrived, the deceased was lying on the bed, and appellant Turner was present. In the room where deceased was shot was a large round table in the center of the floor, a stove, a small square table and some built-in cabinets along the wall, the square table being covered by oil-cloth. Investigating officers did not find any weapon at all in the room, but did find four empty shells of a .380 caliber pistol on the floor under the table. A scientific expert from the Los Angeles Police Department, investigating the apartment, found a .380 caliber copper-jacketed bullet in the floor 12 inches inside the door of Room 19, the course of which bullet he traced. He received a bullet similar to it from the person in charge of the laboratory of the General Hospital where the deceased expired, and testified that in his opinion the two bullets came from the same gun. He also located two bullet holes in the tablecloth.

A police officer questioned deceased at the Los Angeles Receiving Hospital in the presence of appellant Turner, and asked him how he was wounded, but deceased refused to talk stating that he "could not

talk against his own". Appellant Turner made no statement on that occasion.

Officer Detrich of the Los Angeles Police Department had a conversation in the Lincoln Heights City Jail on June 24, 1947, with appellant Turner, at which time she told the officer that she and deceased were in the room, that she was standing with her back to the rear of the room by the telephone, which is near the head of the bed, that she heard some shots ring out, but that she did not know who fired them, that they must have been fired in the hallway because the deceased was in the hallway at the time. Later conversations with her resulted in the statement on her part, "Just like I told you the first time."

The same officer had a conversation with appellant Nickson on June 29, at the Central Police Station, asking him if he was at Room 19 the night of the shooting, or whether he was in the building on that evening, to which inquiries appellant Nickson stated that he had not been there, that he had been there earlier in the evening and that appellant Turner was there with the deceased, two other ladies and a man, that he had not known who they were because he was not introduced; that he left the apartment about 6:30 or 7 p. m. and went home; that he did not know that the deceased had been shot until he returned the next morning to pick up his lunch pail on his way to work. When asked to explain why he had not attempted to see his sister after she had been arrested, in view of the fact that he had expressed such an affection for her, he would make no explanation. When, on June 23, in the office of the district attorney, he was asked whether he thought all the witnesses at the inquest were lying, he answered by saying, "I don't know nothing about it."

Appellant Nickson testified in his own behalf at the trial that appellant Turner was his sister; that on the date of the homicide he went to his sister's room at about 5:15 or 5:30 p. m.; that he put his dinner pail down and drank a can of beer, remaining for approximately ten or fifteen minutes, and then went to his own residence on Banning Street. That after remaining at home for awhile, he returned to Room 19 and consumed two more cans of

beer; that at that time, appellant Turner, the deceased, and two or three other people whose names he did not know were present. That after about fifteen or twenty minutes at his sister's room he left and went to a pool hall where he remained approximately twenty or twenty-five minutes, after which he again returned to Room 19. That he then left his sister's room, went to the restroom, and when returning to Room 19 thought he saw a lady he recognized going down the hall toward Charles "Hogjaw" Stewart's room, that for that reason he passed by his sister's door, went down the hallway a short distance and discovered that he was mistaken in his identification of the lady. That while he was standing there watching the lady go up the stairs, Stewart opened his door and said, "Hello, Johnnie", to which appellant Nickson replied, "Just fine, hello." That Stewart said, "What happened?" to which Nickson replied, "Oh, nothing, I was just watching a little something." That upon approaching the door to his sister's room he heard his sister say, "You better go ahead on, Oran, I have told you about drawing that knife on me." That he immediately entered Room 19 and as he pushed the door open saw his sister "making a backward motion to the doorway" with a gun in her right hand. That he went in, grabbed the gun out of his sister's hand, pushed her into the corner, stepped over to the left of her, and as he turned around the deceased "made a step forward" and pushed the door closed; that the deceased appeared to be very angry, saying, "I am getting tired of these God damned lies." That he then observed that the deceased had a knife in his right hand whereupon he told the deceased that "they should be ashamed of themselves" and asked what was the matter; that he also asked the deceased to sit down, but that the latter "made a step forward" with the knife raised and then attempted to take another "step forward". That at the time deceased was advancing toward him, appellant Nickson believed that he was in danger of death or great bodily harm, and further believed that his sister was in danger of bodily injury. That he then fired three

times at the deceased but was unaware whether any of those bullets hit him for the reason that deceased continued to stand upright following the third shot, and he then fired two more. That deceased had his arm in a "striking position" at the time appellant Nickson fired the last of the five shots. The deceased then fell to the floor and said, "Johnny, please don't kill me", to which appellant Nickson answered, "I have no intention of killing you, Mr. Oran. I just wanted to stop you from killing one of us." That thereupon, appellant Nickson's sister told him to leave the room and just as he was leaving his sister said, "Watch that knife." That he then immediately left the building and threw the gun in some trash between two buildings nearby. That after this he went back to his sister's room and asked her if she didn't think he should remain, to which she answered that he should not. That thereupon he ran out and boarded a street car. That he had never fired a gun before in his life. That the gun used by him was owned by the deceased. He further testified that in 1944, deceased had cut his sister on the arm; that on January 19, 1945, the deceased had cut his sister's throat, chased her down San Pedro Street with a knife, and that she escaped by taking refuge in a market.

Appellant Nickson denied that he received any money from his sister. He at no time told the police that he had thrown the gun away, nor did he ever seek to locate it.

Appellant Maydell Turner testifying in her own behalf stated that she was the "common law" wife of the deceased and had been living with him since June, 1944; that she had been attacked and cut by the deceased on June 23, 1946, but had refused to prosecute because of his threats to kill her if she did so. That in November, 1944, he had cut her arm with a knife, and again in January, 1945, had cut her in the neck, inflicting an injury which required twelve stitches. That deceased had constantly carried a knife and would usually get "fighting mad" after he had a few drinks. That on June 23, 1947, she saw appellant Nickson in the afternoon about

5 o'clock when he brought his lunch pail to her apartment and consumed a can of beer; that he left for a short while and returned about 6 or 6:15 p. m. That the shooting occurred about 8 o'clock. That appellant Nickson had been out for a short while and when he came in the deceased was behind the door with a knife which he had drawn on appellant Turner who had a gun in her hand; that appellant Nickson then took the gun out of her hand and deceased shut the door saying that he was tired of "them God damned lies"; that appellant Nickson said, "Mr. Oran, you ought to be ashamed to yourself". That deceased was standing up at this time with a knife in his hand, took a step forward, raised the knife and with a vile epithet started toward both she and her brother; that the latter asked the deceased to stop; that the next thing she heard were the shots, but that she did not see the shooting because she was trying to get to the outer door into the hall; that when she turned around she saw the deceased lying on the floor and thereupon told appellant Nickson that he should leave, which he did, but later returned, when she again told him to leave, with which request he complied. Appellant Turner testified that she saw the deceased's knife at the preliminary examination, that it was a green-handled knife, but this testimony is at complete variance with all the other testimony concerning the knife, which was that the same had never been located, and, so far as the record shows, it was never introduced in evidence. Appellant Turner testified she was in fear of her life at the time the deceased was advancing upon her.

Appellant Turner further testified that deceased Oran Young had taken the gun from his trunk that afternoon when he arrived home from work and had placed it in his dresser drawer so that she knew where it was because she observed him through a mirror; that she got the gun from the drawer and put it in the kitchen cabinet in a green bowl and when deceased advanced on her with the knife that she remembered where she had put the gun and grabbed it. That after Young had been shot she picked him up and put him

on the bed with the help of Mr. Dockins, and that after she had put him on the bed Young made another lunge at her with the knife.

Appellant Turner further testified that the reason she did not prosecute Young for the previous assaults made upon upon her with the knife was because of her fear that he would kill her; that she had gone to San Francisco for a period of a week on one occasion to escape him and had returned to Los Angeles only because she could not obtain a job in the north; that upon her return she stayed with her sisters and brothers and because of her fear of Young she arranged with her relatives to call for her at the street car, escort her home and to take her from her home to the car, all because of the fact that the deceased continued to molest her. She denied that the witness Washum had come into the apartment after the shooting. Prior to the shooting there had been a few words about drinking. That she, Virgie Mae Williams, Tom Johnson and Charlie Green were playing "Pokino" when the deceased came in, whereupon the following occurred: "He said that—I was telling him the doctor had released me to onct a week for the treatments I was taking. I was taking him twist a week, and I was telling him. He said, 'You are drinking again.' And I told him no, I wasn't drinking. He said I was a damn liar. This girl Virgie May said, 'Papa King, baby sister is not drinking. If she was I would tell you.' He said, 'I don't have any damn voice in this house.' I turned around and said, 'You have as much voice in the house as anyone else.' That is the argument from that."

It was about twenty or thirty minutes later, according to appellant Turner, that the deceased ordered her guests to leave, which they did. She denied telling officers that she had said that somebody out in the hall must have shot the deceased, but admitted that she had told the arresting officer that she did not know who had shot Young.

The witness Clarence Dockins lived in Room 23 at 123 North San Pedro Street. He was attracted by the shots and im-

mediately went to Room 19 where he was told by appellant Turner to call the police and telephone for an ambulance, which he did. He then picked up the deceased and placed him on the bed and testified he saw a knife lying between the table and the stove, that at that time deceased asked the witness to pick up the knife, which he refused to do. That the deceased also asked appellant Turner to pick up the knife, and she also declined. That the knife had a blade of approximately 5 or 6 inches in length. This witness further testified that approximately fifteen or twenty minutes before the homicide he had been in Room 19 with the deceased and appellant Turner, and that the former had forced him out of the room with a knife. This witness testified he had not seen decedent attempt to cut appellant Turner while the former was lying on the bed.

The contention that the evidence is insufficient to sustain the conviction of appellant Nickson is grounded on the claim that the only hypothesis the evidence will support is that the slaying was in self-defense, and that it was clear that appellant Nickson was entitled to invoke the right of self-defense for the protection of his sister against an attempt by the deceased to murder her or do her great bodily injury. It is further urged that there was no conflict in the evidence concerning the events leading up to and at the time Young was shot. That, therefore, the testimony given by the appellants was the only evidence upon which the court's decision could be based.

With reference to appellant Turner, it is asserted:

"The adjudging of appellant Turner guilty of voluntary manslaughter presents a most anomalous and incongruous state of affairs.

"Since the very nature of this offense makes it necessary to exclude as elements thereof such things as malice, premeditation, aiding, abetting, conspiring, concert of intent and the like it is an inescapable conclusion that she cannot be guilty of voluntary manslaughter under the evidence in this case.

"If her co-appellant is guilty of voluntary manslaughter she cannot be guilty; conversely, if she is guilty he is innocent.

"In the very nature of things both cannot be guilty. Of course, as regards her participation there is no evidence whatsoever to the effect that she pulled the trigger of the gun which killed Young."

[1,2] Application of the law of self-defense has been before the courts on many occasions, and it is now firmly established, as contended by appellants, that it is based on the reasonable appearance of imminent peril of death of, or serious bodily injury to the party assailed, or the one sought to be protected. However, it is equally well established in our law that while the right of self-defense is available to a defendant, the question of whether resort thereto was necessary or proper is a question of fact for determination by the jury or, in this case, by the trial judge.

In the instant case, it is readily apparent that the trial judge did not believe the testimony of appellants or of the witness Clarence Dockins, that the deceased was armed with a knife or that there was a knife in the room, but chose to believe the testimony of the officers that upon their arrival there was no knife in the room, and to rely upon circumstances to be hereinafter referred to.

[3,4] Where the evidence, circumstantial or otherwise, shows that a crime has been committed and that it was perpetrated by the defendant, the applicable rule is that on appeal the court will not retry the case, nor attempt to determine the weight of the evidence or the credibility of witnesses. Before an appellate tribunal is authorized to reverse a judgment upon the ground of "insufficiency of evidence", it must clearly appear that upon no hypothesis whatever was there evidence of sufficient substantiality to support the conclusion arrived at by the duly constituted arbiter of the facts. And this is true although the facts and circumstances shown in evidence might reasonably be reconciled with the innocence of the accused. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778.

[5] When analyzed, the case at bar presents a situation wherein it manifestly appears that the evidence was clearly in conflict.

There was testimony that appellant Nickson was standing out in the hallway just prior to the shooting and was standing in the hallway immediately thereafter; that he received a gun from his sister in the hallway, ran down the hallway, returned, received some money from her and then hurried away. That all of the shots were fired prior to the time that he received the weapon from his sister in the hallway. In addition to that, we have the testimony of both appellants with respect to threats and actual attacks with a knife by the deceased upon appellant Turner.

In conflict with their testimony given at the trial, we have the statement of appellant Nickson to police officers that he was not present at the time of the shooting, and that he was unaware of the same until he returned the following day to pick up his lunch pail. We also have the story told to police officers by appellant Turner, that the shooting was done from outside of the room; that the deceased was in the hallway at the time he was shot, and that she did not know who shot Young. Both of these statements, as well as the flight of appellant Nickson, are circumstances tending to evidence consciousness of guilt.

[6] Guilty knowledge, as well as intent to violate the law, may be shown by the facts and circumstances in the case, including the conduct of an accused, and any false or misleading statements he may make to the arresting officers or others with relation to material facts, for the purpose of misleading, or warding off suspicion. Such conduct is receivable in evidence as indicating a consciousness of guilt, and such false statements, though not conclusive of guilt, may strengthen inferences of guilt arising from other facts. *People v. Gibson*, 64 Cal.App.2d 537, 539, 149 P.2d 25; *People v. Amaya*, 44 Cal. App.2d 656, 659, 112 P.2d 942; 8 Cal.Jur. 43.

The evidence further shows that immediately after the shooting, appellant

Turner was standing over the deceased, who was at that time alive and sitting in a pool of blood, at which time she stated, "I told you it would happen if you drew a knife on me." From this the trier of facts was entitled to infer that there had been a quarrel as well as previous threats on the part of appellant Turner to do bodily harm to the deceased if he molested her. There is also the showing that appellant Turner saw the deceased obtain his gun from his trunk and place it in a drawer, that she took it therefrom and placed it in a cabinet, and that at the time she claimed he threatened her with a knife, she obtained the gun and had it in her hand pointing the same at the deceased. This statement is directly in conflict with what she told police officers.

The testimony of appellant Nickson given at the trial was substantially the same as that of his sister. He stated he took the gun from her hand, and upon being threatened by the deceased who was armed with a knife, that he then shot him five times. This also is in direct conflict with the statement this appellant gave to the police as hereinbefore set forth. There is further evidence that there was no knife in the room and that the deceased was not in possession of a knife at any time. There was further testimony concerning the empty cartridge shells which were found in the room on the floor, and that a bullet was found in the room, that a tracing of the course of the bullet showed that it had been fired from inside of the room which was in contradiction of the statement made to the police by appellant Turner that the deceased was shot from outside the room.

[7] Viewing the conflicting evidence in the light most favorable to the prosecution, as we are bound to do following a determination of guilt, it is manifest that the court gave credence to the testimony and circumstances tending to show that appellants acted in concert to attack the deceased, and that the latter was not in possession of a knife with which he was threatening or menacing them.

In view of the decision finding appellants guilty of manslaughter it would appear

that the court decided that the homicide was committed in the heat of passion or during a quarrel, thus constituting manslaughter (Penal Code, sec. 192, subd. 1). That there was a quarrel is substantiated by testimony that prior to the homicide deceased appeared to be in a contentious and quarrelsome mood, had ordered the guests of appellant Turner from the room, had argued with her relative to her drinking, and was resentful of the fact that he did not have "any damn voice in this house."

[8-10] There being substantial evidence that insofar as the events of the evening here in question are concerned, appellants were acting in concert, the question of which appellant actually fired the fatal shots is not of any great moment, and in that regard it is conceded that appellant Nickson did fire the shots. The liability of an accused for a criminal act is fixed by the provisions of sections 31 and 971 of the Penal Code, under the terms of which all persons "concerned" are principals, whether "concerned" directly, or by aiding and abetting in its commission. By these sections it is manifest that one who, not being the principal actor, but who assists in the commission of a crime, is regarded as a principal. One may aid or abet in the commission of a crime without having previously entered into a conspiracy to commit a crime. While the mere presence alone of an accused at the scene of a homicide is not sufficient to make him a participant, and while it does not necessarily follow that he is guilty because he does not prevent it, his presence sometimes may be a circumstance tending to support a finding that he is a principal. In the case now engaging our attention we are persuaded that there is evidence of such a character as to warrant the court in concluding that appellant Turner assisted or supplemented the efforts of appellant Nickson, with knowledge of the wrongful purpose of the latter, and by her actions and conduct incited, encouraged or aided him in the commission of a crime, thus making her liable as a principal for the offense of manslaughter, of which the court, upon substantial evidence, found appellant Nickson

guilty. *People v. Young*, 132 Cal.App. 770, 772, 23 P.2d 524; *People v. LeGrant*, 76 Cal.App.2d 148, 152, 172 P.2d 554.

It would appear to be the contention of appellant Turner that there can be no aiding and abetting in the commission of voluntary manslaughter; that because she did not "pull the trigger of the gun which killed Young", she cannot be held criminally accountable for his death. Appellant Turner's claim in this regard is devoid of merit. A complete answer to it is contained in what we have hereinbefore said, as well as in the cases of *People v. Marty*, 59 Cal.App. 503, 506, 507, 210 P. 964, *People v. Blackwood*, 35 Cal.App.2d 728, 732, 96 P.2d 982, and *People v. Latona*, 2 Cal.2d 714, 725, 43 P.2d 260.

From the foregoing it follows that the judgment and the order denying the motion for a new trial as to each defendant must be, and each is, hereby affirmed.

YORK, P. J., and DORAN, J., concur.



LINDENBERG v. MacDONALD et al.

Civ. 13650.

District Court of Appeal, First District,
Division 2, California.

July 21, 1948.

As Modified on Denial of Rehearing

Aug. 20, 1948.

Hearing Granted Sept. 13, 1948.*

1. Landlord and tenant ☞93

A lease authorizing landlords to terminate lease to erect new building was terminable on occurrence of conditions subsequent, the language defining which must be construed most strongly against landlords drawing lease.

2. Contracts ☞155

Any uncertainties existing in agreement are to be interpreted most strongly against the one who prepared the instrument and caused the uncertainties to be present.

* Subsequent opinion 214 P.2d 5.

3. Contracts ⇐318

A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. Civ.Code, § 1442.

4. Landlord and tenant ⇐93

A provision in lease authorizing landlord to terminate lease for purpose of tearing down building and erecting new building must be interpreted as a whole, and does not permit tearing down of building until made necessary by construction of new building, and does not permit landlords to tear down building and let land lie idle for extended period before erecting new building.

5. Landlord and tenant ⇐93

Under lease authorizing landlords to terminate lease for purpose of tearing down building and erecting new building, landlords must have legal power to erect new building before terminating lease, and landlords terminating lease without obtaining permit to construct new building from War Production Board were liable for damages sustained by tenant who vacated premises some seven months before building controls were relaxed and building was razed.

6. Landlord and tenant ⇐95

A binding contract of sale, and not merely landlord's good-faith expectation of making sale, warrants termination of lease containing provision authorizing termination in event of such sale.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action for damages for alleged unlawful termination of lease by Albert Lindenberg against Graeme MacDonald and others. From a judgment for the defendants, the plaintiff appeals.

Reversed.

Millard Smith of Vallejo, and Geo. Olshausen and Philander Brooks Beadle, both of San Francisco, for appellant.

Hoge, Pelton & Gunther and Leo V. Kilion, all of San Francisco, for respondent.

DOOLING, Justice.

Plaintiff has appealed from a judgment entered in favor of defendants following the return of a verdict directed by the court. The action was one for damages for the alleged unlawful termination of a lease. The plaintiff was operating a jewelry store as lessee in premises in the city of Vallejo under a written lease executed by defendants as lessors for a term ending December 31, 1945. The lease contained the following provision:

"Lessor may terminate this lease in the event that the existing improvements are to be torn down to make way for the erection of a new building on sixty (60) days written notice addressed to the lessee at 407 Georgia Street, Vallejo, California."

On November 28, 1944, defendants gave the following written notice to plaintiff:

"Arrangements have been made to tear down the building which you now occupy and a new building will be erected thereon as soon as you and other tenants have moved. All tenants have been notified. Therefore, I am now giving notice as required by the lease, for you to vacate the premises at 407 Georgia Street not later than January 31, 1945. I regret that you have to move at the present time, as I know the difficulties of finding a suitable location under the present conditions, but in order for me to make certain arrangements which I must do in Vallejo, I must erect this new building now. Hoping that this will not inconvenience you too much, I am, Very truly yours, Graeme MacDonald."

At that time the United States was engaged in the prosecution of the recent war with Germany and Japan and no building could be done without a permit from the War Production Board. Defendants had disclosed to certain officials connected with the War Production Board their desire to obtain a permit and had received verbal assurances that led them to believe that such permit would be granted. However they had not made formal application for a permit and did not in fact formally apply for a permit to the War Production Board until January 4, 1945. On January 23, 1945, this application was denied and two subsequent applications were denied on April 2

and June 16, 1945. In the meantime on January 13, 1945, pursuant to the notice of November 28, 1944, plaintiff quit the premises. They were afterwards let temporarily to another jeweler, who occupied them till the middle of August, 1945, at which time the building was razed in preparation for the construction of a new building. This was only possible because with the surrender of Japan all building controls were relaxed.

It was the theory of the trial court in directing the verdict that despite the fact that defendants could not legally construct the projected building without a permit from the War Production Board they were entitled to terminate the lease if they in good faith intended and expected to erect a new building. We cannot agree with this construction of the quoted provision of the lease.

[1-3] The lease was terminable upon the occurrence of a condition subsequent. *Los Angeles Athletic Club v. Board of Harbor Com'rs.*, 130 Cal.App. 376, 387, 20 P.2d 130. The language defining this condition must be construed most strongly against the defendants. At least two rules of construction compel this result: 1. The evidence shows that the lease was drawn by defendants. "Any uncertainties existing in an agreement are to be interpreted most strongly against the one who prepared the instrument and caused the uncertainties to be present." 4 Cal.Jur. 10 Yr. Supp., 1943 Revision, p. 135 and cases collected in note 5; *Pacific Lumber Co. v. Ind. Acc. Commission*, 22 Cal.2d 410, 422, 139 P.2d 892. 2. "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Civ. Code, sec. 1442; *Los Angeles Athletic Club v. Board of Harbor Com'rs.*, supra, 130 Cal.App. 376, 388, 20 P.2d 130; 6 Cal.Jur. 310 and cases collected in note 17.

[4] The condition in the lease, "in the event that the existing improvements are to be torn down to make way for the erection of a new building," must be construed as a whole and contemplates that the improvements are not to be torn down until the intended construction of the new building makes it necessary. The lease could

certainly not be terminated to permit the razing of the existing building if the defendants intended to let the land lie idle for any extended period before commencing the erection of a new structure. In *Southeastern Land Co. v. Clem*, 239 Ky. 417, 39 S.W.2d 674, the court said of a similar provision, 39 S.W.2d at page 676: "He could not terminate the lease and let the lot lie idle." Cf. *Donohue v. City of New York*, 54 Misc. 415, 105 N.Y.S. 1069.

Until a permit for the construction of the proposed new building had been granted by the War Production Board defendants could not legally engage in its construction. This they recognized. Defendant Gracme MacDonald testified at the trial that he did not intend to build without a permit and did not intend to demolish the existing structure until a permit to erect a new one had been obtained. He further testified that he knew that the board had the legal power to deny the permit.

[5] The question is thus squarely presented: Should the proviso of the lease "in the event that the existing improvements are to be torn down to make way for the erection of a new building" be construed to require that defendants have the legal power to erect a new building before they could exercise the right reserved to them to terminate the lease? The language will reasonably bear that construction. Defendants could not truthfully say that a new building was to be erected before they had obtained the necessary permit. The only accurate notice that they could give in the absence of a permit would be: "The existing improvements are to be torn down to make way for the erection of a new building *if we get a permit from the War Production Board.*" The proviso in the lease, however, is absolute, not conditional. That being so, construing it most strongly against the lessors, we must give it an unconditional construction.

[6] The precise question seems to be one of first impression. Support for our conclusion is found by analogy in those cases authorizing the termination of a lease in the event of the sale of the demised premises. The case uniformly holds that the good faith expectation of making a sale

does not justify the landlord's terminating the lease, nothing short of a binding contract of sale being sufficient to satisfy the condition. *Bellone v. Kleinau*, 54 Cal.App. 428, 201 P. 977; *Diamond Cattle Co. v. Clark*, 52 Wyo. 265, 74 P.2d 857, 866, 116 A.L.R. 912; *Allen v. Marino*, 133 Conn. 138, 48 A.2d 564; *John Hancock Mut. Life Ins. Co. v. Behr*, 229 Iowa 900, 295 N.W. 436.

Respondents rely on *Woods v. Postal Telegraph Co.*, 205 Ala. 236, 87 So. 681, 27 A.L.R. 834; *Southeastern Land Co. v. Clem*, supra, 239 Ky. 417, 39 S.W.2d 674, and similar cases holding that like conditions in leases are satisfied by a good faith intention to proceed with the erection of a new building. None of these cases is in point since in no one of them does it appear that the legal power to build was conditioned upon the obtaining of a permit which might be denied in the discretion of the licensing authority. Upon the facts proved the plaintiff is entitled to such damages as the jury may legally assess.

Judgment reversed.

NOURSE, P. J., and GOODELL, J. concur.



DILLARD et al. v. McKNIGHT et al.
Civ. 16116.

District Court of Appeal, Second District,
Division 1, California.

July 28, 1948.

Rehearing and Petition for Modification
Denied Aug. 20, 1948.

Hearing Granted Sept. 23, 1948.*

1. Judgment ⚡634

In determining the validity of a plea of *res judicata*, three questions are pertinent, was the issue decided in the prior adjudication identical with the one presented in action in question, was there a final judgment on merits, and was party against whom plea is asserted a party or in privity with a party to prior adjudication.

* Subsequent opinion 209 P.2d 387.

2. Judgment ⚡948, 948(1)

Doctrine of *res judicata* is usually regarded as a defense, but is equally available to plaintiff where circumstances warrant it, either by pleading it as an element of his cause of action, or in reply to defendant's answer, or where no opportunity for this is afforded, by introducing evidence of the former adjudication.

3. Judgment ⚡950

When the facts are not admitted, a plea of *res judicata* must be proved by proper evidence.

4. Judgment ⚡951(1, 4)

Although a judgment pleaded is an adjudication of the matter at bar and may have been rendered by the same court upon the same cause of action, and although such judgment and its supporting papers may be on file in the same court, the party pleading such prior adjudication carries the burden of establishing his plea which can be done only by actual proof of its records.

5. Judgment ⚡746

Where during the course of a trial plaintiffs failed either to plead or prove a former judgment, but proceeded to try the entire cause anew, thereby presenting for determination the very issues previously decided, plaintiffs waived their right to claim the benefit of the judgment rendered in the first trial under doctrine of *res judicata*.

6. Judgment ⚡746

A party who is entitled to claim the benefit of a former judgment may waive, or be estopped to assert the right.

7. Judgment ⚡746

Where a party joins issue on the very question settled by a judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it or makes an admission of record inconsistent with the former judgment, he will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment had been rendered.

8. Evidence ⚡594

Testimony which is not inherently improbable and is not impeached or contra-

dicted by other evidence must be accepted as true by the trier of facts.

9. Automobiles ⇨197(2)

Oil well driller who was carrying out employer's orders to hire another man, then return to scene of employment, was acting within scope of employment thereby charging employer with liability for a death occasioned by employee's negligence while driving an automobile owned by a third party several blocks from hotel at which prospect lived and on the only route to the hotel known by the employee.



Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Irene Dillard and another against General Jackson McKnight and others and James A. Bower and Robert A. Thorley for wrongful death of plaintiff's decedent in an automobile collision. From the judgment, plaintiffs appeal.

Reversed.

Dana R. Williams and Kenneth Sperry, both of Long Beach, for appellants.

Arthur C. Fisher, of Los Angeles, for respondent Thorley.

YORK, Presiding Justice.

It appears from the record herein that on July 24, 1941, Hodge L. Dillard died as the result of injuries sustained by him on the evening of July 20, 1941, in a collision at the corner of Avalon Boulevard and Artesia Street, in the County of Los Angeles, between a Pontiac coupe in which he was a passenger, and a Studebaker automobile then being operated by defendant McKnight in an allegedly negligent manner. The instant action to recover damages for wrongful death was instituted by the parents of the decedent against defendant McKnight; his employer, defendant Wilcox; W. J. Neville, the owner of the Studebaker car; the Thorley Oil Company; and several fictitiously named defendants.

On August 11, 1942, the cause went to trial on the first amended complaint, at the conclusion of which a motion for non-

suit was granted as to defendant Thorley Oil Company, and on September 2, 1942, judgment was entered in favor of plaintiffs against defendants McKnight and Wilcox for the sum of \$7,500, and also in favor of the defendant Neville, it being found by the court therein that "at all times herein mentioned, defendant, General Jackson McKnight, was the agent, servant and employee of the defendants herein, and that he was acting within the scope of his employment as such agent, servant and employee." This judgment was returned unsatisfied on November 5, 1942.

Thereafter service was made upon defendants Thorley and Bower, who had been sued as Doe V and Doe IV, respectively, and on August 16, 1944, the first amended complaint herein was amended to show the true names of these two defendants in place of such fictitious names.

On September 12, 1946, the cause came to trial before the same judge for the second time during the course of which defendants Bower and Thorley were examined as witnesses. At the conclusion of said second trial, it was found by the court that "as a direct and proximate result of the negligence of the defendant General Jackson McKnight, and by reason of the accident and the injuries received by the said Hodge L. Dillard, his death resulted on July 24th, 1941. * * *

"* * * that on the 20th day of July, 1941, the defendant General Jackson McKnight was employed by the defendants J. F. Wilcox, Robert A. Thorley and James A. Bower, as a driller on a well being drilled to attempt to produce oil near the corner of Main Street and Sepulveda Boulevard, in the County of Los Angeles, State of California.

"* * * that at the time of the accident herein described, and which resulted in the death of Hodge L. Dillard, the defendant General Jackson McKnight was not acting within the scope of his employment as the agent, servant or employee of said J. F. Wilcox, Robt. A. Thorley, or James A. Bower, or of any other defendant named in the amended complaint filed in this action."

Accordingly, judgment was entered on December 27, 1946, in favor of defendants Thorley and Bower.

This appeal is prosecuted from such judgment by the plaintiffs, it being urged by them that "The only finding which supports the judgment is without substantial support in the evidence", to wit: the finding that defendant McKnight was not acting within the scope of his employment at the time of the accident, in that "(A) The former judgment herein, wherein it was found that the defendant McKnight was acting within the scope of his employment as an employee of the defendant J. F. Wilcox is res adjudicata and conclusive on that issue as against the defendants Robert A. Thorley and James A. Bower, who were admittedly co-partners and joint employers of the defendant McKnight. * * * (B) The findings of the trial court with respect to whether the defendant McKnight was acting within the scope of his employment at the time of the accident are contrary to the undisputed evidence in the case."

It is undisputed that early in July, 1941, defendant Wilcox was drilling an oil well close to the corner of Main Street and Sepulveda Boulevard, near the town of Lomita; that defendant Thorley invested some money in this venture and on July 14, 1941, as a limited partner, executed Articles of Limited Partnership (which were never recorded) in connection with such investment; that six days later the defendant McKnight, who was then, and theretofore had been, employed as a driller by defendant Wilcox, became involved in the accident heretofore mentioned.

Defendant Wilcox was called as a witness in the second trial herein, and testified that in the latter part of June, 1941, he started oil drilling operations on 200 acres of land which he had under lease at Main and Sepulveda; that defendant Bower helped finance the venture on a 50/50 basis, and early in July they ran out of money; that thereupon they began negotiations with defendant Thorley, president of the Thorley Oil Company, who operated a producing oil well located on property owned by him at 618 West 124th Street, in the City of Los Angeles; that as a re-

sult of these negotiations defendant Thorley agreed to help finance the Wilcox well for which he was to receive "25% interest in the well and that particular block the well was to be drilled on and some acreage * * * I believe 50% of what we had left"; that at the same time the Articles of Limited Partnership heretofore mentioned were executed. This witness also testified that within a few days thereafter, defendant Thorley suggested that Mr. Bob Hickerson, an employee of the Thorley Oil Company, be placed in charge of the drilling operations at the Wilcox well, which was done, and that Dr. Thorley also placed his own petroleum engineer on the job at the said Wilcox well.

Defendant McKnight testified that in June of 1941 he was hired by defendant Owen to work as a driller on a well, known as Wilcox No. 1, located near Main and Sepulveda; that at first he took orders from Owen and later from Bob Hickerson; that he worked an eight-hour shift and on July 20, 1941, he went to work at 4:00 p. m.; that they were short a derrick man; that Hickerson "come out there to the rig and I told him I needed another derrick man. He said, well, go ahead, that he didn't know where to get one, if I knew where to get one to hire him. * * * he said any time I could find one, any time one come around to hire him, that it was all right with him." This witness also testified that when Hickerson started to leave the well on that day he could not get his car started and asked the witness to give him a push; that he was not able to push the car so he "went back to the rig and got a rope and pulled him up Main Street there to Carson to the filling station, and there wasn't no mechanic on duty on Sunday evening, and he told me to pull him on down to Normandie on Carson. * * * and there was no mechanic there, and he said 'pull me down', over to a lease somewhere on Figueroa." They then cut through to Figueroa and continued to 124th Street, the location of the Thorley Oil Company well, where he left Hickerson and "started back to the well. * * * it was getting along about sundown when I started to pull his car. * * * Being summertime it was late, about 8:00 when

it is supposed to be getting dark." That he turned into Figueroa Street and "missed the Main Street crossing there or I crossed it and didn't see the sign, and I thought I would go on over to Truck Boulevard and see this roughneck and get him to come out the next evening if I could not get him to come out that night. * * * I was going to hit Truck Boulevard and go through to Wilmington to see this roughneck and go back to the well"; that the man lived about three blocks west of Truck Boulevard; that he made no stops at any place except boulevard stops from the time he unhooked Hickerson's truck until the time of the accident, which occurred before he reached Truck Boulevard. This witness also testified that before he left Hickerson at the Thorley lease, the latter "told me, when I got back to the lease (Wilcox well) to tell the driller when he come on to put on a new bit and not to carry more than two points, and the bit would stand that. * * * He told me to tell Casperia on the morning tour—when I got back to the rig, he said tell him if the bit is dull * * * to run in a Smith rig drill bit in the hole and not to carry over two points weight." With respect to this incident, the following took place:

"Q. What time was this Casperia coming on duty that night? A. 12:00 o'clock.

"Q. What time was it, to the best of your knowledge, when you were talking to Mr. Hickerson at the Thorley Oil Company lease? A. Well, it was sometime after dark—it must have been between 9:00 and 10:00. I didn't have any watch.

"Q. Whose car were you driving at that time. A. Jack Neville's. * * *

"Q. When you left the place at 124th and Figueroa, where were you intending to go? A. Well, I was going to go back to the rig until I missed Main Street, and then I thought I would go and pick up the derrick man if I could get him. * * *

"The Court: What time was it you came on duty that night. A. 4:00 o'clock.

"The Court: What time was it you started to pull this other man's car? A. Well, it was about, it was getting along about sundown, and some time in the evening, it must have been about 7:30 or 8:00—

"The Court: 7:30 or 8:00? A. I pulled up to Carson and Main.

"The Court: How long did it take you to pull up to Carson and Main? A. I imagine about an hour and a half.

"The Court: An hour and a half to pull how far? A. Oh, we stopped at two stations.

"The Court: Yes. A. I guess it must have been about eight or nine miles, isn't it? 124th and Figueroa to Main—right under the viaduct there at Wilmington. It must be eight or nine miles or ten, I don't know how far.

"Q. By Mr. Sperry: Well, did you intend to try to get the man to come back with you that night? A. Or leave word for him if he wasn't home. I was going to leave a card there for him. * * *

"Q. And after you went by there where did you intend to go? A. Back to the rig. I had to work on until midnight.

"Q. About how far was it from the rig to this place in Wilmington where you intended to pick up this man? A. Well, I should about half a mile, I guess. * * * I don't know exactly. * * *

"The Court: I think you can stipulate on that, that it was about three miles easily, couldn't you? * * * From where the Main Oil Company lease was to where the Victory Hotel was * * * it must have been a good three miles, three miles and a half."

The accident occurred at approximately ten o'clock in the evening of July 20, 1941.

[1] In discussing the doctrine of res judicata, our Supreme Court in *Bernhard v. Bank of America*, 19 Cal.2d 807, 813, 122 P.2d 892, 895, states: "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

There is no doubt that the facts presented at the instant trial constitute an affirmative answer to these questions. However,

as stated by appellants in their memorandum of points and authorities supporting their motion for a new trial herein, "the only real issue presented upon the second trial related to the nature of the relationship between Wilcox and the defendants Bower and Thorley." The articles of limited partnership executed by James F. Wilcox, general partner, and Robert A. Thorley, limited partner, were introduced in evidence at this, the second trial, which definitely placed defendant Thorley in privity with defendant Wilcox, against whom the judgment in the first trial was rendered. Having proved the relationship, it then became incumbent upon appellants to claim the benefit of the first judgment and thus bind the defendant Thorley.

[2-4] As stated at 50 C.J.S., Judgments, § 596, page 14: "While the doctrine of res judicata is usually regarded as a defense, it is equally available to plaintiff where the circumstances warrant it, either by pleading it as an element of his cause of action or in reply to defendant's answer * * * or, *where no opportunity for this is afforded, by introducing evidence of the former adjudication* * * *." And "When the facts are not admitted, a *plea of res adjudicata must be proved by proper evidence.*" 50 C.J.S., Judgments, § 836, page 404. (Emphasis added.) See also, Johnson v. Ota, 43 Cal.App.2d 94, 97, 110 P.2d 507, 509, wherein it is stated: "Although the judgment pleaded was an adjudication of the matter at bar and may have been rendered by the same court upon the same cause of action, and although such judgment and its supporting papers may be on file in the same court, still the party pleading such prior adjudication carried the burden of establishing his plea which can be done only by actual proof of its records. Glaze v. Bogle, supra [105 Ga. 295, 31 S.E. 169]."

[5] During the course of the instant trial, appellants failed to either plead or prove the former judgment, but proceeded to try the entire cause anew, thereby presenting for determination the very issues previously decided. By so doing, appellants have waived their right to claim the

benefit of the judgment rendered in the first trial herein.

[6] Apropos of this, the following appears in 50 C.J.S., Judgments, § 597, page 15:

"A party who is entitled to claim the benefit of a former judgment may waive, or be estopped to assert, the right.

[7] "Although it has been said that, when a cause has been once fairly tried, it ought not to be tried again, even if the parties are willing, it is nevertheless a general rule that a party entitled to claim the benefit of a former judgment may waive or estop himself to assert such right. So, where a party * * * *joins issue on the very question settled by the judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it*, or makes an admission of record inconsistent with the former judgment, he will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment had been rendered. [Cooley v. Snake River Dist. Impr. Co., 78 Or. 384, 152 P. 1190; 34 C.J. p. 750, note 19.]" See, also, Freeman on Judgments, 5th Ed., p. 1715, sec. 808; Domestic and Foreign Petroleum Co., Ltd. v. Long, 4 Cal.2d 547, 562, 51 P.2d 73; 15 Cal.Jur. 214, sec. 233.

Appellants urge that the "findings of the trial court with respect to whether the defendant McKnight was acting within the scope of his employment at the time of the accident are contrary to the undisputed evidence in the case."

[8] The testimony of defendant McKnight hereinabove summarized discloses that he was employed as a driller and was in charge of the drilling operations in the absence of the superintendent, Bob Hickerson; that the latter had requested him to hire another man at any time he could find one; that the witness knew of a man whom he thought he could get but he did not know his telephone number; further, he had no automobile of his own. Thus the circumstances as depicted by the evidence presented an opportunity for the witness McKnight to drive by the hotel where the roughneck lived and make ar-

rangements for the latter to come to work at the well. The undisputed evidence is that the Truck Boulevard went within three blocks of the hotel where the roughneck lived and that this was the only route with which McKnight was familiar. The accident occurred while he was en route to the hotel in Wilmington to see the so-called roughneck. Since the witness was carrying out an instruction of his employer at the time of the accident, in the face of another instruction to return to the well, it cannot be said that there was such a deviation as to support a finding that he was not acting within the scope of his employment.

As stated in *Gomez v. Cecena*, 15 Cal.2d 363, 366, 101 P.2d 477, 478: "While no universal and immutable formula can be prescribed for determining the weight to be accorded testimonial evidence, it has frequently been said that testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by the trier of fact. *Michaels v. Pacific Soft Water Laundry*, 104 Cal.App. 366, 286 P. 172; *Shepard v. Shepard*, 65 Cal.App. 310, 223 P. 1012; *Hynes v. White*, 47 Cal.App. 549, 190 P. 836; *Lee Sing Far v. United States*, 9 Cir., 94 F. 834; see *Wigmore on Evidence*, 2d Ed. § 2034." Similarly, in *Fidelity & Casualty Co. v. Abraham*, 70 Cal.App.2d 776, 782, 161 P.2d 689, 692, it was held: "But the settled rule is that the uncontradicted and unimpeached testimony of a witness cannot be arbitrarily disregarded." And in the late case of *Dobson v. Dobson*, 86 Cal.App.2d 13, 193 P.2d 794, the rule was repeated: "Testimony, which is not inherently improbable and is not impeached or contradicted by other evidence, must be accepted as true by the trier of fact."

[9] Applying the foregoing principle of law to the facts here presented, it is obvious that the finding to the effect that the employee McKnight was not acting within the scope of his employment at the time of the accident is without support in the evidence.

For the reasons stated, the judgment appealed from is reversed.

DORAN and WHITE, JJ., concur.

BARTHOLOMEW et ux. v. STAHeli et al.

Civ. 7473.

Sac. 5892.

District Court of Appeal, Third District,
California.

July 22, 1948.

Hearing Denied Sept. 13, 1948.

1. Easements ⇨36(3), 55

In suit to enjoin overburdening of roadway easement by use arising from defendants' operation on their adjoining property of nudist colony and pleasure resort as commercial enterprises, evidence sustained finding that the defendants, their family, employees and personal guests had acquired an easement to use the private roadway but that the defendants had not acquired by adverse possession or otherwise the right to increase that burden by use for commercial purposes.

2. Easements ⇨36(1)

Parties who claimed acquisition of adverse right to enjoy roadway easement over adjoining property in connection with operation of a nudist colony and resort had burden of proving that road had been so used openly, notoriously, and continuously, with a claim of right to do so for statutory period of five years or more. Civ.Code, § 806.

3. Easements ⇨41

Where easement is acquired by prescription, extent of right is fixed and determined by manner of use in which it originated. Civ.Code, § 806.

4. Easements ⇨41

An easement acquired by prescription cannot be extended or increased so as to enlarge the burden except by grant or by adverse user which has been acquiesced in for required statutory time. Civ.Code, § 806.

5. Easements ⇨44(1)

Where property was purchased for, and during many subsequent years was operated as, a home and farm and it was for such purposes only that roadway easement over adjoining property was acquired, use of roadway in connection with the operation of a nudist colony and pleasure resort

was an unauthorized increased burden and a harmful imposition upon property rights of servient tenement, which could not be justified in absence of grant or evidence of prescriptive use of increased burden for statutory period. Civ.Code, § 806.

6. Easements ⚡55

Complaint alleging that defendants maintained a nudist colony on their ranch and invited public to patronize their various enterprises and to use private roadway across adjoining property for that purpose and which alleged facts showing an increase of burden of easement beyond defendants' prior personal use of roadway raised issue of unauthorized enlargement of easement over the roadway and trial court did not err in adopting findings and in determining that issue.

7. Easements ⚡55

In suit to enjoin overburdening of roadway easement by alleged unauthorized use, trial court's findings sufficiently described roadway and servient tenement over which it passed by reference to paragraph of supplemental complaint and to exhibit of defendants which consisted of a surveyor's diagram specifically showing the boundaries, courses and distances of the roadway.

8. Highways ⚡15

Private roadway could not become public highway merely by user for long period of time in absence of acceptance or declaration by board of supervisors or use by public generally prior to year in which statute providing that no route of travel over another's land shall become a public road until so declared by board of supervisors or by dedication, was adopted. Pol. Code, §§ 2619, 2621.

9. Highways ⚡17

In suit to enjoin overburdening of roadway easement by alleged unauthorized use, evidence that the land over which roadway extended was acquired in 1920 by state and thereafter maintained until bought by plaintiffs in 1943 as an industrial farm for women and later as a home for epileptics, during all of which time the state maintained gates and cattle guards across the road, and that defendants pur-

chased their adjoining land in 1929 and thereafter maintained an iron gate at point where roadway entered their property sustained finding that roadway had never been a public road or highway.

10. Dedication ⚡16(1)

Intention of landowner to dedicate a roadway as a public highway must be shown by clear and unequivocal acts or declarations.

11. Appeal and error ⚡1008(1)

Whether roadway was dedicated as a public highway was question of fact for trial judge, whose decision thereon was binding on appellate court unless there was no substantial evidence to support finding in that respect.

12. Dedication ⚡44 Highways ⚡68

In suit to enjoin overburdening of roadway easement by alleged unauthorized use, evidence among other things, that gates were maintained across roadway, sustained finding that roadway was never dedicated to public use by grant, or by judgment, or by decree which directed the sale of certain properties of estate and provided that all ways appearing on map were public ways.

13. Easements ⚡55

Owners of servient tenement were entitled to an injunction to prevent a continuation of overburdening by adjoining property owners of their easement to travel private roadway as a means of ingress and egress to and from their home and farm as a dwelling place and agricultural enterprise.

14. Easements ⚡55

Injunction properly issued to prevent continuation of unlawful acts which would deprive owners of servient tenement of full enjoyment of their property rights and to preclude excessive and unwarranted use of roadway easement by adjoining property owners from ripening into prescriptive use thereof.

15. States ⚡89

Property owned by the state is held in trust for people of the state and may not

be lost or abandoned through negligence of its officers or agents.

16. Limitation of actions Ⓒ60(1)

Where state held title to and occupied and used property for state purposes from 1920 to 1943 but during that period maintained gates and cattle guards on roadway across the property and also received rents, issues and profits from the property, and although nudist colony on adjoining property may have been established in 1934, burden on roadway easement was greatly increased in 1943 and 1944, action by successors in interest of state to enjoin allegedly unauthorized increase in use was not barred by ten-year statute of limitations. Code Civ.Proc. § 315.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Frank H. Bartholomew and wife against Emma Staheli, Victor H. Staheli and others to enjoin use of private roadway across plaintiffs' land, except for limited purpose. Judgment for plaintiffs and the named defendants appeal.

Affirmed.

J. H. Brill and E. C. Berger, both of San Francisco, for appellants.

Geary & Tauzer, of Santa Rosa, and Cooley, Crowley & Supple, of San Francisco, for respondents.

THOMPSON, Justice.

The defendants Emma Staheli and Victor Staheli were enjoined from using a private roadway across plaintiffs' land, except for the purpose of travelling thereon to and from their adjoining farm. The injunction prohibits defendants from overburdening their easement to use their private right of way over plaintiffs' land by inviting greatly increased travel of vehicles by means of which members and customers of defendants' nudist colony, resort and store were encouraged to patronize those enterprises conducted for pecuniary profit. From the injunction and judgment which was accordingly rendered this appeal was perfected.

The appellants contend: That the findings and judgment are not supported by the evidence; that defendants acquired adverse possession of the right of way for all purposes; that the roadway was dedicated for public use; that plaintiffs are estopped from asserting a limited easement of the roadway by a partition decree with respect to the property, which was rendered in 1906 in the matter of the estate of Kate Johnson, deceased.

The plaintiffs purchased from the State of California in 1943 the property, consisting of 435 acres of farm land, upon which the roadway in question exists. The property contained a large dwelling house, barn and other buildings, together with several acres of orchard. The State acquired that land in 1920 from Henry Cailleaud, who bought it from the Kate Johnson estate in 1906. The property was used and maintained by the State for many years, incident to the Sonoma State Home, as an Industrial Farm for Women, and thereafter as a home for epileptics. During said time, and prior thereto, a twelve-foot meandering dirt roadway existed on the property, which roadway entered from a state highway on the southwesterly side and extended across the land a distance of about one mile to the northeast boundary where it entered defendants' adjacent farm property. The defendants bought their ranch in 1929. During all of said time plaintiffs and their predecessors in title maintained gates and cattle guards on said roadway at their southwesterly boundary and beyond the buildings situated midway on the course of said road. The gates were usually kept closed and locked, but the defendants were furnished keys to the padlocks for their personal use. An iron gate was also maintained by the defendants across the road where it entered their property. That gate was also sometimes locked and a sign reading "No trespassing" was displayed thereon. The road extended to the dwelling house and buildings which were maintained on defendants' farm, but it did not pass through or beyond their ranch, or connect with any other road or highway. Their property was originally used by the defendants exclusively as a home and farm. It was known as the "Fir

Crag Ranch." Sometime before the commencement of this action the defendants organized and maintained on their ranch a nudist colony, a resort for renting cottages, a public dining room and a store. Those enterprises were conducted by the defendants for financial profit. On their said gate defendants displayed signs reading "Sun-O-Ma Club" and "Private Club; No trespassing." Subsequently the Club was called "Nature's Recreation Association." Defendants distributed circulars and displayed signs directing their prospective guests and patrons to write to them at their Post Office Box 263 at Sonoma for further information. Dues for memberships in the nudist colony, and bills for entertainment and patronage of guests at the resort and for purchases by customers at the store were paid to defendants. The maintenance of the nudist colony and the advertisements induced vastly increased travel over the roadway across plaintiffs' land, to their great detriment. The defendant Emma Staheli admitted that in June, 1944, they registered at their resort forty or fifty families per week. The plaintiff Frank Bartholomew testified he observed as many as 500 automobiles per week traveling that roadway during the summer of 1944. He said many of them were operated at excessive rates of speed, with mufflers open and with unusual noise and commotion, that they passed his home in the daytime, throughout the nights and on Sundays, raising clouds of dust which settled over his orchard and destroyed one-half of his fruit crop, and that the dust, the noise and tumult greatly disturbed their peace and comfort. He also said that the gates were damaged, torn from their hinges, and left open, and that the cattle guards were changed for convenience of the machines, and that his cattle were thereby enabled to escape from their enclosure and to stray to remote localities, which they did to his great inconvenience and damage, that he wrote to the defendants in 1944, and talked with Emma Staheli on one occasion as she drove through his property, protesting against the damages incurred and the increased use of the private roadway. He said: "I talked to her about the damage to the road and the gate

having been left open," and she replied that "she regretted it but couldn't be responsible for people living on her place, for their acts and what they did."

This suit for injunction was commenced July 31, 1944, to restrain the defendants and their agents from inducing or permitting the damage or destruction of plaintiffs' gates, cattle guards and roadway, and the increased burden on the easement created by the maintenance on defendants' ranch of the nudist colony and pleasure resort as commercial enterprises. The defendants' answer merely denied the material allegations of the complaint. A temporary restraining order was issued. That order was modified July 13, 1945, to prohibit defendants or their agents from removing or damaging the gates and from traveling over the land of plaintiffs, except upon and along "public ways, roads, and streets," designated as such "in Book 21 of Maps, Pages 1 and 2, Sonoma County Records." An amended answer was filed in October, 1945, in which the defendants, for the first time, affirmatively alleged title to an easement in the road in question by adverse possession, dedication of the roadway as a public highway, and an easement derived through plaintiffs' predecessor in title, Henry Cailleaud, in the suit in the estate of Kate Johnson, deceased, previously mentioned. A second amended and supplemental complaint was filed, by leave of court. The trial began November 7, 1945. A vast amount of oral and documentary evidence was adduced. The transcript contains over 1800 pages. There is much conflict upon the essential issues of the case. The able trial judge wrote a learned opinion, carefully reviewing the evidence and applying the essential principles of law. He adopted findings favorable to plaintiffs upon all issues, except that he determined the defendants and their family, employees and personal guests had acquired an easement in the private roadway described in Defendants' Exhibit "A", for traveling to and from their "real property as a single family dwelling and farm," but "not for resort, commercial, subdivision, or other purposes." A judgment was rendered accordingly, permitting the defendants, their family, employees and personal guests to con-

tinue to use and travel said private roadway for such limited purpose, but prohibiting and enjoining them from increasing the burden on said easement by using or traveling said roadway "in connection with the conduct or maintenance of a nudist colony, or in connection with any resort, subdivision, or for any commercial purpose."

[1,2] We are of the opinion the findings and judgment are amply supported by the evidence. The evidence in this case upholds the finding of the court that defendants, their family, employees and personal guests acquired an easement to use the private roadway in question in connection with and as a single family dwelling and farm only. But our attention is called to no evidence, and we have been unable to find any in the record, to support appellants' contention that they acquired by adverse possession or otherwise the right to increase that burden so as to authorize the use of the road by vast numbers of machines and individuals who visited defendants' premises in 1943 and 1944, as members of the nudist colony, to rent summer cottages and to patronize the dining room and store which were maintained and conducted by defendants for some eighteen months prior to June, 1944, for the purpose of deriving pecuniary profit. The evidence clearly shows that such unauthorized increased travel and patronage of the nudist colony and resort occurred chiefly in 1943 and 1944, just prior to the commencement of this suit. We are directed by the appellants to no evidence showing that they had acquired an adverse right to enjoy their easement with its greatly increased burden and unreasonable enlargement, by proof that the road had been so used openly, notoriously and continuously, with a claim of right to do so, for the statutory period of five years or more. The burden was on the defendants to furnish that evidence in support of their claim of an easement with its increased burden. They failed to do so. The record is quite clear that defendants purchased their ranch in 1929 to be used for, and during many subsequent years operated it as, a home and farm, raising crops and grazing cattle thereon. It was for those purposes only that they originally ac-

quired an easement by permission of the former owners of plaintiffs' land to travel that roadway for their personal accommodation. It was not until recent years that the nudist colony and summer resort enterprises were established and developed into such detrimental and harmful enterprises. The easement for access to a tranquil home and farm was converted into a turbulent route to reach a hilarious nudist colony. That unauthorized change of burden on the easement was a harmful imposition upon plaintiffs' property rights. The court found that the roadway in question was not the only means of access to defendants' land. It is not claimed that said right of way or an easement therein was ever conveyed by deed or grant to the defendants on their predecessors in title. They failed to establish their claim to the enlarged easement by prescription. The court specifically found that they had acquired no such enlarged or increased rights. The evidence supports that finding. Regarding the burden which was imposed on the defendants to satisfactorily prove their claim of adverse possession of the enlarged easement, it is said in *Dooling v. Dabel*, 82 Cal.App.2d 417, 186 P.2d 183, 186:

"* * * The burden is ordinarily on one who claims a prescriptive right to an easement in a private roadway over another man's property to affirmatively prove the essential elements thereof. * * * But, when the evidence of prescriptive use of a roadway is conflicting, it is the sole province of the jury or the trial judge to determine from the facts and circumstances of the case whether the prescriptive title thereto has been established. Where there is a conflict of evidence in that regard, and there is substantial evidence to support the findings of the court or jury, as there is in this case, the conclusions of the court may not be interfered with on appeal. *Conaway v. Toogood*, 172 Cal. 706, 709, 158 P. 200; *McMorris v. Pagano*, 63 Cal.App.2d 446, 450, 146 P.2d 944."

[3,4] When an easement is acquired by prescription, the extent of the right is fixed and determined by the manner of use in which it originated. An easement acquired by prescription cannot be extended

or increased so as to enlarge the burden except by grant or by adverse user which has been acquiesced in for the required statutory time. One who has acquired an easement by prescription or by grant may not use it to impose a substantial increase or change of burden on the servient tenement. 28 C.J.S., Easements, § 76b, page 754; 9 Cal.Jur. 950, sec. 6; Civil Code, sec. 806. In the case of *Hannah v. Pogue*, 23 Cal.2d 849, on page 854, 147 P.2d 572, on page 574, the Supreme Court says in that regard:

"* * * The scope of a prescriptive easement is determined by *the use through which it is acquired*. A person using the land of another for the prescriptive period may acquire the right to continue such use, *but does not acquire the right to make other uses of it*. [Citing numerous authorities.]" (Italics added.)

Likewise, in *North Fork Water Co. v. Edwards*, 121 Cal. 662, 54 P. 69, 70, regarding an easement acquired over defendant's land for the maintenance of an irrigating ditch, the Supreme Court said:

"* * * Every easement includes what are termed 'secondary easements'; that is, the right to do such things as are necessary for the full enjoyment of the easement itself. But this right is limited, and must be exercised in such reasonable manner as not to injuriously increase the burden upon the servient tenement. The burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate by any alteration in the mode of enjoying the former. The owner cannot commit a trespass upon the servient tenement beyond the limits fixed by the grant or use."

[5] The authorities in California and elsewhere uniformly support the foregoing principle of law that the extent of an easement may not be enlarged except by grant or by evidence of prescriptive use of the increased burden for the statutory period required by law. We conclude that the court was justified in finding that the defendants had not acquired, by prescription, the asserted increased burden beyond the original easement to personally travel the private roadway incident to the enjoyment of

their home and farm, so as to entitle them to invite large numbers of the members and patrons of their nudist colony, the summer resort, dining room and store, to travel the private roadway to patronize those commercial enterprises, to the detriment of plaintiffs' property rights.

Indeed, the defendant Emma Staheli recognized the unauthorized use of the road by large numbers of the members of the nudist colony in 1944. She testified that in June and July of that year forty or fifty families came to their property over the week-ends. She said there was no official convention or meeting of the members of that organization at their ranch that year. She, however, denied that defendants were then operating the nudist colony, and asserted that "Mr. Ghilieri operated the Club" that year; that they proposed to sell the ranch to him. She said, "He has intentions of buying" the property. Regarding defendants' intention of continuing to operate the ranch as they had during the preceding eighteen months, for commercial profit from said enterprises, she testified as follows:

"Q. It is your intention to continue to use this road in the manner in which you have used it *during the last eighteen months* * * *? A. My future plans, of course, are renting or selling the lower 160 and carry on above at the ranch *as I always have*. The Club is not in existence and naturally it wouldn't be used in that respect. * * *

"Q. So am I to understand from that that you have no plan to operate it as a club of the type that has been operated in the past? A. That is right."

But the court was not bound by her statement that it was their intention to abandon the use of their farm for maintaining the nudist colony. If the witness was in good faith regarding the abandoning of their nudist colony enterprise, the defendants were not aggrieved by the injunction which restrains them from using the roadway for that purpose. Certainly the use of the road, as the evidence shows that it was used, constituted an unauthorized increased burden on the easement which they had acquired.

[6] The appellants contend that the alleged unauthorized enlargement of the easement over the roadway was not an issue in the case, and that the court erred in adopting findings to that effect and in determining that fact. We think not. The original complaint alleged that the defendants maintained on their ranch a nudist colony, swimming tank, cottages, public dining hall and store, and that they invited the public to patronize those enterprises and to use said private roadway for that purpose. No demurrer to that complaint was filed. Subsequently, by leave of court, a second supplemental complaint was filed, in Section VII of which plaintiffs more specifically alleged the maintenance of said commercial enterprises on defendants' ranch and their invitations for the public to use said roadway in patronizing the Club, store, cottages and dining room. The facts alleged therein clearly show an unauthorized use of the road by the public and members of the club, and the consequential increase of burden of the easement beyond defendants' previous personal use of the private roadway. The issue of the unauthorized enlargement of the easement was adequately pleaded. The case was tried on the theory that it was an issue to be determined. The court did not err in adopting findings and in determining that issue. The court definitely and properly found that defendants' use of the roadway "created an additional burden upon said right of way in that it greatly increased the vehicular travel thereover."

[7] Finding II sufficiently describes the twelve-foot roadway in question and the servient tenement over which it passes, by reference to paragraph II of the supplemental complaint and to defendants' exhibit "A", which was a surveyor's diagram specifically showing the boundaries, courses and distances of the roadway. *McLean v. Ladewig*, 2 Cal.App.2d 21, 37 P.2d 502; *Newport v. Hatton*, 195 Cal. 132, 156, 231 P. 987; *Reed v. Murphy*, 196 Cal. 395, 400, 238 P. 78. The diagram of the road was prepared by the defendants, referred to throughout the trial, and offered by them as exhibit "A". The court finds that it was "the only road across Plaintiffs' property by which Defendants have obtained in-

gress to and egress from their said property." The description and identity of the road is adequate and sufficiently accurate. The courses, distances and boundaries were not questioned at the trial.

The case of *Matthiessen v. Grand*, 92 Cal. App. 504, 268 P. 675, upon which the appellants rely in support of their contention that the court failed to adequately describe the roadway in question, is clearly distinguishable from this action. That was a suit to quiet title to a roadway. In a cross-complaint the defendant claimed to have acquired an easement therein by prescription. The evidence showed that the defendant frequently varied from the course of the old road in question in traveling to and from his premises. In that case the chief issue was the location and course of the roadway to which plaintiff sought to quiet title. It was uncertain as to whether the findings and judgment in favor of the defendant covered the course of the old road or the route of departure therefrom which was sometimes followed by the defendant. There was a surveyor's map of the road which was offered in evidence. But it was not referred to in the findings or judgment. There was no way of determining the location or course of the roadway to which the defendant was adjudged to have acquired title by prescription. For that reason this court reversed the judgment, saying in that regard, 92 Cal.App. at page 511, 268 P. at page 678:

"* * * The obstruction complained of by respondents, the maintenance of which was enjoined by the court, was placed across one of these departures from the old roadway, which change was claimed to have been made in 1922, two years before the action was commenced. The only evidence of the course of travel, the distances, or termini, or location of the alleged changes, was furnished by a surveyor's map which was offered by appellant. *Neither this map nor the data furnished thereby is referred to in the findings or judgment.*" (Italics added.)

In the present action, unlike the *Matthiessen* case, both the findings and judgment do refer not only to the complaint but to exhibit "A" for a description of the roadway, and also further describe the road

in question. We think the description is adequate.

[8] The appellants contend that paragraph "V" of the findings, which determines that the roadway in question was never dedicated by user or accepted as a public road or highway, and that "said road is not now and never has been a public road or highway," is not supported by the evidence. They claim the roadway became a public highway by user for a long period of time. We think not. The statute precludes the acquiring of a public road in that manner. Section 2619 of the Political Code, which formerly provided that "all roads used as such for a period of five years, are highways," was repealed in 1874. 13 Cal.Jur. 313, sec. 8; Pol.Code, sec. 2621. The section last cited, which was adopted in 1883 (Stats.1883, Chap. II, p. 6), provides in part:

"* * * No route of travel used by one or more persons over another's land, shall hereafter become a public road or byway by use, until so declared by the board of supervisors or by dedication by the owner of the land affected."

In the present case there is no evidence that the roadway was ever accepted or declared by the Board of Supervisors to be a public road. Nor is there evidence to show that it was used as such by the public generally prior to 1883.

[9] The land over which the roadway extends was acquired in 1920 by the State of California and thereafter maintained, until it was bought by plaintiffs in 1943, as an Industrial Farm for Women, and later as a home for epileptics, incident to the Sonoma State Home, during all of which time the State maintained gates and cattle guards across the road. The defendants purchased their adjoining land in 1929 and thereafter maintained an iron gate, which was sometimes kept locked by them, at the point where the roadway entered their property. They also displayed a sign on that gate which read "No trespassing." We are satisfied the finding adopted by the trial court that "said road is not now and never has been a public road or highway" is amply supported by the evidence.

[10-12] Nor does the evidence show that the road was ever dedicated to public use by grant, or by judgment or decree in the suit entitled *Kate Johnson Estate Co. v. Turnbull*, decided in the Superior Court of San Francisco in 1906. It is true that the decree which directs the sale of certain properties of that estate contained the provision "all ways, roads, or streets appearing upon said map are hereby declared to be public ways, roads, and streets and shall forever remain as such." Said reference was to Book 214 of Maps, page 2, Sonoma County Records, which was received in evidence as defendants' exhibit "E". A reference to said map discloses the fact that only three streets or roads are delineated thereon, no one of which extends to the defendants' property or corresponds with the roadway which is involved in this suit. Those streets which do appear on said map are named Wilson Street, Johnson Avenue and Buena Vista Avenue. There are some dimly dotted parallel lines on the map which meander here and there, but they are not named as ways, streets or roads. It seems clear they were not intended to represent dedicated streets or roadways. No one of such parallel dotted lines extends to the defendants' land. It may not be said that the decree in the *Turnbull* case, or reference to said map, marked defendants' exhibit "E", furnishes evidence of a dedication of the roadway in question. The court definitely so determined. The intention of the owner of land to dedicate a roadway thereon as a public highway must be shown by clear and unequivocal acts or declarations. The question of whether the roadway was dedicated as a public highway was one of fact to be decided by the trial judge, whose determination thereof is binding on this court unless there is no substantial evidence to support the finding in that respect. *Helm v. McClure*, 107 Cal. 199, 204, 40 P. 437; *Smithers v. Fitch*, 82 Cal. 153, 158, 22 P. 935; *Lyons v. Schwartz*, 40 Cal.App.2d 60, 65, 104 P.2d 383; 9 Cal.Jur. 68, sec. 54. In *Quinn v. Anderson*, 70 Cal. 454, on page 457, 11 P. 746, on page 747, it is said that "stronger evidence is required of the dedication of a neighborhood or timber road than of a thoroughfare * * *; and in case of a country road than of a street in a

town or city." The maintenance of gates on the roadway has been held to rebut the presumption of a dedication as a public road or highway. *Smithers v. Fitch*, supra; *Quinn v. Anderson*, supra; *Coburn v. San Mateo County, C.C.*, 75 F. 520, 533; *Hibberd v. Melville*, 3 Cal.Unrep. 879, 33 P. 201. We conclude that the court's finding that the roadway in question was not dedicated as a public road or highway, is amply supported by the evidence.

[13,14] For the reasons previously stated, the court did not err in refusing to grant defendants' motion for a nonsuit. Plaintiffs were entitled to an injunction to prevent a continuation of defendants' overburdening of their easement to personally travel the private roadway as a means of ingress and egress to and from their home and farm as a dwelling place and agricultural enterprise. The injunction properly issued to prevent a continuation of unlawful acts which would deprive plaintiffs of full enjoyment of their property rights and to preclude such excessive and unwarranted use of the roadway from ripening into defendants' prescriptive use thereof. *Vestal v. Young*, 147 Cal. 715, 719, 82 P. 381; *Lindsay-Strathmore Irr. Dist. v. Superior Court*, 182 Cal. 315, 327, 187 P. 1056.

[15,16] Finally, the appellants assert that plaintiffs, as the successors in title to the State of California, are barred under the provisions of Section 315 of the Code of Civil Procedure from maintaining this action because the use of the road and the maintenance of the nudist colony by defendants existed for more than ten years before the commencement of this action. That section is relied upon by the defendants as a statute of limitations precluding plaintiffs from injunctive relief. But the statute of limitations was not pleaded in the answer or at all. That section provides that:

"The people of this state will not sue any person for or in respect to any real property, * * *, unless—

"1. Such right or title shall have accrued within ten years before any action or other preceeding for the same is commenced; or,

"2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or some part thereof, within the space of ten years."

It is contended that since the court determined in paragraph IV of the findings that defendants "Since 1934" maintained said nudist colony on their adjoining property, the State and its successors in title lost their right to enjoin a continuation to do so because more than ten years had elapsed since its establishment on their ranch. It is true that the State held title to and occupied and used said property for state purposes from 1920 to 1943. But during that period it maintained gates and cattle guards on said roadway, and it also "received the rents, issues and profits" from the property. Paragraph 2 of that section provides, as an exception thereto, that when the State has received rents, issues and profits from the property "within the space of ten years," the prohibition against maintaining a suit with relation thereto does not apply. Moreover, property owned by the State is held in trust for the people of the State, and may not be lost or abandoned through the negligence of its officers or agents. In *People v. Kerber*, 152 Cal. 731, 93 P. 878, 125 Am.St.Rep. 93, a judgment for recovery of tideland by the State, wherein the defendant denied its ownership thereof and pleaded as a defense the ten-year statute of limitations of said Section 315 of the Code of Civil Procedure, was affirmed on appeal. The Supreme Court said, 152 Cal. at page 734, 93 P. at page 879:

"* * * 'It is immaterial where the title—that is, the record title—is held, whether by the state at large, or by a county, or by some municipal department or other official body. There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. The rule is universal in its application to all property set apart or reserved for public use, and the public use for which it is appropriated is immaterial. The same principles which govern the adverse holding of a street, a public square, a quay, a wharf, a common, apply to the adverse

holding of a schoolhouse. *The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights.* This rule has been often repeated in the opinions of this court. [Citing numerous California authorities.]” (Italics added.)

Under the preceding authority, and upon the facts of this case, we conclude that the provisions of Section 315 of the Code of Civil Procedure have no application to this case, and do not bar the maintenance of this action to enjoin the increased burden imposed by the defendants in 1943 and thereafter, upon their previously-acquired easement to personally travel the roadway for the limited purpose authorized by the court. The defendants acquired their land in 1929. Regardless of the finding that they established the nudist colony in 1934, while the State owned the plaintiff’s property, the evidence clearly shows the burden on the easement of the road was tremendously increased in 1943 and 1944 to the unwarranted extent of 500 passing automobiles during some weeks, as Mr. Bartholomew testified. Certainly that evidence supports the judgment.

For the reasons stated, the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



86 Cal.App.2d 858

HOLZMAN v. DE ESCAMILLA et al.
Civ. 3671.

District Court of Appeal, Fourth District,
California.

July 23, 1948.

I. Appeal and error ⇨1011(1)

Conflicts of evidence are settled in trial court and not on review.

195 P.2d—53

2. Partnership ⇨371

Evidence that members of limited partnership had absolute power to withdraw all partnership funds in banks without knowledge or consent of general partner and were otherwise active in dictating partnership affairs showed that they took part in control of business of partnership and thus became liable as general partners. Civ.Code, § 2483.

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

Action by Lawrence Holzman, as trustee in bankruptcy of estate of Hacienda Farms, Limited, a limited partnership, against Ricardo de Escamilla, James L. Russell and H. W. Andrews, for the purpose of determining whether the last two named defendants had become liable as general partners to creditors of the partnership. Judgment for plaintiff and the last two named defendants appeal.

Affirmed.

Arthur F. H. Wright, of San Diego, for appellants.

Edgar A. McNulty, of San Diego, for respondents.

MARKS, Justice.

This is an appeal by James L. Russell and H. W. Andrews from a judgment decreeing they were general partners in Hacienda Farms, Limited, a limited partnership, from February 27, to December 1, 1943, and as such were liable as general partners to the creditors of the partnership.

Early in 1943, Hacienda Farms, Limited, was organized as a limited partnership (Secs. 2477 et seq., Civil Code) with Ricardo de Escamilla as the general partner and James L. Russell and H. W. Andrews as limited partners.

The partnership went into bankruptcy in December, 1943, and Lawrence Holzman was appointed and qualified as trustee of the estate of the bankrupt. On November 13, 1944, he brought this action for the purpose of determining that Russell and Andrews, by taking part in the control of the partnership business, had become liable

as general partners to the creditors of the partnership. The trial court found in favor of the plaintiff on this issue and rendered judgment to the effect that the three defendants were liable as general partners.

[1] The findings supporting the judgment are so fully supported by the testimony of certain witnesses, although contradicted by Russell and Andrews, that we need mention but a small part of it. We will not mention conflicting evidence as conflicts in the evidence are settled in the trial court and not here.

De Escamilla was raising beans on farm lands near Escondido at the time the partnership was formed. The partnership continued raising vegetable and truck crops which were marketed principally through a produce concern controlled by Andrews.

The record shows the following testimony of de Escamilla:

"A. We put in some tomatoes.

"Q. Did you have a conversation or conversations with Mr. Andrews or Mr. Russell before planting the tomatoes? A. We always conferred and agreed as to what crops we would put in. * * *

"Q. Who determined that it was advisable to plant watermelons? A. Mr. Andrews. * * *

"Q. Who determined that string beans should be planted? A. All of us. There was never any planting done—except the first crop that was put into the partnership as an asset by myself, there was never any crop that was planted or contemplated in planting that wasn't thoroughly discussed and agreed upon by the three of us; particularly Andrews and myself."

De Escamilla further testified that Russell and Andrews came to the farms about twice a week and consulted about the crops to be planted. He did not want to plant peppers or egg plant because, as he said, "I don't like that country for peppers or egg plant; no, sir," but he was overruled and those crops were planted. The same is true of the watermelons.

Shortly before October 15, 1943, Andrews and Russell requested de Escamilla

to resign as manager, which he did, and Harry Miller was appointed in his place.

Hacienda Farms, Limited, maintained two bank accounts, one in a San Diego bank and another in an Escondido bank. It was provided that checks could be drawn on the signatures of any two of the three partners. It is stated in plaintiff's brief, without any contradiction (the checks are not before us) that money was withdrawn on twenty checks signed by Russell and Andrews and that all other checks except three bore the signatures of de Escamilla, the general partner, and one of the other defendants. The general partner had no power to withdraw money without the signature of one of the limited partners.

Section 2483 of the Civil Code provides as follows:

"A limited partner shall not become liable as a general partner, unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business."

[2] The foregoing illustrations sufficiently show that Russell and Andrews both took "part in the control of the business." The manner of withdrawing money from the bank accounts is particularly illuminating. The two men had absolute power to withdraw all the partnership funds in the banks without the knowledge or consent of the general partner. Either Russell or Andrews could take control of the business from de Escamilla by refusing to sign checks for bills contracted by him and thus limit his activities in the management of the business. They required him to resign as manager and selected his successor. They were active in dictating the crops to be planted, some of them against the wish of Escamilla. This clearly shows they took part in the control of the business of the partnership and thus became liable as general partners. *Tyler v. Wilson*, 58 Cal.App.2d 583, 137 P.2d 33.

Judgment affirmed.

BARNARD, P. J., concurs.

86 Cal.App.2d 827

ZOLEZZI et ux. v. MICHELIS et al.

No. 13509.

District Court of Appeal, First District,
Division 2, California.

July 21, 1948.

1. Tenancy in common ⇨15(7)

The exclusive occupancy by tenant in common is deemed permissive and does not become adverse until tenant out of possession has had either actual or constructive notice that possession of cotenant is hostile to him.

2. Mortgages ⇨138, 187

A trust deed carries none of incidents of ownership of property other than right to convey on default, and conveys no right of possession to trustee or beneficiary, and trustor, like mortgagor, is entitled to possession of land until his rights have been divested by conveyance in execution of trust.

3. Tenancy in common ⇨3

Trustees under deed of trust on undivided one-fourth interest in land were not tenants in common with grantee under deed executed subsequent to trust deed and purporting to convey the whole title to entire parcel to grantee, but beneficiary acquiring title by trustees' deed became tenant in common with grantee, their interests being one-quarter and three-quarters respectively.

4. Tenancy in common ⇨1

A tenancy in common requires for its existence but one unity, namely, that of possession.

5. Tenancy in common ⇨14

When one enters avowedly as tenant in common with others, his possession is the possession of the others, so long as the tenancy in common is disclaimed, and to constitute ouster there must be acts giving notice to the world of an intent to exclude the cotenants, but such rule is inapplicable, where possession was neither avowedly begun as tenant in common nor instituted under deed defining his title as such.

6. Tenancy in common ⇨15(11)

Evidence warranted finding that plaintiff had title to land by virtue of adverse possession against defendant's predecessor who became tenant in common with plaintiff by trustee's deed and who thereafter for some thirteen years asserted no interest in land which was in exclusive possession of plaintiff.

7. Appeal and error ⇨931(1), 1010(1)

If there is any substantial evidence to support the judgment, it must be affirmed, and all conflicts must be resolved in favor of the prevailing party and the evidence viewed in a light most favorable to him.

8. Tenancy in common ⇨14

Any act of a cotenant in exclusive possession which manifests an intention on his part to hold exclusively for himself is equivalent to an ouster.

9. Tenancy in common ⇨15(1)

A tenant in common who enters into actual possession under color of title, and who, with his predecessors in interest, has maintained possession and exercised acts of ownership openly and notoriously, claiming as against other tenants and paying taxes assessed thereon for more than five years prior to the commencement of an action against him, thereby acquires title by prescription under the statute of limitations.

10. Evidence ⇨264, 265(5)

In quiet title action, allegation in complaint in plaintiff's prior partition suit that plaintiff and defendant were tenants in common was an admission against interest but was no more than a piece of evidence in quiet title action and could not operate as a divestiture of plaintiff's title.

11. Evidence ⇨222(3), 265(5)

An offer made by one in possession to purchase does not impair the character of his possession, although the fact of such offer to purchase is admissible in evidence against him in quiet title action.

Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

Action to quiet title by Ernest Zolezzi and Bessie Zolezzi, husband and wife, against Frank Michelis and others. The named defendant filed a cross complaint.

Judgment affirmed.

Albert Picard, of San Francisco, for appellant.

Morgan J. Doyle and J. Jos. Sullivan, both of San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from a decree quieting respondents' title to a parcel of real property in San Francisco.

The property described in the complaint is 34 feet 4½ inches by 157 feet 6 inches in area, fronting on the northerly side of Lombard Street, and extending northerly.

Appellant by his answer denies respondents' title to *an undivided one-quarter interest in the northernmost 20 feet of the property* and by his cross-complaint asserts that he "is the owner in fee simple, entitled to the possession, and in possession" of such fractional interest.

Respondents' claim of title to the whole interest in the 20-foot strip is based on adverse possession. Such strip is all that is involved in this case.

Respondents' chain of title starts after the 1906 fire with a decree quieting the title of Allina Avy to the entire lot (157 feet 6 inches in depth). On her death it was distributed to Eugene Avy, Edmond Avy, Robert C. Avy and Emilie A. Chapuis. On February 26, 1930 these four distributees conveyed the entire lot by grant deed to Robert L. and Genevieve Mayock and on the same day the Mayocks conveyed it by grant deed to respondent Bessie Zolezzi. On April 12, 1943, she made a grant deed to herself and her husband, Ernest Zolezzi, as joint tenants, and they have so held it ever since.

Appellant's claim arises as follows: On February 6, 1930, 20 days before the deed to the Mayocks, Robert C. Avy, one of the four owners, executed a deed of trust to two trustees, for the benefit of Christine Woehleke, covering his one-quarter interest in the 20-foot strip (and other property not herein involved). At a trustees' sale the

beneficiary was the bidder and on June 1, 1932 the trustees made a deed to her of the one-quarter interest, which deed was recorded on August 4, 1933. On March 26, 1945 she made a quitclaim deed of the 20-foot strip to appellant and his wife as joint tenants. Christine Woehleke filed a disclaimer in this suit.

On June 1, 1932, when Christine Woehleke acquired title by the trustees' deed, she became a tenant in common with Bessie Zolezzi of the 20-foot strip, their interests therein being one-quarter and three-quarters, respectively. Ever since then Bessie Zolezzi and her husband have been in the exclusive possession of every part of the property, including the 20-foot strip. The court found that the Zolezzis have been in possession of the whole property continuously since February 26, 1930, and have paid all taxes, and "that during all of said times, all said land has been protected by a substantial enclosure". The evidence shows that the main part of the lot is improved with a three-story structure consisting of six Romeo flats and that the Zolezzis moved into one of them as soon as Bessie Zolezzi bought the property, or possibly before. It shows, also, that the 20-foot strip is part of the back yard of the property and that there are some sheds thereon, built by respondents.

When Christine Woehleke became vested with the one-quarter interest in the 20-foot strip she apparently did nothing to assert such interest. Appellant points out that there is no evidence that she ever entered upon or asserted any claim to the property. The answer to that contention is that regardless of whose burden it was to prove this—there being a cross-complaint herein on which appellant relies—the fact remains that the Zolezzis testified that they never had seen Christine Woehleke, or heard of her, which, of course, is sufficient to prove that Christine Woehleke never asserted any claim, for the Zolezzis alone were in complete possession and they were the only persons to whom such claim could have been asserted.

[1-4] Appellant relies on the rule, recently restated in *West v. Evans*, 29 Cal.2d 414, 418, 175 P.2d 219, 221, that "The ex-

clusive occupancy by a cotenant is deemed permissive; it does not become adverse until the tenant out of possession has had either actual or constructive notice that the possession of the cotenant is hostile to him." Under this rule the claim is made that respondents did nothing which could be construed as an ouster.

This rule, of course, is settled law. In this case, however, no tenancy in common came into existence until June 1, 1932, when the trustees' deed brought Christine Woehleke into the picture, more than two years after Bessie Zolezzi acquired title and entered possession. The trustees were never tenants in common with Bessie Zolezzi since a deed of trust "carries none of the incidents of ownership of the property, other than the right to convey upon default * * *." *Mac Leod v. Moran*, 153 Cal. 97, 99, 94 P. 604, 605; *Hollywood Lumber Co. v. Love*, 155 Cal. 270, 273, 100 P. 698. It "conveys no right of possession to the trustee or the beneficiary; and the trustor, like a mortgagor, is entitled to the possession of the land * * * until his rights have been divested by a conveyance in the execution of the trust * * *". 25 Cal.Jur., pp. 41-42; *Kinnison v. Guaranty Liquidating Corp.*, 18 Cal.2d 256, 260, 115 P.2d 450. Without the right of possession the trustees could not have become tenants in common, for such tenancy "requires for its existence but one unity, namely, that of *possession*". *DeWitt v. San Francisco*, 2 Cal. 289, 297; *Meyer v. Superior Court*, 200 Cal. 776, 792, 254 P. 1108; *Furman v. Brewer*, 38 Cal.App. 687, 694, 177 P. 495; *Wood v. Henley*, 88 Cal. App. 441, 452, 263 P. 870; 7 Cal.Jur. p. 341.

[5] Respondent Bessie Zolezzi entered into possession under color of title by a deed purporting to convey *the whole title to the entire parcel* exclusively to her. When she so entered there were no cotenants in the picture, and never, from that day to this, has her open, notorious and exclusive possession (with her husband) been interrupted. *Her possession was not begun as a tenant in common with anyone, nor was it begun under a deed or other instrument defining her title as one of cotenancy.* Hence the case is within the

rule stated in *Akley v. Bassett*, 189 Cal. 625, 641, 642, 209 P. 576, 583, as follows: "*The rule is that when one enters avowedly as tenant in common with others*, his possession is the possession of the others, so long as the tenancy in common is not disclaimed. In such cases, to constitute the ouster there must be acts of the most open and notorious character, clearly giving notice to the world, and to all having occasion to observe the condition and occupancy of the property, that the intention is to exclude, and does exclude the cotenant. *The rule thus stated, however, has no application to a case where the possession of the person in question was neither avowedly begun as a tenant in common, nor instituted under a deed or instrument which defined his title as such.* Bath v. Valdez, 70 Cal. 350, 358, 11 P. 724; *Frick v. Sinon*, 75 Cal. 337, 339, 17 P. 439, 7 Am.St.Rep. 177; *Elder v. McClaskey*, 70 F. 529, 538-540, 17 C.C.A. 251." (Emphasis added.)

Elder v. McClaskey, was again followed in *Johns v. Scobie*, 12 Cal.2d 618, 625, 86 P.2d 820, 121 A.L.R. 1404.

In adverse possession cases questions of fact include such as the following: "Whether the occupancy of possession was adverse; whether the possession or use was under permission or license; whether or not the use was under a claim of right; whether the party claiming title to land by adverse possession entered into the possession acknowledging himself to be a cotenant, or whether he entered claiming the whole title; as to what constitutes sufficient inclosures; as to whether or not artificial barriers and acts of ownership are sufficient to notify the public that the land is appropriated; whether the possession was such that the owner must be presumed to have known of the claimant's exclusive ownership; whether or not taxes were assessed during the five years of adverse occupancy; whether there was an ouster; or whether right by prescription has been acquired." 1 Cal.Jur. pp. 635-6.

[6-9] In case at bar there is ample evidence to support the findings which are in respondents' favor on the several issues. There are a few conflicts in the record with respect to possession but "if there is

any substantial evidence to support the judgment, it must be affirmed. All conflicts must be resolved in favor of the prevailing party and the evidence viewed in a light most favorable to him." *O'Banion v. Borba*, 32 Cal.2d 145, 195 P.2d 10. The case comes within the rule stated in *Akley v. Bassett*, 189 Cal. 625, 641, 209 P. 576, 582, as follows: "Any act of the cotenant in the exclusive possession, which manifests an intention on his part to hold exclusively for himself, is equivalent in law to an actual ouster. 1 Cal.Jur. 544; *Feliz v. Feliz*, 105 Cal. 1, 5, 38 P. 521. A tenant in common, who enters into the actual possession of land under claim and color of title, and who, with his predecessor in interest, has maintained possession, and exercised acts of ownership openly and notoriously, claiming the same adversely to other cotenants who are of age, and to all the world, and paying taxes assessed thereon for more than five years prior to the commencement of an action against him, thereby acquires a title by prescription under the statute of limitations. *Gregory v. Gregory*, 102 Cal. 50, 53, 36 P. 364; *Winterburn v. Chambers*, 91 Cal. 170, 184, 27 P. 658; *Freeman on Cotenancy and Partition*, § 221."

[10] Appellant relies on the fact that respondents filed a partition suit (which never was tried) against appellant and his wife after the quitclaim deed was recorded. In the complaint therein they alleged that appellants and respondents were tenants in common of the 20-foot strip, in one-quarter and three-quarter interests, respectively. This, it is argued, was a concession of appellant's ownership. It was an admission against interest, it is true, but it was no more than a piece of evidence in the case. It could not operate as a divestiture of respondents' title.

[11] Appellant also relies on the fact that respondents offered to purchase his interest for \$1,000. "This clearly shows" they argue, "that the plaintiffs did not consider that their possession of the disputed property was adverse to the defendant, and tends to show that the plaintiffs' possession was in subordination to the title of said premises in defendant and his predecessor

in title." Such an offer made by one in possession does not "impair the character of his possession; although the fact of such * * * offer to purchase is admissible in evidence against him." 1 Cal. Jur. p. 548.

We are satisfied that when Christine Woehleke executed the quitclaim deed to appellant she had ceased to have any interest in the property.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.



86 Cal.App.2d 838

THOMSON et al. v. LINEER et al.

Civ. 13660.

District Court of Appeal, First District,
Division 2, California.

July 22, 1948.

Descent and distribution § 119(1)

Owner's agreement to give plaintiffs the first right to buy "when I sell my ranch" was contingent upon event which could occur only during owner's lifetime, and hence was not enforceable after owner's death against his heirs or their grantees.

Appeal from Superior Court, Monterey County; G. Jorgensen, Judge.

Action by Lester J. Thomson and another against Algot S. Lineer and others for specific performance or damages. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Wm. A. Wittman and Charles S. Buck, both of South Gate, for appellants.

A. E. Warth, of Salinas, for respondent Algot S. and Blanche F. Lineer.

Garth V. Lacey, of Salinas, for respondent Rebecca A. Currier.

DOOLING, Justice.

This is an appeal from a judgment for the defendants in an action for specific performance or damages in the alternative.

Briefly the facts are as follows: Milton Currier purportedly executed the following document: "When I sell my ranch I'll give Thomsons the first right to buy at 6.00 per acre if they take Sky Ranch."

The appellants purchased the Sky Ranch and paid a full consideration therefor. Thereafter Milton Currier died without ever offering the lower ranch, the one presumably referred to in the option above quoted, for sale at any time.

By decree of final distribution the title to the property was vested in Rebecca Currier, who conveyed by grant deed to the defendant Lineer.

The appellants present three points on this appeal: First, that the court's finding that an option did not exist was not supported by the evidence. Second, that the option created an irrevocable vested interest, is subject to specific performance, and is binding on intervening persons with knowledge of the option.

The third point involves the discretion of the trial court in denying the motion for a new trial on the ground of newly discovered evidence. In view of our conclusion on the second point the third point becomes moot.

We shall not discuss the question whether the writing is genuine, but shall assume for the purposes of this decision that it was in fact executed by Milton Currier.

The controlling question is whether specific performance will lie against the heirs of the offeror, or their grantees.

The right to exercise the option is expressly made contingent upon the happening of an uncertain future event—"when I sell my ranch." It is couched in personal terms and, literally construed, the condition upon which the right to exercise the option depends can only occur during the promisor's lifetime and became impossible of performance upon his death. This is the natural meaning to be placed upon the language used.

It concurs with the meaning given to a similar provision in a deed in *Maynard v.*

Polhemus, 74 Cal. 141, 15 P. 451. In that case a deed from De Peyster to Cooper contained the following proviso: "with the sole provision that if the said Cooper should ever sell any of the aforesaid property, it shall be sold to the said De Peyster at the aforesaid price." The court said, 74 Cal. at page 143, 15 P. at page 452:

"If the proviso referred to be construed as a covenant, it was merely personal, and not binding, upon the heirs or assigns of Cooper. It does not appear that De Peyster attempted to bind the heirs of Cooper by any covenant. All claim on behalf of De Peyster and his grantees under the proviso ceased upon the death of Cooper."

This conclusion makes the consideration of any other question idle.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J.,
concur.



86 Cal.App.2d 474

In re MARTIN'S ESTATE.

CROSS v. O'CONNOR.

Civ. 13687.

District Court of Appeal, First District,
Division 1, California.

June 30, 1948.

1. Adoption Ⓒ14

Where adoption proceeding shows on its face that no service was had on one of parents, child purported to be adopted may attack decree collaterally.

2. Constitutional law Ⓒ306

Notice to natural parent, of adoption proceeding or of guardianship proceeding upon which adoption was predicated, was indispensable under due process clause, even if applicable Minnesota law did not require such notice and either the parent not notified or the child could raise that constitutional defect.

3. Adoption **14, 21**

Where parties used device of having guardian appointed for child so that guardian could give required consent to adoption but real father of child was not notified, and it appeared on face of record that father was given no notice, actual or constructive, of either the adoption proceeding or of guardianship proceeding upon which the adoption was predicated, the child was entitled to attack collaterally the validity of such adoption proceeding and was entitled to inherit from real father's estate.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Proceeding in the matter of the estate of Edward R. Martin, deceased. From a decree of final distribution awarding entire estate to Patricia M. O'Connor, John R. Cross appeals.

Affirmed.

Robert E. Hatch, of San Francisco, for appellant.

Bernal & Bernal, of Berkeley, for respondent.

PETERS, Presiding Justice.

This is a companion case to *Estate of Smith*, Cal.App., 195 P.2d 842, and the law stated in that opinion need not be here again set forth.

In the instant case the respondent is the daughter of the deceased, and the appellant is his brother. Admittedly, if respondent is entitled to inherit as a daughter, she is entitled to the estate to the exclusion of the appellant. It was the theory of the appellant in the trial court, and it is his theory here, that respondent is not entitled to inherit as a daughter of the deceased because, so it is contended, she was adopted out of the family of the deceased in 1910 by a decree of adoption rendered by a Minnesota court. The trial court ruled that the adoption decree was ineffective as to respondent because it shows, on its face, that the father of the child was given no notice of the proceeding. Based upon this determination, the trial court, by its decree of final distribution, awarded the en-

tire estate to respondent. From this decree the brother appeals.

[1] In all essential details this case is governed by the rules announced in the *Estate of Hampton*, 55 Cal.App.2d 543, 131 P.2d 565. That case has been fully discussed in *Estate of Smith*, and what was there said need not be here repeated. Suffice it to say that the *Hampton* case held that, if an adoption proceeding shows, on its face, that no service was had on one of the parents, the child purported to be adopted collaterally may attack the decree. Those rules are controlling here.

The record shows the following: Respondent was born in July, 1902, in Minnesota, and was then named Mabel I. Cross. Her mother died in March, 1903. Her father was Roy H. Cross. He later assumed the name of Edward R. Martin. It is his estate that is here involved. The father abandoned the child in 1902. Subsequently, in 1910, a guardian was appointed for the child, and the grandmother of the child purported to adopt her. It is the validity of those proceedings that is here involved.

The record shows that on the petition of Julia R. Britton, respondent's grandmother, filed in Minnesota and dated June 17, 1910, one F. J. Britton was appointed guardian of the respondent. The order appointing the guardian is also dated June 17, 1910. The petition for adoption is undated, but the affidavit of the petitioning party attached thereto is dated June 8, 1910. It alleges the abandonment of respondent by the father of the child in October, 1902. Attached is a consent of the guardian, F. J. Britton, by which such guardian purported to consent to the grandmother adopting the child. The consent is not dated, but the certificate of the notary before whom it was executed is dated June 20, 1910. The adoption order is dated June 20, 1910. It recites that the father abandoned the child in 1902; that F. J. Britton had been appointed guardian of the child on June 17, 1910, and that the grandmother desires and has consented to adopt the child.

From this record, when the pertinent dates are considered, together with the allegations in the various documents, it ap-

pears, on the face of the record, that the real father of the child was given no notice, actual or constructive, of either the adoption proceeding or of the guardianship proceeding upon which the adoption was predicated.

It is admitted that the applicable Minnesota law, in effect at the time of the adoption, provided that when a parent had abandoned his child, or could not be found, the consent of such parent to an adoption was not indispensable, but, that, in such events, a duly appointed guardian could give the required consent. In reference to the guardianship proceeding, the law provided that a guardian of the estate or person of a minor could be appointed whenever it should appear to the court necessary or convenient. The law required service upon the minor at least fourteen days prior to the hearing. There was also a statute relating to dependent, neglected and delinquent children which permitted any citizen to file a petition to have a destitute, homeless or abandoned minor under seventeen so declared. The petition had to set forth the names and addresses of the parents, if known, but if the parents were dead or their addresses unknown, then the name and address of the guardian was all that was required. Summons could then issue to anyone having custody of the child, and was to be served as a summons in a civil action. It was expressly provided that the parents of the child, if living and if their addresses were known, or the child's legal guardian, if one had been appointed, or if there were no parents or if their residences were unknown, or if there was no guardian, then some relative whose address was known, must be notified of the proceedings. If, on the hearing, the court determined that the child was dependent or neglected, it was empowered to commit the child to the care of a citizen or of some suitable in-

stitution. The person or institution to whom such child was given was then authorized to give assent to an adoption of such child.

In the present case it is apparent that the guardianship order was the basis of the adoption decree. The guardian, F. J. Britton, then consented to the adoption. The petition for the appointment of the guardian and the order of appointment are both dated June 17, 1910. Thus it is clear, from the face of the record, that Roy H. Cross (the decedent) was given no actual or constructive notice of that proceeding. In fact, on the printed form of the guardianship order there is a printed provision reciting those upon whom service has been made, but the court struck those "notice" provisions from its order.

[2, 3] Under the rule of the Hampton case, *supra*, even if the applicable Minnesota law did not require notice to the absent parent, such notice was indispensable under the due process clause so far as the parent was concerned. The parent not notified, or, under the rule of the Hampton case, the child, is entitled to raise that constitutional defect. In the Hampton case the parties used the device of having the child declared abandoned, and given into the custody of an institution so that it could consent to the adoption. The mother was not notified of that proceeding. In the present case the parties used the device of having a guardian appointed so that the guardian could give the required consent. But the father was not notified. Under such circumstances there is no escape from the conclusion that the rule of the Hampton case permits the child to attack the validity of such an adoption proceeding.

The decree appealed from is affirmed.

WARD and BRAY, JJ., concur.

In re SMITH'S ESTATE.

SMITH v. PASSARELLA.

Civ. 13459.

District Court of Appeal, First District,
Division 1, California.

June 30, 1948.

Rehearing Denied July 30, 1948.

Hearing Denied Aug. 26, 1948.

1. Adoption ⇨21

Will leaving all decedent's property to widow, specifically leaving to her the proceeds of all insurance policies, and providing that such property was to be the "sole and absolute property" of the widow did not express an intent to exclude adopted child so as to preclude such child from taking as a pretermitted heir, in absence of words showing that decedent had child in mind but nevertheless excluded such child. Probate Code, § 90.

2. Adoption ⇨14

New York adoption order established prima facie case for alleged adopted daughter claiming an interest in estate of adopting father as pretermitted heir, and order was entitled to full faith and credit until it was established that it was void, the burden being upon person attacking the order to establish its invalidity. Probate Code, § 90; Domestic Relations Law N.Y. §§ 110-118, Laws 1909, c. 19, as amended.

3. Adoption ⇨14

Widow challenging determination that one claiming to be adopted daughter of deceased was legally adopted had burden of proving that foreign adoption decree was void.

4. Adoption ⇨14

Where alleged adopted daughter of deceased claimed interest in estate as pretermitted heir, proof offered by widow was insufficient to establish that New York adoption decree was void for want of notice of adoption to natural father by whom daughter had been abandoned, though there was nothing in record to show that notice, actual or constructive, was given to natural father of the pendency of the adoption proceedings, in absence of affirmative show-

ing that there was no prior duly noticed abandonment proceeding. Probate Code, § 90; Domestic Relations Law N.Y. §§ 110-118, Laws 1909, c. 19, as amended.

5. Adoption ⇨14

Where alleged adopted daughter of deceased claimed interest in estate as pretermitted heir, widow who was a stranger to the adoption proceeding but claimed through deceased who was a party thereto, could not attack collaterally New York adoption decree even if defect of lack of notice to natural father appeared on face of record, since such defect constituted at most a lack of due process to the natural father which point could be raised only by the person affected. Probate Code, § 90; Domestic Relations Law N.Y. §§ 110-118, Laws 1909, c. 19, as amended.

6. Adoption ⇨1

Fundamentally adoption creates a status and is a proceeding at least quasi in rem.

7. Adoption ⇨10

Either state of domicile of child or state of domicile of adopting parents has jurisdiction over subject matter of adoption proceedings, but in order to terminate the personal rights which are also involved, it is necessary, in addition to securing jurisdiction over the subject matter, to secure jurisdiction over the real parents, the child, and the adopting parents.

8. Adoption ⇨14

Adoption proceeding is subject to attack collaterally by person who has not been served, actually or constructively, and whose personal rights are involved, but participating persons may not object that some other person was deprived of his constitutional rights, and neither persons participating, nor those claiming through them, nor strangers to the proceeding may attack adoption decree collaterally when court rendering it had jurisdiction of subject matter.

9. Judgment ⇨493, 494

Judgment that is void may be attacked collaterally or directly by parties or strangers but rule permitting such attack usually applies where court had no jurisdiction over subject matter as well as no jurisdic-

tion over parties and has no application where court has jurisdiction over subject matter and over some of parties.

10. Adoption ⚭14

Where New York court had jurisdiction over subject matter of adoption proceedings, over consenting mother and over adopting parent, and only assumed defect was failure to give natural father notice of the proceeding, the natural father and the adopted child only could collaterally attack the court's adoption decree, and those participating in the proceeding and those claiming through them had no such right. Probate Code, § 90; Domestic Relations Law N.Y. §§ 110-118, Laws 1909, c. 19, as amended.

11. Adoption ⚭14

Adopting parent, and those claiming through him, are estopped from attacking adoption decree secured by the parent.

12. Appeal and error ⚭991

Nature of property, as separate or community, is primarily a factual problem and normally is question for trial court.

13. Appeal and error ⚭991

Whether presumptions as to community nature of property acquired after marriage have been rebutted is primarily a question of fact. Civ.Code, § 164.

14. Appeal and error ⚭1010(1)

A finding that property is separate property of a deceased will not be disturbed if there is substantial evidence or reasonable inferences from the evidence to support it. Civ.Code, § 164.

15. Executors and administrators ⚭314(12)

Where most of property involved at start of hearing upon petition for final distribution was presumptively community property, but trial court found that in fact it was separate property, question was whether there was "satisfactory evidence" to support such finding, meaning by "satisfactory evidence" not only direct evidence but also reasonable inferences from that evidence. Civ.Code, § 164.

See Words and Phrases, Permanent Edition, for all other definitions of "Satisfactory Evidence".

16. Husband and wife ⚭254

Where property was purchased with money from joint bank account of husband and wife, whether property purchased was separate property of husband was a question of intent, and the fact that most of the property purchased was placed in separate name of husband was some evidence that husband intended it to be his separate property.

17. Husband and wife ⚭249

Where the only evidence is that separate and community property are commingled, entire fund must be treated as community if separate funds have not been identified, but such rule has no application where there is other evidence.

18. Husband and wife ⚭262(1)

Presumptively, family expenses are paid from community earnings, and excess over community earnings less community expenses is separate property.

19. Husband and wife ⚭264

Evidence that total value of deceased husband's estate far exceeded his community earnings, and that there was a change in title of much of the property from separate to joint, and back to separate, was satisfactory evidence that, except as to excess of community earnings over community expenses, the property was separate property of deceased, and hence supported finding, except as to the excess of community earnings, that property in estate was separate property of husband. Civ.Code, § 164.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Harold W. Smith, deceased. From a decree of final distribution awarding a one half interest in the estate to Marion Smith Passarella as the legally adopted and pretermitted daughter of deceased, Rachel Elizabeth Smith, widow, appeals.

Modified and affirmed as modified.

Samuel D. Hamburg, of San Francisco, for appellant.

Robert E. Hatch, of San Francisco, for respondent.

PETERS, Presiding Justice.

[1] Harold W. Smith died testate in California on October 7, 1944. By his will, executed in North Carolina in July of 1941 while he was a resident of that state, he devised his entire estate, appraised at a little over \$17,000, to his then newly-acquired wife whom he had married in June, 1941, in North Carolina. The couple came to California in November, 1941. The will of decedent was admitted to probate, and, upon the hearing of the petition for final distribution, it developed that Marion Smith Passarella, the respondent, claimed an interest in the estate as a pretermitted heir, claiming to be the adopted daughter of the deceased. She therefore claimed a one-half interest in that portion of decedent's estate that was his separate property. After a hearing, the probate court decreed that respondent was a legally adopted and pretermitted daughter of deceased, that the entire estate was the separate property of decedent, and that appellant and respondent should share equally therein. The wife appeals from the Decree of final distribution, challenging both the determination that respondent was legally adopted, and the finding that the entire estate was the separate property of the deceased. In addition, appellant contends that, if it be assumed that respondent was legally adopted, nevertheless she may not take as a pretermitted heir under § 90 of the Probate Code because, so it is asserted, the will shows, on its face, that the testator intended to exclude respondent from his will. This contention is based upon the fact that the will left all of decedent's property to appellant and specifically left to her the proceeds of all insurance policies, and provided that this property was to be "the sole and absolute property" of appellant. It is too clear to require extended discussion that such provisions leaving all the property to the widow, or disposing of the entire estate, do not express an intent to exclude a child. To exclude a child the words of the will must show that the testator had the child in mind, but, nevertheless, excluded such child. (See many

cases collected 26 Cal.Jur. p. 925, § 238.) There is no such language in the present will.

This case was argued together with Estate of Morgan, 1 Civ. 13, 686, and Estate of Martin, Cal.App., 195 P.2d 839, inasmuch as all three cases involve common questions relating to the validity of adoption decrees and the right collaterally to attack such decrees. The appellants in the Estate of Morgan, subsequent to the oral argument, requested that their appeal be dismissed, and it has been so ordered.

In the instant case, the factual background of the adoption issue is not in dispute. Respondent is the child of Edith and George Norton. She was born in 1913. Shortly after her birth George Norton abandoned his wife and child. In 1920, in Buffalo, New York, Edith Norton secured a final decree of divorce from George Norton. In 1923 Edith married decedent, Harold W. Smith, and lived with him until her death. In August, 1923, the decedent adopted or attempted to adopt the respondent in New York. It is the validity of that adoption decree that presents one of the main questions on this appeal. A complete photostatic copy of the adoption proceeding was introduced into evidence. The petition for adoption was prepared, sworn to and filed in Erie County, New York, on August 27, 1923. It alleged that the petitioner, Harold W. Smith, had married the mother of the child, the child then being ten years of age, and desired to adopt the child; that the father of the child George Norton, in September, 1913, had "abandoned his said wife and child"; that since that date the father had contributed nothing to the child's support, and had never returned to or communicated with his wife or child; that "George E. Norton abandoned said Marion Crocker Norton in September, 1913, and has abandoned her ever since said date." Attached to this petition was a verified statement of the mother of the child sworn to and filed on August 27, 1923, reciting that she had read the verified petition of her then husband; that the "statements concerning the abandonment of said Marion Crocker Norton are true to the knowledge of deponent"; that deponent has no knowledge

or information as to the present whereabouts of the father of the child, and has had no such information since May of 1920. The mother also filed a consent to the adoption, also dated August 27, 1923. The order of adoption was dated, signed by the judge and filed on August 27, 1923. It recites the facts concerning the filing of the petition, the agreement to adopt, and the consent to the adoption by the mother and then the order states: " * * * and it appearing that George E. Norton, the father of said Marion Crocker Norton, abandoned said Marion Crocker Norton in September, 1913, and has never communicated with her or contributed to her support in any manner since said date." The order of adoption is then made.

It will be noted that there is nothing in the record of the adoption proceeding to indicate that any type of notice, actual or constructive, was given to the father of the child of the pendency of that proceeding. Indeed, the recitals in the various documents referred to above, and the fact that the petition for, and the order of, adoption bear the same date, indicates, that no notice of the adoption proceeding was ever given the natural father of the child. The recitals in the adoption proceeding, however, do not indicate affirmatively or negatively whether there had been a prior adjudication of abandonment and whether, if there had been, the father had notice thereof.

Appellant urges that since the natural parent had no notice of the adoption proceeding, the order of adoption was void for lack of jurisdiction in the Erie County, New York, court, and for that reason it is contended that respondent never became the legally adopted child of decedent and cannot take any portion of his estate as a pretermitted heir. In this connection the appellant relies upon the Estate of Hampton, 55 Cal.App.2d 543, 131 P.2d 565, and urges that the holding of that case conclusively establishes that the adoption decree in the instant case is completely void.

For the purposes of clarity, the exact relationships of the litigants in the instant case should be again set forth. The adopted child is the respondent. She does not challenge the adoption decree, but, in

fact, is relying upon it to establish her relationship to the deceased, her adopted father. No party to the adoption proceeding is challenging the adoption order. No relative of the adopted child is attacking the decree. The mother of the child consented to the adoption, and is now dead. Harold W. Smith, who adopted the child, is now deceased, and at no time since the order was made twenty-five years ago has he challenged or questioned the decree. The real father of the child is not a party to this proceeding and has, so far as the record shows, at no time ever challenged or questioned the decree. The appellant is a subsequent wife of Harold W. Smith. She was not a party to the adoption proceeding, and has no legal relationship with respondent. She claims through the adopting parent. It is she who seeks to attack collaterally the adoption decree.

The facts of the Hampton case were these: Hazel Higgins Sliff was the illegitimate daughter of Katherine Higgins Hampton. Katherine died testate and failed to mention her daughter Hazel in her will. Hazel opposed the probate of the will on the ground that she was a pretermitted heir. The proponents of the will contended that Hazel had no legal right to inherit from her real mother for the reason that in 1901, in Kansas, Jesse and Mary Ann Parker had adopted Hazel. The proponents, in support of this contention, offered into evidence the records of the Kansas abandonment and adoption proceedings. The trial judge ruled that these records were inadmissible for the reason that they showed that the real mother of Hazel, Katherine Hampton, had no notice of either proceeding, and that, according to the trial judge, rendered the Kansas adoption order a nullity as to Hazel. This determination was approved by the District Court of Appeal. A petition for hearing in the Supreme Court was denied, three justices voting for a hearing.

The theory of the District Court of Appeal as disclosed in the opinion was this: The Kansas statutes provided that the required consent to an adoption could be had in either of two ways. First, there was the normal method of the parents of the child

appearing before the court and giving their consent. In addition, the statutes provided for a court hearing at which the child could be judicially determined to have been abandoned by its parents, in which event the court was empowered to turn the child over to a designated institution. After compliance was had with this procedure the statutes authorized the governing official of the institution to give his consent to the adoption, thus disposing with parental consent. Insofar as the abandonment proceeding is concerned, the pertinent Kansas statute required that the parents be notified, if their whereabouts were known, not less than three days before the hearing, otherwise notification to the person having actual custody of the child was all that was required. No statutory provision for any other type of notice to the parents was provided.

In the Hampton case, Hazel was born illegitimately to Katherine Higgins in 1897 in Kansas. When the child was six weeks old Katherine placed the child in Kansas in the home of Jesse and Mary Parker, both now deceased. Katherine visited the Parkers two or three times during 1898 and 1899, and in 1900 wrote them that she was intending to come to California. Thereafter, the Parkers heard nothing further from her. The proceeding to have Hazel declared a neglected and abandoned child was started in 1901. She was found to be an abandoned child and turned over, by court order, to the institution designated in the statute. The president of that institution then signed the consent to the adoption of Hazel by the Parkers.

The record shows that the abandonment proceeding was preceded by an order to show cause issued by the Kansas court and directed to the Parkers and to the mother of the child. The sheriff returned the order to show cause, showing service on the Parkers on October 9, 1901, but endorsed on it the statement that: "I could not find the within named Kitty Higgins in my County." The order determining that Hazel had been abandoned was signed October 14, 1901. It finds that "proper notices have been served, and that the proceedings are regular," but also specifically

recites that "notice was issued to the mother of said child Kitty Higgins, and said notice was returned by the sheriff of Sedgwick Co., Kansas, with the report that said sheriff was unable to find said Kitty Higgins within the county." (55 Cal.App.2d at pages 549, 550, 131 P.2d at page 569.) The child was declared to be a neglected child and turned over to an institution. The next day, the president filed his consent to the adoption of Hazel by the Parkers, they filed their agreement to adopt, and the adoption decree was signed.

The District Court of Appeal held that Hazel, the adopted child, could attack these proceedings on the ground that they were void, under the due process clause, because of lack of proper notice to her mother of either the abandonment or adoption proceedings. This conclusion was reached even though the Kansas statutes did not require such notice, it being held that the due process clause of the federal Constitution required such notice. In reaching this conclusion the court first made this observation (55 Cal.App.2d at page 552, 131 P.2d at page 570): "* * * a judgment of a sister state is binding upon the courts of this state, if valid by virtue of the full faith and credit clause of the United States Constitution (Art. IV), but the jurisdiction of the court of a sister state in which a judgment is rendered, may be questioned collaterally in another state notwithstanding the full faith and credit clause * * * and the judgment may be ignored if want of jurisdiction appears on the face of the record * * *."

The court further said (55 Cal.App.2d at page 553, 131 P.2d at page 571): "We must therefore determine whether, from the proffered record before us, under the law and under the due process provision of our Constitution * * *, sufficient notice was given whereby that court acquired jurisdiction of the cause and parties."

At page 557 of 55 Cal.App.2d, at page 573 of 131 P.2d the court says: "Without attempting to adopt Hazel Sliff * * *, by giving the notice * * * required, petitioners attempted to avoid that requirement, in reference to notice, by seeking the aid of the abandonment proceeding which,

as appellants contend, does not require notice of the examination or proceedings to be given to the parent if it is shown that the only parent authorized to give consent has neglected and abandoned the child, unless her whereabouts is known."

At the pages hereinafter designated the court stated the following:

(55 Cal.App.2d at page 557, 131 P.2d at page 573): "A proceeding by which the parent, entitled to the custody of his or her minor child, is deprived of such custody is a proceeding adverse to him or her. Guardianship of Van Loan, 142 Cal. 423, 426, 76 P. 37."

(55 Cal.App.2d at page 558, 131 P.2d at page 573): "* * * in this proceeding, did the court acquire jurisdiction of the parties? If not, the judgment awarding the custody of the minor child to the Wichita Children's Home for the ultimate purpose of allowing it to consent to the adoption of the child, rather than the parent, was void, and the adoption proceeding based on such a void judgment is likewise void."

(55 Cal.App.2d at page 559, 131 P.2d at page 574): "Our attention has been called to many cases which hold that after service of notice (either personal or substituted) of such abandonment proceedings on the parent or parents, no written consent of such parent or parents is necessary if the trial court determines, on the hearing, upon proper and sufficient evidence, that the minor child has been abandoned by them. [Citing cases.] This is, however, not determinative of the issue here presented. The mere fact, if alleged in the petition and found by the court, that the parent neglected or abandoned the minor child, will not and does not dispense with the right of such parent to notice, either actual or constructive, of such proceeding, in order that he or she may appear and contest the question to be there determined, i. e., whether or not, in fact, he or she has actually neglected or intentionally abandoned the child so that the court may then be authorized to so declare it abandoned for the purpose of allowing the children's home to give consent to a subsequent adoption of the child in the place and stead of its nat-

ural parent by reason of her or his claimed misconduct."

The court quoted the following language from Guardianship of Michels, 170 Cal. 339, 149 P. 587 (55 Cal.App.2d at page 560, 131 P.2d at page 574): "'* * * it is within the power of the state to declare what sins and acts of omission or commission shall constitute abandonment by the parent or parents. Unquestionably due process of law demands some sufficient notice to the parents of the proceedings about to be taken, with an opportunity to the parents to be heard upon the issue.'"

After noting an excerpt from 1 Cal.Jur. p. 429, in which is stated the rule that notice of the abandonment proceedings would have to be given the parents in order to comply with due process requirements, the court says (55 Cal.App.2d at page 561, 131 P.2d at page 575):

"Our attention has not been directed to any case in Kansas construing their statute in this respect. However, this question is discussed and many cases are cited in 1 American Jurisprudence, page 642, section 40, and page 644, section 44. * * * It is there said:

"The existence of the facts rendering consent unnecessary, though alleged in the petition, must be judicially determined, and notice is therefore an essential prerequisite to a valid decree and a cutting off of the parent's rights, for even where the parents, by their wrongful neglect or criminal conduct, have forfeited their right to give or withhold consent, it does not necessarily follow that they are not entitled to notice * * * although no notice may be specified by statute in cases where the rights of the parent have been forfeited by abandonment or other misconduct, notice will ordinarily be required in order to bind the parent on the question of such abandonment or misconduct. * * * Although notice is not always specifically required, the judicial proceedings by which adoption is effected are prescribed as a duty of courts of record, wherefore it is presumed that the legislature intended that such proceedings should be in accordance with the usual practice of such courts, requiring notice as an element of due process. * * * Non-

residence of the parent does not excuse failure to give notice to him, although constructive notice may be given where the residence of the parent is unknown. * * * Where the custody of a child has been taken from the parents for delinquency, by adversary proceedings (upon due notice), notice of adoption proceedings is unnecessary, since the parents have already been divested of the custody and control of the child.' "

The court concluded (55 Cal.App.2d at page 562, 131 P.2d at page 576): "It therefore must follow that since it is an elemental and fundamental principle of law that notice to a party whose rights are to be affected by a judicial proceeding is an essential element of due process, the failure to give adequate notice to the mother of Hazel L. Sliff of the abandonment proceeding as an enabling step to securing the adoption of her child without her consent, was void as being in violation of the due process clause of our Constitution. The order of the trial court refusing the introduction of such record into evidence must be sustained."

The appellate court then went on to state (55 Cal.App.2d at page 563, 131 P.2d at page 576) that the adopted child "who was the central figure therein and the person whose interests were mainly affected thereby, has the right to attack the decree entered which purports to thus interfere with her right of inheriting from her natural mother." The facts of *Estate of Hampton*, supra, are very similar to those of the instant case, with two vital exceptions: First, in the *Hampton* case the adopted child was seeking to inherit from her real mother, and it was the adopted child, not a stranger, that sought to attack the adoption order. In the instant case, the adopted child is relying upon, and seeks to uphold, the adoption order, while one claiming through the adopting parent seeks to attack it collaterally. In the second place, in the *Hampton* case the defect of lack of service appeared on the face of the record. In the instant case, it does not appear from the face of the record, or by evidence, that there might not have been a prior abandonment proceeding of which the father had actual notice.

In 1923, when the adoption order was made in the instant case, the New York Domestic Relations Law contained provisions substantially similar to those of Kansas, except that the statute expressly dispensed with notice of adoption proceedings when the parent had abandoned the child. (McKinney's Consolidated Laws of New York, Chap. 14, §§ 110-118.)

In the case of *In re Johnston*, 76 Misc. 374, 137 N.Y.S. 92, the real father of the adopted child was attacking the adoption decree because of lack of service upon him. There, as in the *Hampton* case, an abandonment proceeding was instituted and the fact of abandonment proved and found, but the father was not served. It was held that without service on the father the subsequent adoption order was void as to him.

The same conclusion was reached in *Matter of Livingston*, 151 App.Div. 1, 135 N.Y.S. 328, where a real mother was attempting to secure her child from the adopting parents. The court discusses the constitutional issue at some length and holds that, if the mother had no notice of the abandonment or adoption proceedings, the order of adoption was void as to her.

In the case of *Matter of Dein*, 135 Misc. 244, at page 245, 237 N.Y.S. 658, at page 661, the court stated: "It appears that the statute authorizes an adoption without the consent of the surviving parent, if such surviving parent has abandoned the minor child. This statute contains no express provision requiring notice to the parent in order that he or she may be heard on the question of whether or not he or she has abandoned the child. Without such notice, either actual or constructive, an adjudication cannot be made that will be binding on the parent on that issue. *People ex rel. Lentino v. Feser*, 195 App.Div. 90, 96, 186 N.Y.S. 443. The order of adoption, however is not void or voidable because of her right to attack it. *People ex rel. Pickle v. Pickle*, 215 App.Div. 38, 44, 213 N.Y.S. 70."

[2-4] Thus it will be noted that, under the New York statutes, notice to the real parent or parents as a condition precedent to a valid adjudication of abandonment was not expressly required. Such notice, however, is required under the due process

clause. But, in the instant case, this lack of notice does not affirmatively appear on the face of the record. There is no affirmative showing that the real father of the child was not given notice of a possible prior abandonment proceeding. There is only a failure to recite that such a hearing, based upon proper notice, had been had. The general rule, at least as to domestic judgments, seems to be that before a judgment may be attacked collaterally the defect must affirmatively appear on the face of the record. *Wells Fargo & Co. v. City etc. of San Francisco*, 25 Cal.2d 37, 152 P.2d 625. However, there is authority that a foreign judgment may be attacked collaterally by evidence showing lack of jurisdiction even though the defect does not appear on the face of the record. *Estate of Pusey*, 180 Cal. 368, 181 P. 648; *Hammell v. Britton*, 19 Cal.2d 72, 119 P.2d 333; *DuQuesnay v. Henderson*, 24 Cal.App.2d 11, 74 P.2d 294; *Ryder v. Ryder*, 2 Cal.App.2d 426, 37 P.2d 1069. If it be assumed that this last-mentioned rule is applicable to the instant case, it should be noted that appellant introduced no evidence, other than the record of the adoption decree, from which we can ascertain whether there had been a prior duly-noticed abandonment proceeding. This point may be conclusive against appellant. The New York adoption order established a *prima facie* case for respondent. That order, under any theory, is entitled to full faith and credit until it is established that it is void. The burden is upon the person attacking the decree to establish its invalidity. While the adoption decree does not affirmatively recite that there was a prior duly-noticed abandonment proceeding, it does not recite that there was no such proceeding. The burden was on appellant to prove that the foreign decree was void. This she did not do.

[5-10] Another, and more fundamental reason exists why appellant, a stranger to the adoption proceeding, is in no legal position to attack collaterally the New York adoption decree, even if the defect of lack of notice to one of the real parents appeared on the face of the record. Such defect, at most, constituted lack of due process to the parent not served, which point may be raised only by the person affected by such

procedural lack of due process, and may not be raised by persons over whom the court had jurisdiction. Fundamentally, an adoption creates a status, and is a proceeding at least quasi in rem. Either the state of domicile of the child or the state of domicile of the adopting parents has jurisdiction over the adoption proceedings. (Restatement of Conflict of Laws, §§ 142, 143; see, also, § 54; see, also, Restatement of Judgments, § 33.) That means such state has jurisdiction over the subject matter. But there are also personal rights involved. In order to terminate these rights it is necessary, in addition to securing jurisdiction over the subject matter, also to secure jurisdiction over the real parents, the child and the adopting parents. As to any person not served, actually or constructively, the proceeding is subject to attack collaterally. But persons participating in the proceeding have no legal right to object that some other person was deprived of his constitutional rights. The only persons who may object are those not served, or, under the rule of the Hampton case, the child. There is no sound legal reason why persons who participated in the proceeding, those claiming through them, or strangers to the proceedings, should be permitted to attack an adoption decree collaterally when the court rendering it had jurisdiction of the subject matter. While it is true that a judgment that is absolutely void may be attacked collaterally or directly by parties or strangers (*Andrews v. Superior Court*, 29 Cal.2d 208, 174 P.2d 313; *Estate of Pusey*, 180 Cal. 368, 181 P. 648), that rule usually applies where the court had no jurisdiction over the subject matter as well as no jurisdiction over the parties. It has no application to cases where the court has jurisdiction over the subject matter and over some of the parties. In the instant case, the New York court had jurisdiction over the subject matter, over the consenting parent and over the adopting parent. The only assumed defect was failure to give one of the parents notice of the proceeding. That party, and, under the rule of the Hampton case, the child, may collaterally attack the decree. But those participating in the proceeding, and those claiming through them, should not be permitted so to attack the decree.

There seems to be remarkably few authorities on this issue directly in point. In *Appeal of Woodward*, 81 Conn. 152, 70 A. 453, the court held that those claiming through the adopting parent were in no legal position to attack an adoption proceeding where no notice was served on the parents. (See, also, *Goodrich on Conflict of Laws*, 2d Ed., p. 384.) There is a note on the *Hampton* case in 31 Cal.L.Rev. 325, which generally approves the rule of that case, but in f. n. 16 appearing on p. 328, appears the following comment: "The court in the instant [*Hampton*] case held the adoption proceedings void. This is proper, but the proceedings should not be subject to collateral attack by the heirs of the adopting parents. (See dictum in *Estate of Camp*, 131 Cal. 469, 63 P. 736, 82 Am.St.Rep. 371.) * * * The adopting parents and their heirs should be estopped from attacking the validity of the decree just as the party obtaining a divorce decree is estopped from denying its validity for lack of jurisdiction of the court awarding the decree."

[11] In the *Estate of Camp*, referred to in the above quotation, a brother of decedent, after the record of an adoption by the decedent of two children had been read into the record, offered to prove that the adoption was defective because the children had not, in fact, been abandoned by their parents. The court treated the fact of abandonment as being jurisdictional to the right of the court to make the adoption order, but then held that the recital in the order that the fact of abandonment appeared to the satisfaction of the trial court could not be collaterally impeached by the brother of the adopting parent. The court then, either as an alternative ground of its opinion or by way of dicta, stated (131 Cal. at page 471, 63 P. at page 736, 82 Am. St.Rep. 371): "Whether the parents of the child in a direct proceeding against the adopting person for the recovery of the persons of the children would be bound by this determination of the judge is not involved herein. It is very clear that, if an action had been brought against the decedent in his lifetime for necessities supplied for the support of the children, he would not have been permitted to show in his de-

fense that at the time of the proceedings for their adoption the parents had not in fact abandoned them. He would have been estopped by his recital of their abandonment in his petition. Inasmuch as the rights of the appellant herein are derived solely through and under the decedent, he can have no greater right to question the validity of the order than would the decedent."

Whether this holding was an alternative ground of the opinion, and therefore a precedent that those claiming through an adopting parent may not attack collaterally the adoption order (*Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley*, 217 Cal. 644, 20 P.2d 940), or was mere dicta, need not be now decided. Whatever the nature of the ruling may have been it is sound law and should be followed. The adopting parent sets in motion the adoption machinery. He drafts the documents. He determines which of several procedures to follow. He should be held to be estopped from attacking the decree secured by himself. Such estoppel should also apply against those claiming through the adopting parent.

For either or both of the reasons given above it must be held that the trial court correctly held that the adoption decree here involved established, as against appellant, the validity of the adoption. The trial court, therefore, correctly determined that respondent was a pretermitted heir.

[12-14] The other basic contention of the appellant is that the finding of the trial court that all of the property in the estate was the separate property of decedent, is unsupported by the evidence. This problem of tracing the nature of property is primarily a factual one, and normally is a question for the trial court. There are certain presumptions as to the community nature of property acquired after marriage (§ 164, Civ. Code), but whether such presumptions have been rebutted is primarily a question of fact. A finding that property is separate property of a deceased will not be disturbed if there is substantial evidence or reasonable inferences from the evidence to support it. *Estate of Trelut*, 26 Cal.App.2d 717, 80 P.2d 147; *Estate of Ades*, 81 Cal. App.2d 334, 184 P.2d 1. In many cases, as in the instant one, the problem involves the

intent of the decedent, who, of course, is not present to state his intent.

Not involved in the present controversy is certain property received by the appellant which was not part of the estate of her deceased husband. Upon the death of the decedent there was a joint tenancy bank account in a San Francisco bank in which there was a balance of about \$800. In addition, appellant received \$3,000 in cash from her husband's mutual aid benefits, he having been a retired army officer, and also received a life annuity of \$63 per month. These items were not part of decedent's estate and are not here involved.

As to the property within the estate, the following are the facts: The inventory shows that there was \$1,100 in cash in decedent's safe deposit box, \$1,300 in a commercial account under his sole name in a Fresno bank, and two life policies totaling \$13,000 payable to the estate. In addition, there was a Ford automobile and a trailer, both registered in decedent's name. There was also some realty in Mariposa County which stood in his name, and certain furnishings located there or in storage in San Francisco. Appellant contends that all of these properties were acquired after marriage, and, therefore, under the presumptions contained in § 164 of the Civil Code, must be presumed to be community property.

Appellant married the decedent in June, 1941, in North Carolina, where decedent was then stationed on army duty. They came to California in November, 1941. The husband died in October, 1944. Thus the parties lived together about forty months. On December 9, 1941, a joint commercial account in the name of husband and wife was opened in a San Francisco bank. Admittedly, at the time of marriage the husband owned a piece of San Francisco property which he sold, early in 1942, for a substantial sum of money which was deposited in the joint account. In December, 1941, the parties bought a home in San Francisco for \$6,250, and the title thereto was taken in joint tenancy. A cash payment of \$750 was made on this house, and payments thereafter made, first, of \$42.50 per month, and later \$38.00 per month. They later sold this home for \$8,800 and

paid off the mortgage of \$5,500. The net of \$1,500 was used, in part, by decedent, to pay off on a loan he had made on his life insurance policies, and the balance was deposited in the joint account. In 1943 the Mariposa County property was purchased with a \$1,500 check drawn on the joint account. The automobile and trailer were purchased about May, 1944, with checks drawn on the joint account. The \$10,000 life insurance policy was fully paid up before the marriage, but decedent made several loans on the policy before marriage, and these loans, totaling \$3,506, were paid off after marriage. The \$3,000 policy was a ten-payment life policy on which \$1,269 was paid to the company after marriage. The decedent retired from the army at the time of his marriage, and thereafter received net from the government \$248 per month, he having authorized the government to deduct from his retirement pay a payment of \$24 per month plus for the insurance premiums.

The joint account was originally opened in an amount of about \$300, which came from decedent's salary. The retirement benefit checks from the government were mailed directly to the bank and deposited in the joint account. The appellant testified that the decedent received from the government during their married life the sum of \$10,618, and that for a short period he worked as a defense worker and earned net the sum of \$814.93, making net earnings of \$11,432.93. When asked about their living expenses appellant testified "I guess around \$200 a month." If this figure be accepted, it would mean that in the forty months of their marriage about \$8,000 was expended on living expenses.

Appellant while admitting that the money received from the sale of the San Francisco property owned before marriage was her husband's separate property contends that when such funds were deposited in the joint account a gift of such funds to her was consummated citing such cases as *Wheeland v. Rodgers*, 20 Cal.2d 218, 124 P.2d 816; *Monnette v. Title Ins. & Trust Co.*, 107 Cal.App. 313, 290 P. 668. She then contends that when the other properties were purchased with funds from that account they likewise became joint tenancy

property, even though taken in the name of the husband alone. See *Wallace v. Riley*, 23 Cal.App.2d 654, 74 P.2d 807; *Estate of Harris*, 9 Cal.2d 649, 72 P.2d 873. She applies the same argument to the Fresno bank account which, although in the name of decedent alone, was opened with a check on the joint account. She also contends that the \$1,100 in the safe deposit box must be presumed to be community property, because, although its source was not traced, it was discovered after marriage. *Estate of Jolly*, 196 Cal. 547, 238 P. 353. She also urges that she has a community interest in the two life policies because \$1,269 of premiums on one policy, and a loan of \$3,506 was paid off on the other, after marriage. The automobile, trailer, and Mariposa property, according to her contention, must be presumed to be community property because "acquired" after marriage. *Falk v. Falk*, 48 Cal.App.2d 762, 120 P.2d 714; *Veterans' Welfare Board v. Liebhart*, 50 Cal.App.2d 179, 122 P.2d 693.

[15-18] There can be no doubt that most of the property here involved, at the start of the trial, was presumptively community property, for the reasons set forth by appellant. But the trial court has found that, in fact, it was separate property. The real question is whether there is "satisfactory" evidence to support that finding, and that means not only direct evidence, but reasonable inferences from that evidence. It is obvious that this man died possessed of property valued far in excess of the money he earned during marriage. While most of the property was purchased with money from the joint account, the real question is the intent with which money from that account was later used to buy property taken in his name alone. The fact that most of the subsequently purchased property—the automobile and trailer and the Mariposa property, as well as the money in the safe deposit box and the money in the Fresno account—were placed in the separate name of decedent although paid for, in the main, with money from the joint account, is some evidence that the decedent intended it to be his separate property. While it is true that when the only evidence is that separate and community property are commingled, the entire fund

must be treated as community if the separate funds have not been identified (*Fountain v. Maxim*, 210 Cal. 48, 290 P. 576; *Falk v. Falk*, 48 Cal.App.2d 762, 120 P.2d 714), that rule has no application where there is other evidence. In the instant case we know that the total value of deceased's estate far exceeds his community earnings. We have the evidence of the change of title of much of the property from separate to joint, and back to separate. In addition, accepting the testimony of appellant as to her "guess" as to the family expenses of \$200 per month, in their forty months of marriage the family expenses totaled \$8,000. During the same period the total community income was \$11,432.93, which leaves a net of community savings of \$3,432.93. It is a well-settled presumption in such cases that the expenses of the family are paid from community earnings, and that the excess over community earnings less community expenses is separate property. *Huber v. Huber*, 27 Cal.2d 784, 167 P.2d 708; *Van Camp v. Van Camp*, 53 Cal.App. 17, 199 P. 885; *Estate of Tompkins*, 123 Cal.App. 670, 11 P.2d 886; *Estate of Ades*, 81 Cal. App.2d 334, 184 P.2d 1.

[19] Under these circumstances we think that except as to the sum of \$3,432.93—the excess of community earnings over community expenses—there was "satisfactory" evidence that the balance of the property was the separate property of the deceased. As to this excess, although the evidence of family expenses was most incomplete, out of an abundance of caution we will accept appellant's "guess" of \$200 per month. This will require a partial reversal and a partial affirmance.

The decree settling, allowing and approving the first and final account and the supplemental accounts, and of final distribution is hereby modified to provide that of the cash on hand \$3,432.93 was the community property of deceased and appellant, and that appellant is entitled to the whole thereof; but in all other respects the decree is affirmed. Both sides to bear their own costs on this appeal.

WARD and BRAY, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

LACEY v. BERTONE.

Civ. 13608.

**District Court of Appeal, First District,
Division 2, California.**

July 16, 1948.

Rehearing Denied Aug. 14, 1948.

Hearing Granted Sept. 8, 1948.*

1. Motions ⇨21

An order to show cause is a notice of motion. Code Civ.Proc. § 1005.

2. Motions ⇨24

Service of order to show cause less than five days before hearing thereon is insufficient in absence of order shortening time of service. Code Civ.Proc. § 1005.

3. Appeal and error ⇨1031(1)

Under court rule, District Court of Appeal will not presume that an error apparent on the face of the record was cured by something not shown by the record. Rules on Appeal, rule 52.

4. Appearance ⇨9(7)

Where court erred in granting temporary injunction without sufficient notice, but on motion to dissolve the injunction, plaintiff undertook to relitigate the merits of its issuance, plaintiff could not thereafter complain of the original lack of statutory notice. Code Civ.Proc. § 1005.

5. Appearance ⇨19(1)

A general, as distinguished from a special appearance, will cure antecedent lack of jurisdiction of the person.

Appeal from Superior Court; City and County of San Francisco; Herbert C. Kaufman, Judge.

Action by E. V. Lacey, also known as Edward V. Lacey, against S. Bertone, also known as Stefano Bertone, for specific performance of a contract to sell an apartment house and for declaratory relief wherein defendant cross-complained to determine that plaintiff's rights under a contract of sale were terminated, for damages and for an accounting of rent. From an order granting a temporary injunction and from an order denying plaintiff's motion to dissolve the injunction, plaintiff appeals.

Orders affirmed.

*Subsequent opinion 203 P.2d 755.

Phil F. Garvey and Jas. A. Himmel, both of San Francisco, for appellant.

Allen Spivock, of San Francisco, for respondent.

DOOLING, Justice.

Two appeals are presented, one from an order granting a temporary injunction and the second from an order denying appellant's motion to dissolve said injunction.

Appellant as plaintiff brought this action for specific performance of a contract to sell an apartment house and for declaratory relief. Defendant cross-complained seeking a determination that plaintiff's rights under the contract of sale were terminated, damages and an accounting of rents collected by plaintiff.

After the trial and submission of the action but before judgment defendant and cross-complainant filed an application for an injunction pendente lite to enjoin plaintiff and cross-defendant from collecting further rents from the apartment except on condition that they be deposited in a joint account of the parties and from interfering with cross-complainant's access to the premises. An order to show cause and temporary restraining order were issued, the return day in the order to show cause being June 2, 1947. Service of the order to show cause was made on appellant Lacey on May 29, 1947. On the return day no appearance was made by or on behalf of appellant and the temporary injunction was granted as prayed.

Several attacks are made on this order:

1. That the order to show cause was not served five days before the hearing as required by Code Civ.Proc., sec. 1005;
2. That the order to show cause was not served on appellant's attorney but only on appellant;
3. That the order to show cause was defective in specifying the hour of hearing as "10 o'clock", without designating whether a. m. or p. m.

[1,2] Since the first ground is sound we need not consider the other two. An order to show cause is a notice of motion. *Difani v. Riverside County Oil Co.*, 201 Cal. 210, 256 P. 210; *McAuliffe v. Coughlin*, 105 Cal. 268, 38 P. 730. This being so sec.

1005, Code Civ.Proc. is applicable and a service of less than five days, in the absence of an order shortening time of service, is insufficient.

[3] Respondent argues that we should presume in support of the order appealed from that the court did make an order shortening time; but under rule 52, Rules on Appeal, we can no longer presume that an error apparent on the face of the record was cured by something not shown by the record. *Alkus v. Johnson-Pacific Co.*, 80 Cal.App.2d 1, 181 P.2d 72; *Palpar, Inc., v. Thayer*, 82 Cal.App.2d 578, 186 P.2d 748.

This defect in the time of service would necessitate a reversal but for what followed. On June 13, 1947 appellant served a notice of motion on respondent and pursuant to such notice on June 18, 1947 moved the court to dissolve this temporary injunction. This motion to dissolve was denied and it is from the order of denial that the second appeal is taken.

[4] The notice of motion to dissolve stated as grounds upon which it would be made in addition to insufficient notice "2. That there is not sufficient ground for the injunction. 3. That the extent of the injunction is too great." Appellant thus undertook to relitigate the merits of the issuance of the injunction. Having done that he cannot now complain of the original lack of statutory notice. The applicable principle is well stated in *Thomas v. San Diego College Co.*, 111 Cal. 358, 365, 43 P. 965, 967: "Whether the court erred in granting the order without notice need not be considered, as plaintiffs were heard upon the motion to recall the order, or to stay its execution; and, if their motion was properly denied, they were not prejudiced by the first order."

Similarly in *Goble v. Appellate Dept. of Superior Court*, 130 Cal.App. 737, 739, 20 P.2d 345, 346, we read that "* * * while petitioner had no notice preceding the order staying remittitur, he had his day in court under the motion to vacate it. It is for this reason that he was not prejudiced by the lack of notice. The only purpose of the notice * * * would have been to furnish him an opportunity to be heard. That opportunity he has had."

[5] This principle is no more than a specific application of the well recognized rule that a general, as distinguished from a special, appearance will cure an antecedent lack of jurisdiction of the person. *Raps v. Raps*, 20 Cal.2d 382, 125 P.2d 826.

The orders appealed from are affirmed.

GOODELL, Acting P. J., and GRIFFIN, J. pro tem, concur.



87 Cal.App.2d 20

FONG et al. v. ROSSI.

Civ. 13621.

District Court of Appeal, First District,
Division 2, California.

July 30, 1948.

Rehearing Denied Aug. 28, 1948.

1. Landlord and tenant ⇨47

Where lease would have been illegal without transfer of liquor licenses to tenant and lease recited that principal income would be obtained from conduct of business under liquor licenses then possessed by landlord and used at the premises, and provided for retransfer of liquor licenses under certain circumstances, the lease would be construed as requiring landlord to transfer such liquor licenses. Gen.Laws Act 3796, § 7; Civ.Code, § 1643.

2. Landlord and tenant ⇨34(5)

Where landlord wrongfully refused to transfer liquor licenses as required by lease and tenant gave notice of rescission and surrendered key to premises, rescission of the lease was complete and subsequent offer by landlord to cooperate in obtaining transfer of liquor licenses came too late.

3. Appeal and error ⇨1011(1)

The Court of Appeals is bound by trial court's finding on conflicting evidence.

4. Landlord and tenant ⇨34(2)

Where landlord wrongfully refused to transfer liquor licenses as required by lease unless tenant would buy stock of liquor

on the premises for \$24,000 there was a material failure of consideration which justified tenant in rescinding lease. Civ. Code, § 1689, subd. 2.

5. Landlord and tenant ⇨34(1)

Where tenant rightfully rescinded lease on account of material failure of consideration and court found that expenditures made in good faith by tenant were in excess of any damage suffered by landlord by reason of anything done on the premises by the tenant, landlord's contention that the court had not done full equity between the parties or restored landlord to status quo ante could not be sustained.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Separate actions for rent by Richard R. Fong and another against John L. Rossi who filed a cross-complaint to recover \$2,500 already paid as rent. The actions for rent were consolidated for trial and from a judgment for the defendant, the plaintiffs appeal.

Judgment affirmed.

Wm. E. Ferriter and James C. Purcell, both of San Francisco, for appellants.

Leroy R. Goodrich, of Oakland, for respondent.

DOOLING, Justice.

Two actions for rent were consolidated for trial. The defendant cross-complained to establish a rescission on the ground, among others, of failure of consideration and to recover back \$2,500 already paid as rent. Judgment went against plaintiffs and for defendant on the cross-complaint. From this judgment plaintiffs appeal.

The parties entered into a written contract of lease on May 14, 1946. The downstairs portion of the premises leased had been operated as a restaurant and respondent intended to remodel it and operate it as a night club. The property rented included "all of the furniture, furnishings, and fixtures and equipment." Upon conflicting evidence the trial court found that after the execution of the agreement the plaintiff Fong Wan removed from the

premises a substantial part of the furniture, furnishings, fixtures and equipment without the defendant's consent. Whether this, standing alone, was a sufficiently material partial failure of consideration to support a rescission we need not determine since the court found a failure of consideration in another particular which the terms of the lease itself demonstrate was vital to the contract.

The court found that the plaintiff, Fong Wan, refused to transfer the liquor license appurtenant to the restaurant business unless the defendant would first buy a stock of liquors on the premises for \$24,000. With respect to liquor licenses the lease contained the following provisions:

"17. The parties to this lease understand and agree that the principal income derived and to be derived from the operation of the said Shanghai Cafe is, and will be obtained from the conduct of business done at said place under the liquor licenses now possessed by the lessor and used at said premises.

"18. And it is further understood and agreed that liquor licenses in the City of Oakland are limited in number and are of great financial value and that when revoked, no liquor business of any kind can be done at the premises whereat the liquor licenses are revoked; and it is further understood and agreed that if for any reason beyond the control of the lessor, and resulting from any act, or thing done, or omitted to be done by the lessee or his agents or servants which shall result in the revocation of all or any of the liquor licenses by the Board of Equalization of the State of California, the lessor will suffer material damages in an amount which it is impossible to ascertain at the present time and therefore it is expressly understood and agreed that, in the event that the said Board of Equalization should for any such reason during the term of this lease, and the occupancy by the lessee, revoke any liquor license at said Shanghai Cafe, the lessee shall pay to the lessor within ten days after such order of revocation in lawful money of the United States the sum of Ten Thousand (\$10,000.00) Dollars, and it is expressly agreed that the decision of the Board of Equalization shall be final as between the

parties to this lease and for the purposes of this paragraph; and in the event that the lessor should be required to bring any suit or action against the lessee to collect the said sum of Ten Thousand (\$10,000.00) Dollars, the lessee shall pay to the lessor such sum as the court may find to be reasonable as and for attorneys' fees and costs of the plaintiff in bringing such suit or action.

"19. It is further understood and agreed that if such revocation or revocations shall occur, the lessee shall have thirty days within which to obtain other licenses covering all of the rights and privileges of the present licenses to be used by the lessor at said premises in which event the said sum of Ten Thousand (\$10,000.00) Dollars shall not be paid.

"20. No liquor license now used in connection with the operation of the business upon said premises shall be transferred to any other location, and then at the end of the term of this lease, or the sooner termination thereof, the lessee agrees promptly to have said, or any renewed liquor licenses aforesaid, re-transferred to the lessor, his heirs, executors, administrators or assigns."

[1] Appellants argue that these provisions of the lease contain no promise to transfer the liquor licenses. We are satisfied that while no express promise to transfer the licenses is contained therein the plain tenor of the whole agreement is that the liquor licenses are to be transferred. It is agreed that the "principal income * * * will be obtained * * * under the liquor licenses now possessed by the lessor * * *." Unless the transfer of the licenses was intended by the parties this agreement would be illegal. *Teachout v. Bogy*, 175 Cal. 481, 166 P. 319. Under section 7 of the Alcoholic Beverage Control Act, Statutes 1935, p. 1123, 2 Deering's Gen.L.1944, Act 3796, a liquor license may be transferred with the approval of the Board of Equalization. Since a contract must be construed so as to give it a legal effect if possible (Civ.Code sec. 1643) this lease must be construed to provide for the transfer of the licenses in the manner authorized by law. *Leboire v. Black*, 84 Cal. App. 260, 190 P.2d 634. In paragraph 20 it is provided that at the end of the term

"the lessee agrees promptly to have said, or any renewed liquor licenses aforesaid, re-transferred to the lessor"—a clear implication that the licenses are to be transferred to the lessee. If more is needed (and if these provisions of the lease be regarded as ambiguous) the broker who negotiated the lease for the lessors testified: "There was a part of these negotiations in relation to this matter with these liquor licenses. I guess that is the way it is supposed to be, that is, these liquor licenses would be transferred to Mr. Rossi. I wouldn't think the place could be run successfully, that is, profitably, without liquor licenses. I would say it is a very large part of the consideration for entering into this arrangement." Furthermore the lease was drawn by appellants' attorney and must be construed most strongly against them. Civ. Code, sec. 1654.

[2] Appellant Fong Wan and respondent both testified that Fong Wan refused to transfer the licenses unless respondent agreed to buy this stock of liquor. Appellants had no legal right to impose this extra-contractual burden on respondent as a condition of the performance of their agreement to transfer the licenses. On July 19, 1946, after fruitless efforts to obtain the transfer of the licenses, respondent served notice of rescission on appellants and surrendered the premises. On July 24, 1946, after receipt of the notice of rescission and the key to the premises, appellants by letter offered to cooperate in obtaining the transfer. The rescission was then complete and their offer came too late.

[3, 4] There is in the record the testimony of appellants' attorney that, before the notice of rescission was given, in a telephone conversation he offered the licenses and the executed transfer applications of the licensees to respondent. This respondent denied and we are bound by the trial court's finding on this conflicting evidence. The rescission was justified by the material failure of consideration found by the court. Civ.Code sec. 1689, subd. 2; 4 Cal.Jur. 785.

[5] The trial court found with regard to certain alterations made in the premises "that the expenditures made in good faith

by defendant * * * were in excess of any damage suffered by plaintiffs by reason of anything done on said premises by defendant." This finding disposes of appellants' claim that the trial court did not do full equity between the parties or restore them to the status quo.

In view of the fact that the matters discussed fully support the judgment the sufficiency of the pleadings, evidence and findings in other particulars need not be considered.

Judgment affirmed.

GOODELL, Acting P. J., and GRIFFIN, J., pro tem., concur.



HUDSON et al. v. CRAFT et al.

Civ. 13513.

District Court of Appeal, First District,
Division 2, California.

July 15, 1948.

Hearing Granted Sept. 8, 1948.*

Assault and battery ☞

Where 18-year-old boy had agreed for a consideration to participate in unlawful boxing match staged by a circus or carnival and was injured in such match, the boy and his father were not entitled to maintain action for personal injuries or medical and surgical expenses against the circus or carnival. Civ.Code, § 3515; Pen. Code, § 412.

DOOLING, J., dissenting.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Guy C. Hudson, a minor, by and through his guardian ad litem, Bernice Hudson, and Ray M. Hudson against Orville Craft, John Doe, and Richard Roe, individually and doing business as Craft

Shows, etc., and another, for personal injuries sustained by the minor and for medical and surgical expenses incurred by the minor's father. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

Young, Ryan & Whitton and Albert K. Whitton, all of Oakland, for appellants.

Applebaum & Mitchell and John Jewett Earle, all of Oakland, for respondent.

GOODELL, Justice.

The appellant Guy C. Hudson, a minor 18 years of age, sued the respondents for \$15,000 damages for personal injuries. His father sued in a separate count for the son's medical and surgical expenses. Respondents' demurrer to the complaint was sustained with leave to amend. Appellants declined to amend, and a judgment for costs was entered for respondents, from which this appeal was taken.

The complaint alleges that the respondent Craft Shows operated in Oakland a circus or carnival and in connection therewith a boxing and wrestling concession for which a separate admission fee was charged; that the concession was operated in violation of section 412 of the Penal Code, also of the provisions of the Business and Professions Code which require a license, and of the rules and regulations of the State Boxing Commission. It alleges that appellant Guy C. Hudson was solicited by respondents to participate in a boxing match and prize fight for a consideration to him of \$5, that he did so and "was violently struck in and about the face and body" and suffered a "broken jaw, concussion of the brain, numerous bruises and contusions about his face and body, and severe shock."

There is nothing in the complaint indicating that there was any anger between the contestants or that they had ever met before they entered the ring; or that force was used in excess of that which is to be anticipated in such a contest, other than the conclusion that appellant was "violently struck."

The complaint shows that appellant voluntarily engaged in the encounter, hence the demurrer raised the question whether one so engaging, with eyes open to the pos-

sibility of bodily injury, assents to the invasion of his right of security from bodily harm and assumes the risk of injury so as to bar his recovery therefor.

It is axiomatic that "He who consents to an act is not wronged by it." Civ.Code, sec. 3515. Whether this principle bars a recovery when the contest so assented to is conducted in violation of law, is the real question presented for decision.

Appellant's adversary was joined as a party defendant but was not served. The litigation, therefore, is between the injured contestant and the promoter of the contest. There is no similar case reported in this state, and apparently but one (where the promoter and not the contestant was sued) in the United States, namely, *Teeters v. Frost*, 145 Okl. 273, 292 P. 356, 357, 71 A.L.R. 179, and on that case the appellants chiefly rely.

There are two rules on this question. The majority rule permits a recovery for assault and battery by a participant in an illegal combat notwithstanding he has assented to engage therein. The minority rule denies a recovery—even though the contest violates the law—because the contestant has engaged in the combat voluntarily and has thereby assented to an invasion of his rights. For a comprehensive discussion of the subject see "Consent as Affecting Civil Liability for Breaches of the Peace" written by Professor Francis H. Bohlen (later the Reporter of the Restatement of Torts) in 24 *Columbia Law Review*, 819; see, also, annotations in 6 A.L.R. 388; 30 A.L.R. 199, and 47 A.L.R. 1092. The Restatement adopts the minority rule.

In *Teeters v. Frost*, *supra*, the defendant Teeters operated a moving picture theatre and as an added attraction featured boxing contests on the stage. Such contests were illegal. Two young men, Frost and Boyer, were entered as contestants, and each was paid \$1 by Teeters. As was said in the opinion, the contestants were "generally young men who were willing to do hard fighting for small pay." In the course of the fight Boyer delivered a blow or blows which resulted in Frost's death, and Frost's parents sued Teeters for \$25,000. The jury awarded them \$5,000 and on appeal the

court followed the majority rule and affirmed the judgment.

Numerous points were presented on appeal, among them assumption of risk. With respect to that defense the court said in 292 P. at page 359: "The law * * * making the assumption of risk a defense in an action in tort applies only when there are contractual rights. It can scarcely be contended that one could contract against the teeth of a criminal statute or any statute prohibitory in its nature." In *Sinclair Prairie Oil Co. v. Thornley*, 10 Cir., 1942, 127 F.2d 128, 133, a tort action arising in Oklahoma, the court said: "It is doubtful if the doctrine of assumption of risk is applicable in this case. The defense of assumption of risk is not available in Oklahoma between parties not in a contractual relationship. *Chicago, R. I. & P. R. Co. v. Rogers*, 60 Okl. 249, 159 P. 1132; *Teeters v. Frost*, 145 Okl. 273, 292 P. 356, 71 A.L.R. 179." There is no such limitation on the application of the rule in California, hence the rejection of that defense in the *Teeters* case renders it no authority at all in this state on the question of assumed risk.

Next, the mainstay of the *Teeters* case on the question of assent was the case of *McNeil v. Mullin*, 1905, 70 Kan. 634, 79 P. 168, 170, the rule of which was discarded by the Kansas court 30 years later. The *McNeil* case reversed a judgment for defendant because the "consent to fight must be treated as utterly void" the court following the majority rule and quoting *Cooley on Torts*, 2d Ed., 187, *infra*. The quotation in the *Teeters* case from *McNeil v. Mullin* embodies the majority rule as it appears in *Cooley on Torts* and in 2 R.C.L. 562 and 5 C.J. 630; 6 C.J.S., *Assault and Battery*, § 16. In *Wood v. McKeever*, 1935, 141 Kan. 323, 41 P.2d 989, 991, involving a shooting affray, the Supreme Court of Kansas said: "The case of *McCulloch v. Goodrich*, 105 Kan. 1, 181 P. 556, 6 A.L.R. 386, and earlier cases support the rule that persons consenting to and engaging in a mutual combat are liable reciprocally for injuries they may inflict on each other. *Such was formerly the general rule of law, but present day legal opinion has largely discarded it.* Restatement, Torts, § 60, comment and illustrations." (Emphasis

added). The foregoing was conceded in the opinion to be unnecessary to the decision because the case was not one of mutual combat but, coming as it does from the same court that decided *McNeil v. Mullin*, it indicates that today Kansas would follow the Restatement. See *Kansas Ann. to the Restatement of Torts*, *Journal of the Kansas Bar Assn.*, August 1935-May, 1936, pp. 181,182. *McCulloch v. Goodrich*, *supra*, involved a fight in anger between two women and the court affirmed a judgment for the plaintiff who was injured, on the authority of *McNeil v. Mullin*. Hence when the Kansas court in *Wood v. McKeever* discards the rule of *McCulloch v. Goodrich* "and earlier cases" it takes in, necessarily the *McNeil* case. For these reasons *Teeters v. Frost* cannot be followed in this state with any degree of confidence as to its correctness.

Appellants claim that the majority rule was adopted by our Supreme Court in *Churchill v. Baumann*, 95 Cal. 541, 30 P. 770, 771. The court in that case cites the maxim *volenti non fit injuria*, and section 3515, Civil Code ("He who consents to an act is not wronged by it"), and then quotes Cooley as follows: "Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. He is not injured by a negligence which is partly chargeable to his own fault. * * * But in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds" (citing Cooley on Torts, 2d Ed., 187 *inter alia*). This is a fair statement of the majority rule, stress being laid therein on the interest of the state, as a third party. The *Churchill* case was an action for diversion of water, where the plaintiff had participated with the defendant in maintaining and repairing the dam which was included in the project. All the court decided was that the plaintiff had consented to what the defendant had done, and was therefore precluded from recovery. No breach of the peace was involved, and we agree with respondents' criticism that it is difficult to explain why that part of the quotation from Cooley deal-

ing with a breach of the peace was included in the opinion. That case is in no respect comparable with this and no case at all similar to this has been cited by appellants where our Supreme Court has applied the majority rule.

This brings us to a consideration of the minority rule. The Restatement of Torts was not published definitively until 1934. Tentative drafts, however, were widely circulated while the compilation was in progress. Respondents rely on the case of *Hart v. Geysel*, 159 Wash. 632, 294 P. 570. That case was decided a couple of months after *Teeters v. Frost*, and (doubtless because of the short interval between the two decisions) does not mention the latter case where, it might be observed, the draft of the Restatement apparently was not brought to the court's attention.

Hart v. Geysel was an action brought by the administrator of a contestant killed in an unlawful prize fight, against the other contestant and other persons. The defendants' demurrers were sustained and a judgment of dismissal entered. In affirming the judgment the court discussed the majority and minority rules as they appeared in the tentative draft of the Restatement, and while declining to follow either rule, the result reached was said by the court to be supported by the draft of the Restatement, and it was. The reasons given in the American Law Institute's treatise for adopting the minority, as against the majority, rule, are to be found in that opinion at 294 P. at page 572. We believe *Hart v. Geysel* reached the correct result even though the court did not flatly declare itself as following the minority rule.

In 1934 the minority rule found its way into section 60 of the Restatement of the Law of Torts, reading as follows:

"Assent to Invasion Constituting Crime. Except as stated in section 61, an assent which satisfies the rules stated in sections 50 to 59 prevents an invasion from being tortious and, therefore, actionable, although the invasion assented to constitutes a crime." The subjoined comment reads: "* * * The assent of the person whose interest is invaded does not affect the criminal character of the other's conduct al-

though it does affect the tortious character thereof except as stated in section 61. Thus, while the actor may be subjected to punishment for the crime, he is not civilly liable to the person assenting to the criminal invasion."

The subjoined illustration (which happens to epitomize this case) reads as follows: "1. A and B engage in a boxing match which is illegal because the required license has not been obtained. Each is guilty of a breach of the peace, but neither is liable to the other."

Section 60 of the Restatement speaks of "an assent which satisfies the rules stated in sections 50 to 59." Those ten sections deal with various aspects of assent e. g. whether actual or apparent; by and to whom given; mistake as to harmful character, or as to authority; assent given under duress; assent by a person incapable of giving it. Section 53, dealing with "assent to Particular Invasion," reads as follows: "To constitute a consent, the assent must be to the invasion itself and not merely to the act which causes it." The following illustration is then given: "If two persons engage in a boxing match, neither of them assents to receiving any particular blow, since each hopes to avoid his adversary's blows by dodging, sidestepping or blocking. However, he does sufficiently express a willingness that the other shall try to hit him, and the expression of such willingness is a sufficient assent to those blows which he is unable to avoid, since while he may avoid some blows, he is substantially certain to receive others."

Section 61, mentioned as an exception, does not destroy or weaken the bearing of section 60 on the present problem, for, as one of its illustrations shows, that section is designed for cases such as statutory rape where the law throws its protection around the female even though she assents. The other party in such case is held civilly liable. The appellants' argument that section 61 was designed to protect participants in unlicensed bouts is without merit.

The Restatement was compiled with great deliberation and only after careful and searching exploration of all the case law extant and of the treatises of eminent text

writers and commentators. As we have seen, tentative drafts were widely circulated several years before the text assumed final form. There was every opportunity to compare and thresh out the divergent rules on any given topic, including, of course, the majority and minority rules under discussion in this very case. There was unlimited opportunity to analyze the views and texts of such recognized authorities as Judge Cooley, quoted above and relied on by appellants. With this wealth of material from all sources, the minority rule was finally selected and adopted, based, as it is, on two "first principles," (a) "that one who has sufficiently expressed his willingness to suffer a particular invasion has no right to complain * * *," and (b) "that no one shall profit by his own wrongdoing." See 294 P. at page 572. The majority rule is an exception to both of these principles while the minority rule is in consonance with them. Idem.

We are satisfied that the rule of the Restatement is the correct rule and the one which should be followed in this state in cases such as that now before the court.

That rule "prevents an invasion from being tortious and, therefore, actionable." Let it be conceded for the purposes of the discussion that the Craft Show was a party to the invasion because it induced it. If assent rules out *the tortious character of the acts themselves*, it would seem to follow that nobody identified with the invasion can be held liable whatever his or their criminal responsibility or moral culpability might be. In short, if appellants cannot maintain a tort action against the other contestant they cannot maintain one against the promoter.

The judgment is affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice (dissenting).

I dissent. The defendant and respondent for its own gain promoted unlicensed prize fights. It thus knowingly violated penal provisions of the law. Penal Code, sec. 412; Business and Professions Code, sec. 18780. The only question is whether in so doing it rendered itself civilly liable to a

contestant who received physical injuries in such a fight. The majority opinion answers this question in the negative, sole reliance being placed on the minority rule of assumption of risk of injury by one voluntarily engaging in a fight or combat, which rule has been adopted by the Restatement of the Law of Torts.

The majority rule, which has an ancient history in our law, is well stated in *Cooley on Torts*, 4th Ed., p. 327:

"Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. * * *

"But in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. If men fight, the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. There are three parties here, one being the state, which, for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable, that consent to an assault is no justification."

This accords with the overwhelming weight of authority. See cases collected in notes 5 and 6, 6 C.J.S., *Assault and Battery*, § 16, page 806; and in notes 31 and 32, 5 C.J. 630. We are asked to turn our backs on these authorities which admittedly far outnumber those expressing the minority rule. While I have the greatest respect for the Restatement I cannot in this instance follow it. I believe the rule of *Cooley* and the majority of our courts to be sound as a matter of basic public policy. The state has not only a normol but also a material interest in the wounding of its citizens. If they are disabled they and their families may become charges on the state, and the

degree in which the state takes care of the wants of the disabled is progressing. I can see no reason why a promoter who knowingly flouts the law for selfish gain and wilfully induces minors and others, who may be physically unprepared, to engage in unlawful violent combat, which he must know may result in their physical injury, should escape civil liability. The only decided case on the precise question agrees with this view. *Teeters v. Frost*, 145 Okl. 273, 292 P. 356.

Even if we accept the minority rule it does not follow that the promoter must escape liability for injury to the contestants. His is the duty to procure the license, not theirs. The law is for their protection, not his. Particularly in view of the strong public policy involved it seems clear that the gullible or youthful contestants who could be induced to run the risk of serious physical injury for five dollars apiece are not in *pari delicto* with the promoter. *Hedlund v. Sutter Medical Service Co.*, 51 Cal. App.2d 327, 332-334, 124 P.2d 878; 6 Cal. Jur. 157.

It is suggested that, by analogy to the cases holding that the driving of an automobile without a license does not render the unlicensed driver liable for injuries to a third person, the lack of a license here should not render the promoter liable to the injured contestant. The cases are not analogous; the true principle applicable here being stated in *Turner v. Whittel*, 2 Cal.App.2d 585, 589, 38 P.2d 835, 837:

"It is the rule that not only the principal actor or actual assailant, but all others who aid, abet, counsel, or encourage the wrongdoer, are equally liable with him to the injured party."

The judgment should be reversed.

87 Cal.App.2d 32

WAID v. SMITH et al.

Civ. 3901.

District Court of Appeal, Fourth District,
California.

July 30, 1948.

1. Automobiles ⇨ 169, 245(2)

Driver must use ordinary care in backing his automobile, but whether such care was used in a given case is largely a question of fact

2. Automobiles ⇨ 245(51)

Whether violation of city ordinance requiring driver of vehicle emerging from alley, driveway, or garage to stop immediately before driving onto sidewalk or sidewalk area extending across alleyway was the proximate cause of injury sustained by 22-months-old child struck by right rear wheel of backing automobile was a question of fact.

3. Automobiles ⇨ 245(8)

New trial ⇨ 68

Whether driver was negligent in striking 22-month-old child with right rear wheel of automobile while backing from garage into street was a question of fact, and therefore the granting of new trial after verdict for defendant driver was not error.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Carl Frederick Waid, a minor, by his guardian ad litem, Raleigh L. Waid, against Marie Georgene Smith and another for injuries sustained by minor plaintiff when struck by automobile. Verdict for defendants and from an order granting a new trial, defendants appeal.

Order affirmed.

Stickney & Stickney and Edward Strop, all of San Diego, for appellants.

Robert C. Thaxton, of San Diego, for respondent.

BARNARD, Presiding Justice.

This action arose out of an accident in which the minor plaintiff, who was 22

months old, was struck by an automobile which was being backed by the defendant Mrs. Smith.

The accident occurred about 3:00 P.M. on January 3, 1946, in the intersection of 42nd Street and East Canterbury Drive in San Diego. In a real sense, this is not an intersection but these two streets come together in the form of a reverse "L." Canterbury runs east and west but ends at 42nd Street, and 42nd Street runs north and south but ends at Canterbury. On the north side of Canterbury and approximately on a line with the center of 42nd Street, if that line were projected across the intersection and to the north, is a wall and hedge forming the east boundary of a home on the north side of Canterbury and opposite the west half of 42nd Street. To the east of this wall and hedge is an open space about twenty feet wide and thirty feet long, which is opposite the easterly half of 42nd Street. The defendants, who lived on the street to the east of 42nd Street, had a garage at the rear of their home which opened upon the easterly side of this open space. Their car was seventeen feet long and it had long been their practice to back the car into this open space until they reached the wall and hedge. Since the space was only twenty feet wide it was then necessary to go forward and backward two or three times until the car was in a position where it could be backed through the south end of this open space into this intersection. As they came into the intersection they would back to the left toward Canterbury enough to permit them to turn to the right and proceed south on 42nd Street.

On this occasion Mrs. Smith backed out in this manner, as she had done daily without incident for eighteen years. Just before entering the garage she had talked with a neighbor over this wall. She then walked over to the garage, looked up the street, and then entered the garage and proceeded to back the car out. At that time no children were around the intersection, and there was no traffic there. After Mrs. Smith left to enter her garage, the neighbor observed the minor plaintiff standing with his wagon and a dog near the east curb of 42nd Street and three-fourths

of a block south of the intersection here in question. No one else saw the child at any time material here.

When Mrs. Smith had her car in a northerly and southerly direction and in a position to back from this open space into the intersection she looked in her rear view mirror and saw nothing in the intersection. She backed slowly out while looking to the rear along the left side of her car. While thus backing out, preparatory to turning south on 42nd Street, she felt a bump. She drove her car forward a few feet toward the entrance to the open space and stopped. She then got out and found the injured child, which had been struck by the right rear wheel of her car. The point where the child was struck was about fifteen feet from the north curb line of Canterbury and on a line between the wall and hedge and the center line of 42nd Street to the south.

There were no eyewitnesses to the accident and no one knows how the child arrived at the point where he was struck. The top half of one of his ears was cut off, he suffered other bruises, and it is claimed that some of his injuries may be permanent. There is much evidence that children at times played in these streets near the other end of the block to the west, and of the block to the south, and there is some evidence that children had been playing in this intersection. The evidence indicates great negligence on the part of the mother of the child.

The jury brought in a verdict in favor of the defendants. On motion for a new trial the court denied it with respect to the cause of action on behalf of the father of the child, and granted it and ordered a new trial with respect to the action for the minor on the ground of the sufficiency of the evidence to support the verdict. The defendants have appealed from the order thus entered in favor of the minor plaintiff.

[1] The appellants contend that no evidence appears in the record which would have supported a judgment in favor of the minor plaintiff. It is argued that there is no evidence to indicate that Mrs. Smith on this occasion did anything which a

reasonable person would not have done, or failed to do anything which a reasonable person would have done. We have considerable sympathy with this point of view and on the record before us we are inclined to agree with the jury rather than with the trial judge. It is often necessary to back an automobile and it is usually not practical to have a watchman posted while this is being done. A driver, in backing, must look largely to the rear along the left side of his car, and cannot see small objects which may approach the rear right side of his car. While such a driver must use ordinary care, whether such care was used in a given case must of necessity be largely a question of fact.

[2] An ordinance of the city of San Diego was introduced in evidence which provides that the "driver of a vehicle emerging from an alley, driveway or garage shall stop such vehicle immediately prior to driving onto a sidewalk or into the sidewalk area extending across an alleyway." Whether or not this provision was applicable here does not satisfactorily appear. The evidence does not clearly show whether this open space, upon which Mrs. Smith's garage opened, as a part of 42nd Street or whether there was here a sidewalk area extending across an alleyway. If this ordinance was applicable, the further question is presented as to whether a violation of it by Mrs. Smith was a proximate cause of the accident. Factually, it seems unlikely that a short stop at that point would have made any difference. Whether she would then have been able to see this small child approaching on the other side of her car, while doubtful, is still a question of fact.

[3] We are forced to the conclusion that it cannot be said, as a matter of law, that Mrs. Smith did everything that a reasonable person would have done under the circumstances. The question is one of fact rather than one of law (*Smith v. Harger*, 84 Cal.App.2d 361, 191 P.2d 25) and is one which the judge at the next trial should consider with great care. Under familiar rules, he has an opportunity for weighing the evidence which is denied to an appellate court. Actually, final justice

must in many cases depend upon the way in which this opportunity and the corresponding duty are exercised.

The order appealed from is affirmed.

MARKS, J., concurs.



86 Cal.App.2d 780

DALLMAN SUPPLY CO. v. SWEET et al.

Civ. 7443.

Sac. 5878.

District Court of Appeal, Third District,
California.

July 16, 1948.

1. Action ⇐6

A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. Code Civ.Proc. §§ 379c, 1060.

2. Action ⇐6

Complaint setting out contracts with separate defendants one of whom was to purchase electric motors from plaintiff and the other to sell the motors to plaintiff and alleging that defendant to whom motors were sold withheld part of purchase price on ground they did not comply with specifications, and seeking recovery of such amount withheld, or in the alternative damages against the other defendant selling the motors to plaintiff stated a cause of action for declaratory relief. Code Civ. Proc. §§ 379c, 1060.

3. Action ⇐6

What may be the ultimate result after trial on the merits of alleged controversy is immaterial in determining whether complaint states a cause of action for declaratory relief. Code Civ.Proc. §§ 379c, 1060.

4. Parties ⇐14, 25

Statute permitting joinder of parties should be liberally construed in furtherance of objects of reformed procedure to simplify pleadings and conduct of actions and so far as possible to permit the settlement of all matters of controversy between the parties in one action. Code Civ.Proc. §§ 378 et seq., 379c.

5. Venue ⇐72

Where plaintiff has in apparent good faith stated a cause of action for declaratory relief against resident defendant, neither the sufficiency nor good faith thereof could be denied in proceeding by nonresident defendant for change of venue.

6. Action ⇐6

Venue ⇐41

Complaint in action for declaratory relief against resident and nonresident defendant based on contracts for sale and purchase of electric motors alleging that resident defendant withheld part of purchase price on ground of failure to comply with specifications stated a cause of action against resident defendant thereby making him a necessary defendant against whom a change of venue would not be granted upon motion of the nonresident defendant. Code Civ.Proc. §§ 378 et seq., 379c.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Declaratory judgment action by Dallman Supply Company against A. W. Sweet and the Royal Air Conditioning Equipment Company. From an order granting the motion of defendant last named for a change of venue, plaintiff and defendant first named appeal.

Reversed.

John F. Downey and Downey, Brand, Seymour & Rohwer, all of Sacramento, for appellant A. W. Sweet.

Matt Wahrhaftig and McKee, Tasheira & Wahrhaftig, all of Oakland (Ridley Stone, Jr., of Oakland, of counsel), for appellant Dallman Supply Co.

McGilvray & McGilvray, of Sacramento, and J. Harold Decker, of Los Angeles, for respondent.

PEEK, Justice.

This is an appeal by the plaintiff Dallman Supply Company (referred to hereinafter as Dallman) and by defendant A. W. Sweet from an order granting the motion of defendant Royal Air Conditioning Equipment Company (hereinafter referred to as Royal) for a change of venue from the County of Sacramento where the action was commenced and where the defendant Sweet resides, to Los Angeles County, the principal place of business of defendant Royal. From our examination of the record as set forth in the Clerk's Transcript it appears that said order of the trial court granting said motion should be reversed.

Plaintiff's complaint, which is entitled "Complaint for Declaratory Relief, for Moneys Due and for Damages", alleges that plaintiff's assignor by a written contract agreed to furnish defendant Sweet evaporative coolers and electric motors of $\frac{1}{6}$ or $\frac{1}{8}$ horsepower in accordance with government specifications for installation at a federal housing project at Herlong, California. By a second written contract Dallman agreed to purchase and Royal agreed to supply the motors so specified. After delivery at Herlong and after payment it was discovered that the motors were not as specified but were of $\frac{1}{4}$ horsepower, and as a result were rejected by the federal agency. Plaintiff immediately advised Royal of the rejection, and both parties endeavored to obtain motors of the specified horsepower but were unable to do so because of the war emergency. Ultimately the urgent nature of the use compelled the acceptance by the Authority of the larger motors but subject to revised specifications, thereby increasing the cost of installation, which cost Sweet was informed would have to be borne by him. Plaintiff was given notice by Sweet that he would so install the motors and would charge the additional cost to plaintiff. Accordingly thereafter Sweet withheld the cost of the revised installation from the purchase price of the motors. Plaintiff meanwhile had informed Royal that in turn it would hold said defendant liable for the additional cost.

The plaintiff further alleges that a controversy now exists between itself and Sweet and between itself and Royal as to the meaning and interpretation of the specifications relating to the motors; the issue in said controversies being the intent of the provision as to the specifications, i. e. whether there was or was not performance by Royal by furnishing and delivering the $\frac{1}{4}$ horsepower motors, that if by such delivery Royal substantially performed, then there is no basis for the withholding by Sweet from the purchase price thereof the amount of the increased installation cost, and in such event the unpaid balance of the purchase price is due and owing by him to plaintiff; and if such delivery by Royal was not substantial performance of the terms of the contract then plaintiff has been damaged by Royal in a like sum.

The complaint concludes with the allegation that although plaintiff is entitled to redress it is in doubt as to which one of the defendants should be held and therefore it seeks by declaratory relief to have the court declare the meaning of the specifications and in the alternative for money due from Sweet on the original purchase price of the motors or damages against Royal for its failure to comply with said contract.

Thus it appears first, that by declaratory relief plaintiff seeks to have determined the controversy which it alleges in fact exists between itself and Sweet and between itself and Royal concerning the question of performance of the contracts and second, because of the resulting doubt as to which one of the defendants is liable it has alleged a cause of action "for money due" against Sweet or "for damages" against Royal and has joined both of them under the provisions of section 379c of the Code of Civil Procedure.

[1-3] It is well established that a complaint for declaratory relief is "legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court." *Maguire v. Hi-*

bernia S. L. Soc., 23 Cal.2d 719, 728, 146 P.2d 673, 677, 151 A.L.R. 1062. The complaint herein recites in detail the dispute between the parties under the specifications set forth in the contracts and prays for a declaration of those rights and duties, and therefore, under the rule as stated, sufficiently complies with the provisions of section 1060 of the Code of Civil Procedure. What may be the ultimate result after a trial on the merits of the alleged controversy is immaterial at this stage of the proceedings for, as was said in the case last cited (23 Cal.2d at page 728 and 730, 146 P.2d at page 678 and 679) said section 1060 contains no suggestion that the pleader must allege facts entitling it to a favorable declaration nor have our courts so held.

The remaining question presented relates to the applicability of said section 379c to the facts alleged in plaintiff's cause of action "for moneys due" from Sweet or "for damages" from Royal.

The section in question provides that "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties."

[4] Our courts have consistently held that the sections of the Code of Civil Procedure amended or added by the statutes of 1927 (378 et seq.) should be liberally construed, permitting joinder whenever possible in furtherance of the objects of the reformed procedure, to simplify the pleadings and conduct of actions, and so far as practicable to permit the settlement of all matters of controversy between the parties in one action. *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 276 P. 1017; *Kraft v. Smith*, 24 Cal.2d 124, 148 P.2d 23.

[5] Here the plaintiff has in apparent good faith stated a cause of action against the resident defendant Sweet. Neither the sufficiency nor good faith thereof can be denied in this proceeding. *McClung v. Watt*, 190 Cal. 155, 211 P. 17; *Harbinson v. Affeldt*, 75 Cal.App.2d 499, 171 P.2d 474; *Nelson v. Marsh*, 100 Cal.App. 578, 280 P. 695.

[6] Particularly plaintiff has alleged the facts surrounding the specifications set forth in the contracts, thereby associating both defendants in the chain of circumstances underlying the ills of which it complains (*Busset v. California Builders Co.*, 123 Cal.App. 657, 12 P.2d 36) and, in accordance with the provisions of said section, also has alleged its doubt as to the defendant from whom it is entitled to redress, necessitating the joinder of both parties, or in other words, that there exists a reasonable uncertainty, requiring determination of some factual or legal issue, in respect to the alternative or quantitative liability of said defendants. *Kraft v. Smith*, supra. The observations of the court in that case would appear to bring the joinder invoked by plaintiff herein squarely within the provisions of said section 379c. And we might add would also appear to more than meet the requirement stated in the *McClung* case [190 Cal. 155, 211 P. 20], that the allegations must at least "shadow forth the semblance of a cause of action" against the resident defendant thereby making him a necessary defendant against whom a change of venue may not be granted upon motion of the non-resident defendant. *Freeman v. Dowling*, 219 Cal. 213, 25 P.2d 980; Sec. 395, C.C.P.

For the foregoing reasons the order is reversed.

ADAMS, P. J., concurs.

86 Cal.App.2d 897

PARADISE et al. v. NOWLIN et al.

Civ. 16569.

District Court of Appeal, Second District,
Division 2, California.

July 26, 1948.

1. Appeal and error ⇐370

Where appellant failed to pay filing fee within 20 days after being notified by clerk of the Supreme Court to pay the same, appeal would be dismissed on motion of respondents. Rules on Appeal, rule 10 (a).

2. Corporations ⇐508

Notice of appeal filed by corporation in propria persona in Superior Court and its opposition to dismissal in District Court of Appeal were void by reason of corporation's lack of power to represent itself in court.

3. Attorney and client ⇐62

A natural person may represent himself and present his own case to the court although he is not a licensed attorney.

4. Corporations ⇐1, 377½, 383, 508

A corporation is not a natural person, but is an artificial entity created by law, and as such it can neither practice law nor appear or act in person; and out of court it must act in its affairs through its agents and representatives, and in matters in court it can act only through licensed attorneys.

5. Corporations ⇐508

A corporation cannot appear in court by an officer who is not an attorney, and it cannot appear in propria persona.

6. Corporations ⇐508

By reason of statutory provision, a corporation may appear in person in the small claims court in contravention of the general principle that a corporation cannot practice law even on its own behalf.

Action by Phil H. Paradise and others, against Genevieve R. Nowlin and others, and the Federated Income Properties, a corporation. From the judgment, defend-

ant, Federated Income Properties, appeals. On plaintiff's motion to dismiss the appeal.

Appeal dismissed.

Federated Income Properties, Inc., in pro. per.

Snyder & Fletcher, of So. Pasadena, for respondents.

WILSON, Justice.

Plaintiffs-respondents have moved to dismiss the appeal of defendant-appellant Federated Income Properties, Inc., a corporation, on the ground that appellant failed to pay the filing fee within 20 days after being notified by the clerk of the Supreme Court to pay the same. (See Rule 10(a), Rules on Appeal, 22 Cal.2d 10.)

[1,2] The motion must be granted on the ground stated but there is another and more important reason for the dismissal of the appeal on the court's own motion, to wit, that the defendant corporation filed the notice of appeal in the superior court and its opposition to the dismissal in this court in propria persona. Such notice and opposition are void by reason of the corporation's lack of power to represent itself in an action in court. Defendant was represented by an attorney at the trial but his services apparently terminated with the entry of judgment in favor of plaintiffs.

[3-5] A composite of the rule in the decided cases, overwhelmingly sustained by the authorities, may be thus stated: A natural person may represent himself and present his own case to the court although he is not a licensed attorney. A corporation is not a natural person. It is an artificial entity created by law and as such it can neither practice law nor appear or act in person. Out of court it must act in its affairs through its agents and representatives and in matters in court it can act only through licensed attorneys. A corporation cannot appear in court by an officer who is not an attorney and it cannot appear in propria persona. *Bennie v. Triangle Ranch Co.*, 73 Colo. 586, 216 P. 718; *Mortgage Comm. v. Great Neck Imp. Co.*, 162 Misc. 416, 295 N.Y.S. 107, 112; *Aberdeen Bindery, Inc. v. Eastern States etc*

Inc., 166 Misc. 904, 3 N.Y.S.2d 419, 423; Finox Realty Corp. v. Lippman, 163 Misc. 870, 296 N.Y.S. 945, 949; J. T. Whalen, Inc. v. Pritzert, 167 Misc. 471, 3 N.Y.S.2d 418; Nispel v. Western Union R. Co., 64 Ill. 311, 314; Nixon, Ellison Co. v. Southwestern Ins. Co., 47 Ill. 444, 446; Kankakee Drainage Dist. v. Commissioners, 29 Ill.App. 86, 87; State Bank of Indiana v. Bell, 5 Blackf., Ind., 127; Culpeper Natl. Bank v. Tidewater Imp. Co. Inc., 119 Va. 73, 89 S.E. 118, 120; Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977, 982; New Jersey Photo Engraving Co. v. Carl Schonert & Sons, 95 N.J.Eq. 12, 122 A. 307; Black & White Operating Co. v. Grosbart, 107 N.J.L. 63, 151 A. 630, 633; State v. Passaic County Agr. Soc., 54 N.J.L. 260, 23 A. 680. See also Union Pacific Ry. Co. v. Horney, 5 Kan. 340, 347; Cary & Co. v. F. E. Satterlee & Co., 166 Minn. 507, 208 N.W. 408, 409; arguendo, Osborn v. Bank of United States, 9 Wheat. 738, 22 U.S. 738, 830, 6 L.Ed. 204, 226.

The federal courts have held that the provisions in the statute that "the parties may plead and manage their own causes" or by attorney (28 U.S.C.A. § 394) does not authorize a corporation to plead and manage its case personally or through an agent who is not an attorney of the court. Mullin-Johnson Co. v. Penn Mut. Life Ins. Co., D.C.Cal., 9 F.Supp. 175; Brandstein v. White Lamps, Inc., D.C.N.Y., 20 F.Supp. 369.

The two cases that have come to our attention which express a different view are A. Victor & Co. v. Sleining, 255 App. Div. 673, 9 N.Y.S.2d 323, and Sellent-Repent Corp. v. Queens Borough Gas & Electric Co., 160 Misc. 920, 290 N.Y.S. 887. These cases are against the weight of authority and are contrary to the New York decisions above cited. The Victor case advances the curious argument that a corporation should be permitted to appear in propria persona because (1) it might be too impoverished to employ a lawyer and (2) it might have a large claim it believed to be just but could find no lawyer who would accept employment, believing the case to be hopeless. In the Sellent-Repent case a corporation was permitted to appear in person, the court stating that the act of

its officer in appearing for it was an act of the corporation. The later New York cases have negated this concept.

[6] The case of Prudential Insurance Co. v. Small Claims Court, 76 Cal.App.2d 379, 173 P.2d 38, 167 A.L.R. 820, contains nothing contrary to what has been said in this opinion. Several of the cases above cited are mentioned with the comment that they deal with courts of record and with the general common-law principles that in the absence of statutory authority a corporation cannot practice law even in its own behalf. The decision holds that by reason of the provisions of the Code of Civil Procedure, to which reference is made, a corporation may appear in person in the small claims court.

Appeal dismissed.

MOORE, P. J., and McCOMB, J., concur.



87 Cal.App.2d 4

COPPRELL v. COPPRELL.

Civ. 16391.

District Court of Appeal, Second District,
Division 2, California.

July 28, 1948.

1. Husband and wife ⇐49¾(6)

Evidence sustained finding that wife prior to commencement of her action for annulment of marriage had made valid oral gift to husband of a joint tenancy bank account wherein she had deposited dependency allotment checks which she had received while husband was in the armed forces.

2. Gifts ⇐15

In ascertaining validity of a gift, intent with which delivery was made is an essential element to be considered, and such intention is to be determined from all circumstances of the transaction including words and acts of donor.

3. Appeal and error ⇐1010(1)

Where trial court's findings in ascertaining validity of oral gift of joint tenancy bank account by wife to husband prior to her commencement of action for annulment of marriage was sustained by substantial evidence, findings would not be disturbed on appeal although different conclusions might reasonably have been drawn from the evidence by different minds.

4. Husband and wife ⇐49½(4), 49¾(2)

Where passbook was only means by which possession of money in joint tenancy bank account of husband and wife could be obtained, delivery of passbook by wife to husband together with the statement "here is your money, it is all here", constituted a gift of the account to husband, and a subsequent return of book by husband to wife for safe-keeping while he remained in army did not amount to gift to wife nor was it a revocation of gift by wife to husband. Civ. Code §§ 1146-1148.

5. Husband and wife ⇐14(3)

During lifetime of both husband and wife they may establish actual facts relating to a joint tenancy bank account and either has right to bring action in respect thereto.

6. Army and navy ⇐23

Fact that Pay and Allowances Act prohibited assignment of monthly family allowance did not militate against judgment finding that wife had made valid oral gift to husband of joint tenancy bank account wherein she had deposited dependency allotment checks which she had received while husband was in armed forces. Servicemen's Dependents Allowance Act of 1942, § 115, 37 U.S.C.A. § 215.

7. Husband and wife ⇐14(3)

Wife's contention that husband became a trustee for her on ground that he withdrew entire amount from a joint tenancy bank account without her knowledge was unavailable in view of finding that wife had made an oral valid gift of the fund to husband.

Action by Ruth Isabelle Copprell against Charles I. Copprell for an annulment of marriage. From paragraph of judgment which adjudges that plaintiff had made valid oral gift to defendant of joint tenancy bank account prior to commencement of the action and from an order denying plaintiff's motion made pursuant to section 663 of the Code of Civil Procedure to vacate that paragraph and to enter judgment in her favor for the amount in the account, the plaintiff appeals.

Affirmed.

Newby, Holder & Newby, of Los Angeles, for appellant.

Brennan & Cornell, of Los Angeles, for respondent.

WILSON, Justice.

This is an action for annulment of marriage. Plaintiff appeals (1) from the paragraph of the judgment which adjudges that plaintiff had made a valid oral gift to defendant of a joint tenancy bank account prior to the commencement of the action, and (2) from an order denying plaintiff's motion made pursuant to section 663 of the Code of Civil Procedure to vacate that paragraph and to enter judgment in her favor for the amount in the account.

[1] Plaintiff contends that the evidence does not sustain the finding of fact that she made an oral gift of her right, title and interest in the bank account. Defendant was inducted into the armed forces of the United States about September 1, 1942. Pursuant to his direction monthly allowances were sent to plaintiff as his dependent wife in checks for \$50 each payable to her. The checks were deposited by her in their joint tenancy account which was opened on February 2, 1943. A passbook was issued to the joint tenants and was kept by plaintiff until December, 1945. In September, 1945, after defendant had returned from overseas, the parties had a conversation about the account. Defendant testified that plaintiff handed him the passbook and said "Here is your money, it is all here;" that he handed it back to her and said "You keep it until I get out of the army. I have no place to keep it in the army." He further testified that in December, 1945, after

he had been discharged from the army, they had another conversation during the course of which he said, "I asked her for the book, and she gave it to me." This evidence sustains the finding and judgment that plaintiff made an oral gift of the bank account to defendant, notwithstanding her denial that she told him he could have the book.

[2, 3] In ascertaining the validity of a gift the intent with which delivery was made is an important and essential element to be considered. Intention is a question of fact to be determined by the trial court from all the evidence, and the circumstances of the transaction and the words and acts of the donor enter into the establishment of the fact. *Mellor v. Bank of Wil-lows*, 173 Cal. 454, 458, 160 P. 567; *Union Mutual Life Ins. Co. v. Broderick*, 196 Cal. 497, 503, 238 P. 1034; *In re Estate of Hall*, 154 Cal. 527, 532, 98 P. 269. As in any other case where the decision of the trial court is sustained by substantial evidence, the findings will not be disturbed on appeal although different conclusions may reasonably be drawn from the evidence by different minds.

[4] There was only one passbook. The testimony of an officer of the bank was that the presentation of the passbook was the only means by which money could be withdrawn from the account unless both parties signed an affidavit that the passbook had been lost or destroyed. Since the passbook was the only means by which possession of the money in the bank could be obtained the delivery of the book to defendant in the circumstances shown by the evidence, as construed by the trier of facts, constituted a gift of the funds represented by the passbook. Civ.Code, secs. 1146, 1147, 1148.¹ The return of the book by defendant to plaintiff in September, 1945, for safekeeping while he remained in the army did not amount to a gift to plaintiff, nor was it a revocation of the gift by her to defendant.

[5] Plaintiff contends that the deposit in the joint tenancy account raised a presumption of equality of interest, citing *Wallace v. Riley*, 23 Cal.App.2d 654, 74 P.2d 807. This case holds (page 663 of 23 Cal. App.2d, page 812 of 74 P.2d) that while upon the death of one of the depositors the whole fund remains in the survivor as his sole and exclusive property, nevertheless during the joint lives of the parties the form of deposit is not conclusive on the subject of ownership in joint tenancy and "if there is proof of some special agreement between them at variance with the legal presumption of equality their rights and interests will then be fixed in accordance with their own agreement." To same effect *Wallace v. Riley*, 23 Cal.App.2d 669, 676, 74 P.2d 807. During the lifetime of both depositors they may establish the actual facts relating to the account, and either has the right to bring an action in respect thereto. *Hill v. Badeljy*, 107 Cal.App. 598, 604, 290 P. 637; *Spear v. Farwell*, 5 Cal.App.2d 111, 113, 42 P.2d 391.

[6] The fact that the Pay and Allowances Act prohibits the assignment of monthly family allowances (37 U.S.C.A., sec. 215) does not militate against the judgment. The gift in this case did not amount to such an assignment as is contemplated by that act. Furthermore, the fact that the allowances had not been used by plaintiff but had been regularly deposited in the bank and had been allowed to accumulate to more than \$1800, and plaintiff's statement "Here is your money, it is all here," is an indication at least that there had been some kind of agreement between the parties that the money would be retained for defendant until his discharge from the army.

[7] The contention of plaintiff that defendant became a trustee for her is based on the finding that he withdrew the entire amount from the bank without her knowledge. This point is unavailable in view of the finding that plaintiff made a gift of the

¹ Sec. 1146. "A gift is a transfer of personal property, made voluntarily, and without consideration."

Sec. 1147. "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor,

if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

Sec. 1148. "A gift, other than a gift in view of death, cannot be revoked by the giver."

fund to defendant. Since plaintiff had given the deposit to defendant it was his money and he had a right to withdraw it without consulting her. There is no inconsistency between the finding as to the gift and the finding that the money was withdrawn without plaintiff's knowledge.

The foregoing statement of the evidence and of the applicable law disposes of plaintiff's motion under section 663 of the Code of Civil Procedure to enter a judgment in her favor. Since the judgment as entered is sustained by the findings and the evidence there was no occasion to enter a different judgment.

The judgment and the order appealed from are affirmed.

MOORE, P. J., and McCOMB, J., concur.



86 Cal.App.2d 478

DANDINI v. DANDINI.
Civ. 13653.

District Court of Appeal, First District,
Division 1, California.
June 30, 1948.

Hearing Denied Aug. 26, 1948.

1. Divorce ⚡327

In determining the value as evidence of sister state's courts divorce decree offered in evidence as foundation for right or as bar or estoppel against asserted right, court may inquire into jurisdiction of court rendering decree.

2. Judgment ⚡818(6)

While state courts have no legal right to annul, vacate or set aside foreign judgment, court's determination that judgment of court of another state was rendered without jurisdiction does not have effect of vacating judgment in such state.

3. Divorce ⚡327

The California courts have power to declare a foreign divorce involving California citizen not appearing in divorce suit

void in state because of lack of proper residence of plaintiff in such suit.

4. Appeal and error ⚡935(2)

On appeal from order denying husband's motion to vacate default judgment in wife's suit to declare foreign state court's decree granting husband's divorce void and ineffective and enjoining him from marrying another than plaintiff, allegations of complaint in such suit must be accepted as true.

5. Husband and wife ⚡299(4)

A wife may secure an injunction prohibiting husband from marrying another woman after obtaining foreign divorce decree alleged to be void, in protection of her right to support payments previously awarded by state court decree for separate maintenance.

6. Injunction ⚡94

Equity will protect by injunction not only property rights but in proper case personal rights such as preservation of status as wife in her suit to enjoin husband from marrying another after obtaining void foreign divorce decree.

7. Injunction ⚡102, 103

Generally, equity has no power to enjoin commission of criminal act such as bigamy for mere violation of law but writ may issue to restrain commission of acts violating public policy by assailing property rights though such acts are crimes. Civ. Code, § 3369.

8. Husband and wife ⚡299(4)

A wife's property right under support order in separate maintenance decree may be protected by injunction against husband's remarriage to another after obtaining void foreign divorce decree.

9. Judgment ⚡138(2)

Where husband was personally served with complaint, summons, order to show cause, temporary restraining order and accompanying documents in wife's suit to declare Nevada decree granting husband divorce void and ineffective and to enjoin him from marrying another woman, but married her in violation of court order and failed to appear on day set for hearing, court properly denied his motion to

vacate final default judgment there being no mistake, inadvertant surprise or excuse for neglect.

10. Action 6

Complaint of wife for determination that husband's divorce decree procured in sister state was void and to enjoin husband from marrying another stated a cause of action.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Lillian R. Dandini against A. O. Dandini, to declare a Nevada decree granting defendant a divorce from plaintiff void and ineffective and enjoin defendant from marrying another than plaintiff. From an order denying defendant's motion to vacate a default judgment, he appeals.

Affirmed.

See also 186 P.2d 41.

Johnson, Harmon & Stirrat and William H. Henderson, all of San Francisco, for plaintiff and respondent.

Leo R. Friedman, of San Francisco, for defendant and appellant.

PETERS, Presiding Justice.

The plaintiff, Lillian R. Dandini, and the defendant, A. O. Dandini, were married in 1932. In 1946 plaintiff secured a decree of separate maintenance, and an award of \$150 per month. Subsequently, defendant, while in arrears in his payments on this award, secured a Nevada divorce from plaintiff, and was contemplating remarriage. Plaintiff thereupon secured a default judgment against defendant, determining that the Nevada divorce was void and of no legal effect, and enjoining defendant from marrying any other person. Over two months after such judgment had been secured, the defendant moved to vacate and set aside his default. The trial court denied the motion, and from that order of denial the defendant appeals.

The complaint which forms the basis of the default judgment is entitled "Complaint for Injunction," and was filed June 27,

1946. It alleges that plaintiff and defendant were married in August, 1932; that in September, 1942, plaintiff commenced, in California, an action for separate maintenance against defendant, and secured personal service on defendant, and he appeared in said action; that on February 13, 1946, plaintiff secured a decree of separate maintenance and an award of \$150 per month for her support; that said decree of separate maintenance and award is in full force and effect; that defendant has never paid one cent pursuant to that decree; that defendant, for over fifteen years prior to that decree and since that date, has been, and is now, a resident and domiciliary of California; that on March 11, 1946, defendant went to Nevada for the purpose of setting up a pretended residence in that state in order to there secure a divorce from plaintiff; that he lived at a designated dude ranch for six weeks, and, on April 23, 1946, filed, in Nevada, a complaint for divorce; that plaintiff is now, and for all her past life has been, a resident of California; that defendant "now is a resident of the State of California and has his domicile in said state; * * * that defendant A. O. Dandini is not now and never has been a resident of Nevada and has never had and does not now have his domicile in the State of Nevada;" that plaintiff was not personally served in the Nevada divorce action, nor did she ever submit herself to the jurisdiction of the Nevada court; that the Nevada court at no time had jurisdiction over plaintiff; that on June 3, 1946, defendant was granted a pretended divorce from plaintiff; "that said pretended divorce is void and of no effect"; that immediately after the pretended divorce was granted, and on June 4, 1946, defendant returned to San Francisco, where he has since remained; that defendant has "no property or employment in Nevada"; that defendant now is about to enter "a pretended marriage" with one Juliana Sesenna on June 29, 1946; that such marriage ceremony will be held unless defendant is restrained and enjoined; "that if said pretended marriage ceremony and contract is permitted to take place and is not enjoined by this court, defendant A. O. Dandini will cause said Juliana Luisa Cun-

gi [Sesenna] to be represented as his wife and will assume status and relationship as that of a married person with said Juliana Luisa Cungi [Sesenna] as aforesaid; that said actions will cause plaintiff mortification, chagrin, worry, annoyance and public ridicule; that if said marriage ceremony is permitted to take place the defendant will expend money for the support of said Juliana Luisa Cungi [Sesenna] and will assume this financial burden to the detriment of plaintiff's collecting her above mentioned award of support and maintenance from defendant; that if said pretended ceremony is consummated it will cause affiant the necessity of bringing litigation in an effort to collect her said award for support and maintenance; that if said preliminary restraining order and injunction are not issued, the said marriage ceremony will be conducted to the irreparable damage of this plaintiff; that the plaintiff has no adequate remedy at law."

The prayer of the complaint was "that the pretended divorce decree in * * * Nevada be declared void and of no effect; that a temporary restraining order be granted plaintiff enjoining and restraining defendant from entering into or being a party to a contract or ceremony of marriage with said Juliana Luisa Cungi [Sesenna], whether in the State of California or elsewhere; * * * that upon final hearing said injunction be made perpetual"; and for other and further relief.

The complaint had attached affidavits of two witnesses who averred that defendant secured his divorce in Reno on June 3, 1946, and left by train for San Francisco on June 4, 1946. The record shows that the court issued a temporary restraining order enjoining defendant from entering into a marriage contract with Juliana Sesenna in California or elsewhere, and that said restraining order, the summons and copies of the pleadings were duly and properly served upon defendant on the evening of June 27, 1946. The hearing was set for July 3, 1946. It is averred by plaintiff, and not denied by defendant, that defendant, in direct violation of the restraining order, entered into a ceremonial marriage with Juliana Sesenna in Nevada on June 28, 1946.

On July 3, 1946, a hearing was had, but defendant did not appear. The process server testified to the fact of service upon defendant on June 27, 1946. The trial court, on July 3, 1946, made its order for a preliminary injunction forbidding Dandini from entering into a marriage with Juliana Sesenna, or anyone, in California, or elsewhere, during the pendency of the action and until its final determination or until the court should otherwise order. Plaintiff applied for a default judgment, which was granted on July 11, 1946. The judgment recited that defendant had been duly served and failed to appear; that default was entered, and after evidence was introduced in open court in support of the allegation of the complaint "and it appearing that all of the allegations of plaintiff's complaint are true and that plaintiff is entitled to a judgment and decree as prayed for," the court adjudged that the Nevada decree "is void and of no effect" and that "defendant A. O. Dandini be and he is hereby permanently enjoined and restrained from entering into or being a party to a contract or ceremony of marriage with Juliana Luisa Cungi Sesenna or anyone whatever whether in the State of California or elsewhere."

Defendant filed his notice of motion to vacate on September 17, 1946, two months and six days after entry of the default judgment, alleging that the grounds thereof were lack of jurisdiction; that the complaint did not state sufficient facts to constitute a cause of action or support the judgment; that no service was ever made upon him in the action, and that his default was entered through his mistake, inadvertance, surprise and excusable neglect. At the same time he filed his proposed answer to the complaint in which he denied the allegations of the complaint that he and plaintiff were still husband and wife, alleged that he had procured a valid decree of divorce in Nevada, denied that his residence in Nevada was only pretended, and alleged that from and after March 11, 1946, he had been and then was domiciled in Nevada.

The plaintiff filed an opposing affidavit and, in addition, produced at the hearing the process server who again testified as to

serving the defendant on June 27, 1946. No further evidence was offered. The court thereupon refused to vacate the default judgment, and from that order the defendant appeals.

[1-4] The first contention of the defendant is that in this type of proceeding the court had no jurisdiction to declare that the Nevada judgment of divorce was void. In this connection the defendant concedes "that where a decree of divorce rendered in the sister state is offered in evidence, either as the foundation for a right or as a bar or estoppel against an asserted right, the court, in determining the value of such decree as evidence, may inquire into the jurisdiction of the court rendering such decree." (Ap.Op.Br., p. 12.) This concession is undoubtedly in accord with the California law. (*Crouch v. Crouch*, 28 Cal.2d 243, 169 P.2d 897; *Brill v. Brill*, 38 Cal.App.2d 741, 102 P.2d 534; *Kegley v. Kegley*, 16 Cal.App.2d 216, 60 P.2d 482.) Indeed, it is clear that such conceded power exists under the federal decisions. That was the precise holding in the "second" *Williams* case. (*Williams v. North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366.) But, says appellant, the conceded rule is inapplicable in the instant case because the question as to whether the Nevada court had jurisdiction was not raised as the foundation of a right or a bar or estoppel of an asserted right, but was brought into issue in a proceeding having for its sole purpose the vacating or setting aside of the divorce decree. This, says appellant, the California courts have no power to do. He urges that the courts of one state have no jurisdiction to consider solely the validity of a divorce decree of a sister state, and to enter a decree determining its invalidity.

It is quite true that the courts of one state have no legal right to "annul," or "vacate," or "set aside" a foreign judgment, but it is equally clear that a determination by a court that a judgment of a court of another state was rendered without jurisdiction does not have the effect of vacating the judgment or decree in the state where it was rendered. (See many cases collected 21 C.J.S., Courts § 552, p. 858.) The power of the courts of this state to declare a

foreign divorce involving one of its citizens who did not appear therein void in this state because of lack of proper residence of the plaintiff in the divorce case, is too well settled to require discussion. We do not find it necessary to decide whether the interest of the first wife in protecting her status as a married woman is such that the courts of this state could make such a determination in a case brought solely for the purpose of having the foreign decree determined to be void in this state. Whether the action of declaratory relief extends to such a determination presents a most interesting problem that is academic in this case. The complaint for the injunction was not filed for the "sole" purpose of having the Nevada divorce decree determined to be invalid in this state. That complaint alleged facts and prayed for a form of relief that demonstrates that an actual, present dispute exists between these parties, and that the determination of the validity of the Nevada decree is only incidental to the determination of that issue—namely, the right of plaintiff to be protected in her right to the payments for support awarded her in the prior separate maintenance action. Thus, in a most real sense, the Nevada decree was not under attack "solely and directly" for the purpose of having its invalidity adjudged. That issue was but incidentally involved in connection with protecting her right to support. In view of defendant's default, the allegations of the complaint must be accepted as true, including the allegation that after the decree of separate maintenance was entered in February, 1946, defendant failed to pay one cent upon that award.

[5] There seems to be no California case directly in point on the precise issue here involved, but plaintiff refers to two New York cases where the issue has been discussed. The first of these is *Richman v. Richman*, 148 Misc. 387, 266 N.Y.S. 513. In this case the wife brought an action against her husband for a separation, and also for an injunction to restrain him from procuring a Mexican divorce and remarrying until the further order of the court. The wife had a prior support award, and the husband was in arrears in his payments. It is not clear from the opinion

whether the Mexican divorce had been secured prior to commencement of the injunction proceeding. Among other things the court stated, 266 N.Y.S. at page 514:

"Assuming that such decree of divorce has been obtained, it is in no wise binding upon this plaintiff. The plaintiff has never submitted to the jurisdiction of the Mexican court and has never been personally served with process and has never appeared in said action.

"If this alleged decree of absolute divorce has become final and the action instituted by defendant therefor has terminated, then the order prayed for enjoining such action will be of no avail. Plaintiff contends that the said decree has not become final, and has not abandoned this portion of her prayer for relief.

"There remains however, the serious question of whether or not this defendant should be restrained from going through the formality of a marriage with a person other than the plaintiff."

The court then discussed the case of *Baumann v. Baumann*, 250 N.Y. 382, 165 N.E. 819, where a husband secured a Yucatan divorce and remarried, and thereafter the wife attempted to enjoin him from representing that he was married to his second wife. The first wife had received a \$25,000 award in a property settlement, and the husband was not in arrears in payments. The Court of Appeals held the Yucatan divorce null and void, the second marriage invalid, and affirmed a declaratory judgment that the first wife was still married to the defendant, but, by a divided court, held that the injunctive relief was beyond the jurisdiction of the court. In distinguishing this case, the court, in the *Richman* case, stated 266 N.Y.S. at page 515:

"The instant case is readily distinguishable from the *Baumann* Case. There the plaintiff and defendant entered into an agreement of separation, which agreement secured to plaintiff \$25,000 a year. The said declaratory judgment defined her matrimonial status and protected her property right. * * * This plaintiff has not been secured of support. In fact, this defendant is now in arrears in his alimony.

* * * If defendant is not now enjoined from going through a ceremony of marriage with a person other than the plaintiff, even though such marriage must be held illegal, plaintiff may suffer a direct financial damage. While the act of this defendant and a woman other than the plaintiff living together and representing themselves as husband and wife may not in itself constitute a legal wrong which infringes a substantial right of the plaintiff, such action resulting from an alleged marriage following an invalid divorce may, and probably will, require the defendant to expend money for the support of such woman and the support of the resultant issue of such cohabitation, when as a matter of fact, defendant in an affidavit in this proceeding asserts that he is now unable to pay his back alimony.

"I am not unmindful of the numerous decisions of our courts to the effect that equity will not by injunction restrain conduct which merely injures a person's feelings or which causes mental anguish, but here a property right is involved. By an order of this court defendant is required to pay to his wife a stated sum each week pending the determination of this action for separation. He is now in default. * * * If he is allowed to go through a ceremony, even though it cannot result in a legal marriage, he will thereby assume an additional financial burden, to the detriment of this plaintiff.

"We are not endeavoring to remedy a social evil or a moral wrong by injunction. That any marriage based on this Mexican divorce would be illegal must be conceded, but if by reason of an alleged marriage ceremony the defendant, now in default of alimony, becomes liable for the support and maintenance of an alleged wife, a financial damage to his wife must necessarily result.

"A court of equity in a proper case may restrain persons within its jurisdiction from proceeding in matrimonial actions in other states. * * * In such cases the applicant must show good equitable grounds, or the injunction will not issue. The court in the *Greenberg* Case [*Greenberg v. Greenberg*, 218 App.Div. 104, 218 N.Y.S. 87] based the relief upon the fact that

'there are many conceivable uses to which such a judgment of divorce could be put, causing plaintiff expense, litigation, worry, annoyance and misrepresentation.' * * *

"The prayer of the plaintiff to enjoin the defendant from attempting to contract a marriage is not for the purpose of assuring plaintiff of her own matrimonial status, but to prevent a threatened legal wrong involving property rights. * * * Nevertheless, under the circumstances here presented, it would seem that this defendant should be enjoined from assuming under color of an invalid decree of a foreign jurisdiction an additional obligation at a time when he admits that he is unable to pay the alimony awarded by this court."

In *Gold v. Gold*, 158 Misc. 570, 287 N.Y. S. 217, a complaint alleged that the defendant husband had procured an invalid New Jersey divorce and remarried another woman. It prayed that the "second" wife be restrained from using the husband's name, and that the husband be restrained from expending money for the support of the second wife, it being alleged that the husband was in arrears in his payments due plaintiff. It was held that the complaint stated a cause of action. The court again distinguished the Baumann case on the ground that in the Gold case "a distinct property right is involved." (287 N.Y.S. at page 219.) On the same page the court stated:

"A court of equity will not award relief by injunction except where some legal wrong has been done or is threatened and where there exists in the moving party some substantial legal right to be protected, but here the plaintiff has a legal right, that is, the right to support and maintenance by her husband, and it would seem that such right is entitled to the protection of the court. A legal wrong has been done and threatens to continue. To preserve her rights she seeks injunctive relief. In the circumstances, if she is enabled to prove the allegations of her amended complaint, she is entitled to such relief.

"It was pointed out in the Bauman Case that equity cannot by injunction restrain conduct which merely injures a person's feelings and causes mental anguish and that the law does not remedy all social

evils or moral wrongs, but in the Baumann Case the complaint did not allege, as is here alleged, that the plaintiff's property rights were affected or endangered by the conduct of the defendants. The complaint in this action sets forth that the acts attempted to be enjoined constitute legal wrongs which invade the legal rights of the plaintiff."

Defendant, while recognizing that the above two cases are directly in point, contends that they no longer are the law of New York. It is urged that at the time they were decided the courts of New York had announced the policy that a foreign divorce on substituted service against a New York citizen would be held void, regardless of whether the person procuring the divorce had acquired, in good faith, a legal domicile in the foreign state. It is contended that the case of *Matter of Holmes*, 291 N.Y. 261, 52 N.E.2d 424, 150 A.L.R. 447, "changed" the New York law in this respect. All that that case held was that under the "first" Williams case (*Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273) the New York courts, under the full faith and credit clause, must give full faith and credit to a Nevada divorce gained on substituted service in the absence of evidence that the Nevada court had no jurisdiction. That is all that the Holmes case decided. The whole tenor of the decision is that if there had been evidence of lack of jurisdiction of the Nevada court, the New York court would not enforce the Nevada decree. The Holmes case in no way discussed, because the issue was not involved, any of the main problems involved in the Richman and Gold cases. The reasoning of those cases that the first wife may secure an injunction in protection of her previously awarded support payments is sound, and should be followed.

[6] Apparently, under New York law, it was necessary to find that a property right was in jeopardy before an injunction would issue, and, in the Richman and Gold cases such was found in the adverse affect on the prior support award of the second invalid marriage. It should be pointed out that in California there is no such rigid requirement that a property right must be adversely affected before an injunction will

issue. Whatever confusion may have existed in the prior cases was set at rest in the well-reasoned and unanimous decision of the Supreme Court in *Orloff v. Los Angeles Turf Club*, 30 Cal.2d 110, 180 P.2d 321, 171 A.L.R. 913. In that case the court held that equity will protect by injunction not only property rights, but, in a proper case, personal rights. This furnishes an additional reason why the injunction properly issued in the instant case, particularly when the direct and important interest of the plaintiff in preserving her status as the wife of defendant is considered.

[7] Defendant next contends that the granting of injunctive relief prohibiting him from marrying Juliana Sesenna, or anyone, was improper for the asserted reason that equity has no power to enjoin the commission of a criminal act—bigamy in this case. That is undoubtedly the general rule. (See, § 3369, Civ.Code; *International etc. Workers v. Landowitz*, 20 Cal.2d 418, 126 P.2d 609; *Perrin v. Mountain View Mausoleum Ass'n*, 206 Cal. 669, 275 P. 787; *Monterey Club v. Superior Court*, 48 Cal.App.2d 131, 119 P.2d 349; 4 Pomeroy, *Equity Jurisprudence*, 5th Ed., § 1347, p. 949.) As stated in 14 Cal.Jur. p. 211, § 25, citing many cases: "It is beyond controversy that equity does not interfere by injunction to prevent the mere violation of law, and that it has no jurisdiction to enjoin the commission of acts merely because such acts when committed will constitute a crime. But it is equally well settled that the writ may issue to restrain the commission of acts which are violative of public policy—which * * * assail the rights of property—although such acts are crimes and punishable as such."

[8] Defendant contends that the general rule applies here and not the exception, asserting that no property rights of plaintiff were threatened by his proposed marriage to Juliana Sesenna. This contention has been fully discussed and decided adversely to defendant in discussing the first point. It has already been held that the primary purpose of this action was to protect plaintiff's property interest in the previously awarded support decree. That this property right is an important one and entitled to

full protection was dramatically illustrated by two recent decisions of the United States Supreme Court—*Estin v. Estin*, 68 S.Ct. 1213, and *Kreiger v. Kreiger*, 68 S.Ct. 1221. In those two cases it was held that even a valid Nevada divorce decree could not adversely affect the important property right involved in a prior support order of another state, where the law of the state where the support order was granted provides that the support order shall survive in such cases. If the prior support award is such an important property right that it is entitled to that protection in the face of a valid decree of divorce, it would seem obvious that it is of sufficient importance to protect it by injunction against the adverse affects of an invalid remarriage.

[9, 10] In this case the trial court has entered the default of defendant. On his motion it has refused to vacate it. In the proceeding to vacate it was proved that defendant was personally served with the complaint, summons, order to show cause, temporary restraining order and accompanying documents on June 27, 1946. He deliberately disobeyed the order of the trial court, and, in direct violation of that order, proceeded to Nevada and there married Juliana Sesenna. Although having full notice of the hearing, he failed to appear on July 3, 1946. Judgment was entered, and became final. Over two months later defendant sought to have the judgment vacated. In that connection he averred, under oath, that he had not been served, but the process server was produced and testified to the true facts. There was no "mistake, inadvertence, surprise or excusable neglect." Insofar as the denial of the motion to vacate rested in the discretion of the trial court, far from being an abuse of discretion to deny the motion, it would have been an abuse of discretion to have granted it. In addition, as already pointed out, the complaint for an injunction stated a cause of action, and the relief granted was within the jurisdiction of the trial court.

The order denying the motion to vacate is affirmed.

WARD and BRAY, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

86 Cal.App.2d 872

FALLON v. FALLON.

No. 13696.

District Court of Appeal, First District,
Division 1, California.

July 26, 1948.

1. Divorce ⇨211, 223

Grant of pendente lite allowances of temporary alimony and suit money rests in sound discretion of trial court, but discretion should not be exercised arbitrarily.

2. Divorce ⇨182, 226

In determining need for pendente lite allowance of suit money in divorce suit, trial judge must be informed in detail as to needs of wife and her resources, and the same rule applies to fees and costs on appeal.

3. Divorce ⇨182

On hearing on allowance of costs and attorney's fees to wife in divorce suit to defend appeal by husband from a judgment denying a divorce on cross-complaint, affidavits, of wife, even if containing conclusions or hearsay, were competent where they were admitted without objection. Code Civ.Proc. § 2009.

4. Divorce ⇨182

Where husband was worth approximately \$500,000 and had monthly income of approximately \$1,500 per month, court did not abuse discretion in directing husband to pay wife costs and \$500 for attorney's fees to defend appeal by husband from judgment denying him a divorce on his cross-complaint where wife was earning approximately \$8 per day and had an additional \$2,500 coming to her at termination of appeal and had already been allowed \$1000 attorney's fees on trial of case.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Suit by Margaret Fallon against Frederick A. Fallon, in which defendant filed a

cross-complaint. From an order and judgment directing defendant to pay plaintiff's costs and a certain sum as attorney's fees to defend an appeal perfected by defendant from a judgment denying him a divorce on his cross-complaint, defendant appeals.

Affirmed.

John G. Reisner, of San Francisco, for appellant.

Jack Flinn and John A. Foley, both of San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from an order and judgment of the superior court directing him to pay plaintiff costs and the sum of \$500 for attorney's fees, to defend an appeal perfected by defendant from a judgment denying him a divorce on his cross-complaint.¹

The sole contention is that the court had no evidence before it upon which to base its order. After the appeal from the judgment denying defendant a divorce was perfected, plaintiff obtained an order requiring defendant to appear and show cause why he should not be required to pay alimony pendente lite, attorney's fees to enable plaintiff to resist the appeal, and the costs of appeal. (The application for alimony was dropped from the calendar.)

[1,2] Accompanying the order to show cause and filed in the proceeding was the affidavit of plaintiff in which she stated "That your affiant is without funds to maintain and support herself or to pay her attorney fees and court costs incident to defending the appeal * * *." This was the only showing made by plaintiff as to her financial condition. As to the financial condition of defendant, she stated that he was a man of considerable wealth, totaling approximately \$500,000, with a monthly income of approximately \$1500 per month. Defendant now contends that thereby plaintiff failed to show that she did not have resources sufficient to pay her own attorney's fees and costs. The rule is well stated in the extract chosen by plaintiff from the opinion in *Loeb v. Loeb*, — Cal.App.2d —, 185 P.2d 42, 45, the court says: "As

¹ (The latter appeal was determined by this court adversely to defendant in *Fal-*

lon v. Fallon, 83 Cal.App.2d 798, 189 P. 2d 766.

previously stated, the grant or denial of pendente lite allowances of temporary alimony and suit money rests in the sound discretion of the trial court. However, that discretion should not be exercised arbitrarily. *Sweeley v. Sweeley*, 28 Cal.2d 389, 394, 170 P.2d 469; *Turner v. Turner*, 80 Cal. 141, 144, 22 P. 72; *Smith v. Smith*, 147 Cal. 143, 145, 81 P. 411. The wife seeking these awards must establish her necessity for them. Such necessity may be proved only by showing that her need for proper support and the expenses of the litigation exceed her available resources. This means that the trial judge must be informed in detail not only as to her needs (*Tremper v. Tremper*, 39 Cal.App. 62, 66, 177 P. 868), but also as to her resources. Cf. *Kenney v. Kenney*, 220 Cal. 134, 138, 30 P.2d 393; *Busch v. Busch*, supra, 99 Cal.App. 198, 201, 278 P. 455." While the *Loeb* case refers to attorney's fees and costs on the main case, the rule is the same as to fees and costs on appeal.

[3] While the showing in the affidavit was a meager basis for an award (*Smith v. Smith*, 147 Cal. 143, 81 P. 411), no objection was made to that showing, nor any contention made that her statement that she was without funds was not the statement of an ultimate fact rather than a conclusion. "The appellant contends that plaintiff's affidavit is incompetent evidence for the reason that it contains averments which are hearsay and which amount to mere conclusions. Even conceding that many of the averments of the affidavit are conclusions or hearsay, they became competent evidence for the reason that they were admitted without objection. Sec. 2009, Code Civ.Proc.; *Mercantile Trust Co. [of San Francisco] v. Sunset, etc., Co.*, 176 Cal. 461, 168 P. 1037; *Soares v. Ghisletta*, 1 Cal.App.2d 402, 36 P.2d 668." *Falk v. Falk*, 48 Cal.App.2d 780, 789, 120 P.2d 724, 729.

Moreover, it is apparent from an examination of the record that the position of the defendant in the trial court was that defendant had affirmatively shown that plaintiff did have sufficient resources to pay her own fees and costs, and hence was not entitled to an award, rather than that plaintiff had failed to show her need and her resources. Somewhat typical of the man-

ner in which the hearing went on is the following extract from the record:

"The Court: What do you have to say to that, Mr. Reisner [attorney for defendant]? Five hundred dollars for the opposition to the appeal?

"Mr. Reisner: I think that really should include the costs."

When the hearing of the order to show cause started, plaintiff called defendant to the stand and he was sworn. No testimony was given, however, as the entire hearing consisted of discussions between counsel and the court plus the offer of an affidavit by defendant.

After some discussion as to the size of the transcript on appeal, and the fact that plaintiff's attorney had already been allowed \$1000 attorney's fees in the main case, defendant's attorney stated the substance of defendant's affidavit which was to the effect that plaintiff was employed as a practical nurse earning at least \$8 a day, and that the defendant had deposited with the clerk of the court to be paid over to plaintiff on the determination of the appeal the sum of \$3500, which was to pay the \$1000 attorney's fee theretofore allowed, and the sum of \$2500, which the court had allowed as alimony for a limited period.

[4] It is apparent that the only contention of defendant made to the court was that a woman making around \$8 a day, having an additional \$2500 coming to her at the termination of the appeal, and having already been allowed \$1000 attorney's fees on the trial of the case, was not entitled to attorney's fees and costs on appeal. Applying the rule in the *Loeb* case to the facts before the trial court, it was informed of plaintiff's need of counsel fees and costs on the appeal, and that the expense thereof exceeded her available resources. While her resources perhaps were not given in as great detail as might be, the manner in which counsel on both sides presented the matter prevented and obviated going into full detail. The court did know the extent of plaintiff's resources, which were her earnings as a practical nurse, and a stated sum to be received when the appeal was determined. It cannot be said that the court abused its discretion in refusing to require

a woman with such limited resources to pay her own attorney's fees and costs to resist an appeal by her wealthy husband, and in requiring him to pay them. " * * * the law does not require a wife to have recourse to her own resources first, to the impairment of the capital of her own separate estate." *Westphal v. Westphal*, 122 Cal.App. 388, 390, 10 P.2d 122, 123. In *Heck v. Heck*, 63 Cal.App.2d 470, 147 P.2d 110, the court allowed attorney's fees to the wife of a husband having an estate of more than \$200,000, even though the evidence disclosed that she had a separate estate of the value of about \$10,000 from which she derived income. There, as here, "the ability of [the husband] to respond to the order was fully established." 63 Cal.App.2d page 476, 147 P.2d page 114.

The order and judgment are affirmed.

PETERS, P. J., and WARD, J., concur.



86 Cal.App.2d 861

**CALIFORNIA COMPENSATION INS. CO. v.
INDUSTRIAL ACCIDENT COM-
MISSION et al.**

Civ. 13668.

District Court of Appeal, First District,
Division 1, California.

July 26, 1948.

1. Workmen's compensation ⇨1709, 1710

Whether injured workman was an independent contractor or employee within coverage of Workmen's Compensation Act is ordinarily a question of fact for Industrial Accident Commission. Labor Code, §§ 3351, 3353.

2. Workmen's compensation ⇨1939

Appellate court has no jurisdiction to interfere with a finding of fact of Industrial Accident Commission if such finding is supported by any substantial evidence or by any reasonable inference from such evidence.

3. Workmen's compensation ⇨1935

On writ of review to annul death benefit award of Industrial Accident Commission on ground that deceased workman was an independent contractor, insurance carrier had burden of proving absence of any substantial evidence or reasonable inference to support commission's finding as to existence of employer-employee relationship. Labor Code, §§ 3351, 3353.

4. Workmen's compensation ⇨1445, 1452

Evidence that hotel manager supervised work and inference from nature of work and method of payment that he could discharge workmen and they could quit sustained finding of Industrial Accident Commission that two men employed at stated price per man per hour to clean and replant hotel garden, though they considered themselves partners for the job, were employees of hotel within coverage of Workmen's Compensation Act and not independent contractors. Labor Code, §§ 3351, 3353, 3360, 5705.

5. Workmen's compensation ⇨1349

Rendition of services for another raises an inference under statute that person rendering service is an employee for purpose of awarding compensation and places burden of proof on the other to show that he is an independent contractor. Labor Code, §§ 3351, 3353, 5705.

6. Workmen's compensation ⇨295

That workmen employed to clean and replant hotel garden considered themselves partners for the job did not preclude them from being employees of the hotel for purpose of awarding compensation. Labor Code, §§ 3351, 3353, 3360.

7. Workmen's compensation ⇨502

Nondependent children of deceased workman were entitled to all payments that had accrued under death benefit award to workman's widow up to date of widow's death, and her death did not render immaterial the question of whether average earnings of deceased workman warranted full death benefit, since, if award should have been less, weekly payments which accrued before widow's death would also be less. Labor Code, § 4706.

8. Workmen's compensation ⇨1619

Evidence that deceased gardener at time of injury was earning \$16 per eight-hour day on a job that was to take five or six days, and that he earned on the average from gardening work approximately \$45 per week, sustained finding of Industrial Accident Commission that his average weekly earnings were at least \$38.46 so as to warrant full death benefit award to totally dependent widow. Labor Code, §§ 4452, 4453, 4702.

9. Workmen's compensation ⇨1939

Industrial Accident Commission's conclusion as to injured employee's average weekly earnings is conclusive in absence of abuse of discretion, as when there is no evidence supporting Commission's findings, but, if there is any evidence supporting them, though slight and affording ground for wide difference of opinion, court cannot set aside Commission's award. Labor Code, § 4453.

10. Workmen's compensation ⇨1691

Industrial Accident Commission could take judicial knowledge of the fact that during March, 1947, economic conditions were such that opportunities for employment were very good.

11. Workmen's compensation ⇨1723

That deceased workman, apparently because of ill health, worked only intermittently during year preceding death, did not, as a matter of law, make him an intermittent employee or make his earning record for preceding year conclusive as to his earning power during year of his death, where evidence showed that during year of death he was in excellent health and worked regularly and steadily.

12. Workmen's compensation ⇨822

The statute providing that average weekly earnings of workmen associating themselves under partnership agreement for performance of labor on a particular piece of work, if not otherwise ascertainable, should be deemed to be \$12, was not applicable where there was some evidence of average weekly earnings of deceased workman. Labor Code, §§ 4453, 4457.

On rehearing.

Award subject to provisions of Labor Code, § 4706, affirmed.

Prior opinion 192 P.2d 477.

Keith, Creede & Sedgwick, of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, both of San Francisco, for respondents.

PETERS, Presiding Justice.

Petition for a writ of review.

A rehearing was granted in this case to give further consideration to the contention of petitioner that, even though an award was warranted, the award made was excessive. We are satisfied that the opinion heretofore filed correctly disposed of the other issues involved and we therefore adopt the following portions of that opinion as and for the opinion of this court on rehearing. The portions so adopted are as follows [192 P.2d 477, 478]:

"The petitioner seeks to annul a death benefit award in favor of Mary Laurio, widow of Vincent Laurio, Vincent having died as the result of injuries suffered in an accident while he was performing services as a gardener for the Canterbury Hotel in San Francisco. After the writ issued, Mary Laurio died and the children of the couple have been substituted as parties to this proceeding.

"Petitioner is the insurance carrier for the Canterbury Hotel, that company having been found to have been the employer of decedent. The major contention of petitioner is that the evidence, as a matter of law, demonstrates that decedent was not an employee but an independent contractor. There is no doubt that if the employer-employee relationship existed, the accident was industrial, and that it caused the death of Laurio. The trial referee recommended a finding that decedent was an independent contractor, but the panel of the Commission found that the employer-employee relationship existed. The insurance carrier's petition for rehearing was denied, one of the three commissioners dissenting.

[1-4] "The evidence on the issue in question is not entirely satisfactory, and

the question presented is a very close one. Normally, of course, whether an injured employee is an independent contractor or an employee is a question of fact, and this court has no power to interfere with a finding of fact of the Commission if such finding is supported by any substantial evidence or by any reasonable inference from that evidence. For petitioner to prevail on this factual issue it is necessary for it to show not only that the evidence preponderates in its favor, but that there is no substantial evidence, and no reasonable inference at all to support the challenged finding. (*Riskin v. Ind. Acc. Comm.*, 23 Cal.2d 248, 144 P.2d 16; *Pacific Lbr. Co. v. Ind. Acc. Comm.*, 22 Cal.2d 410, 139 P.2d 892; *Associated Indem. Corp. v. Ind. Acc. Comm.*, 18 Cal.2d 40, 112 P.2d 615; *Schaller v. Industrial Acc. Comm.*, 11 Cal.2d 46, 77 P.2d 836.) That is a very heavy burden to assume, and while in the present case it may be that the evidence preponderates in favor of petitioner, when the record is read with the statutory background hereafter mentioned in mind, we are of the opinion that there is some evidence and some reasonable inferences from that evidence, that support the finding. This being so, this court has no power to interfere.

"The facts are as follows: The garden of the Canterbury Hotel needed cleaning up, weeding and replanting. Howard Hall, manager of the hotel, telephoned to the Sunset Nursery and asked them to do the job. He was told that the nursery could not handle the work but would be glad to recommend a competent man. Shortly thereafter one Chester Christensen and decedent visited the nursery and were informed of the needs of the hotel. It appears that Christensen and decedent were gardeners, and, on occasion, had worked together on various jobs on a fifty-fifty basis. Christensen testified that he then called upon Hall; that he and Hall walked out into the garden and Hall asked how much it would cost to clean up the garden and how long it would take; that he told Hall that he could not give a bid on the job, but that 'he and his partner' would do the job for two dollars an hour each, would work eight hours a day, and that he thought

the job would take five or six days; that Hall told him that this was all right; that he communicated with Laurio, the decedent, and Laurio agreed to the arrangement; that neither he nor Laurio had a regular or any place of business, and neither had a contractor's license to do gardening work; that several days later he and Laurio started to work, working eight hours a day; that it was part of the arrangement made by Christensen and Hall that Christensen was to purchase whatever plants Hall wanted from the Sunset Nursery where Christensen had an account, and that these sums were to be added to the bill; that a little profit (about 10%) was made on the plants, but the agreement with decedent was that he and Christensen were to share and share alike. Christensen also testified that Hall, during the course of the work, made certain suggestions; that Hall wanted marigolds planted in the center bed of the garden but, upon the witness' suggestion, agreed to other plants; that Hall suggested cutting back the bougainvillia after ascertaining from the witness that this would not adversely affect the plant; that during the several days that he and decedent worked before the accident Hall kept coming out wanting to know when they would be finished. Christensen also testified that Hall did not tell him 'how' to do his work, but indicated that he 'was interested in the results after the work was finished'; that Hall did not place a specific restriction on the amount of money that was to be expended for plants, but that he, Christensen, always consulted Hall as to what plants to buy; that it was his opinion that Hall wanted the job done in the cheapest way possible; that he called to the attention of Hall that a certain tree was overhanging the garden and Hall suggested that they straighten that tree. It was during this straightening process that decedent fell and suffered the injuries that ultimately caused his death.

"Christensen was asked whether Hall had ever 'specifically' told him 'not to do any specific operation you were doing, give you definite directions about not doing any particular thing'? To this Christensen replied that he wanted to remove two banana trees, but that Hall had ordered

them not to be cut, and that he, Christensen, wanted to haul the trash away in his truck but that Hall ordered them to take it to the basement¹ of the hotel for the garbage man to haul away; that he, Christensen, wanted to remove some trees 'in the back' but that Hall ordered them left where they were.

"Hall testified that his agreement with Christensen was that Christensen agreed to put the garden into shape at a total labor cost of two dollars per hour per man; that Christensen was to supply the plants and materials and charge for them; that he could not recall the conversation with respect to how many men would be engaged on the job, but he would not deny that such a conversation took place; that prior to the accident he had had no conversation at all with decedent except to say 'hello'; that he had never instructed decedent as to how the work was to be done; that he did suggest to Christensen that it would be a good idea to straighten the tree, but 'at no time did I give him any instructions on how to do it'; that he had merely instructed Christensen to clean up the garden; that there were great masses of vines and dead shrubs that had to be removed; that he had paid the labor and materials bill submitted by Christensen, and that no payroll deductions were made from that sum; that neither the name of Christensen nor of Laurio ever was entered on the hotel payroll record.

"That is substantially all of the evidence on the basic issue of whether decedent was an employee of the hotel or an independent contractor. Before discussing the question of the sufficiency of the evidence to support the finding of the employer-employee relationship, certain statutory provisions should be mentioned.

"Section 3351 of the Labor Code provides: "Employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, * * *.

"Section 5705 of that Code provides:

"The burden of proof rests upon the party holding the affirmative of the issue. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them:

"(a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his injury actually performing service for the alleged employer."

"Section 3353 provides: "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

[5] "Thus, under these sections, the burden of proof is upon the one contending that a person rendering a service for another is an independent contractor. Upon proof of the rendition of service for another the applicant has proved the existence of the employer-employee relationship and the burden is upon the employer to prove that the applicant was an independent contractor. There have been many cases discussing this problem. The rules announced in these cases have been quite uniformly expressed, but the application of those rules to various factual situations has presented considerable difficulty. No useful purpose would be served by analyzing the many cases on this subject. A reference to two recent cases will suffice to indicate the trend of the authorities. In *Perguica v. Ind. Acc. Comm.*, 29 Cal.2d 857, 179 P.2d 812, the case principally relied upon by petitioner, an award of the Commission based upon a finding that the respondent was an employee was annulled, the Supreme Court holding that, as a matter of law, respondent was an independent contractor. The Supreme Court recognized the rule that: 'Generally speaking, it is a question of fact to be determined by the commission, from the evidence adduced, whether the essential employer-employee relationship exists, * * * and the commission's finding on that issue will not be disturbed where it is supported by substantial evidence' (29 Cal.2d at page 859, 179 P.2d at page 813), but also recognized that 'if from all the facts only a single inference and one conclusion may be drawn, whether one be an employee or an independent contractor is a question of law.' (29 Cal.2d at page

859, 179 P.2d at page 813.) The court then attempted to summarize the factors that should be considered in determining whether the particular services fall into one or the other categories involved. After giving the statutory definition of an independent contractor contained in § 3353 of the Labor Code, *supra*, the court stated, 29 Cal.2d at page 859, 179 P.2d at page 813: "The distinction between the status of an independent contractor and that of an employee rests upon several important considerations. A material and often conclusive factor is the right of an employer to exercise complete and authoritative control of the mode and manner in which the work is performed. The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship. [Citing cases]. Strong evidentiary support of the employment relationship is 'the right of the employer to end the service whenever he sees fit to do so.' [Citing cases.] 'An employee may quit, but an independent contractor is legally obligated to complete his contract.' [Citing cases.] There are 'other factors to be taken into consideration,' as stated in *Empire Star Mines Co. v. California Employment Commission*, 28 Cal.2d 33, at page 43, 168 P.2d 686 * * *: "(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (Rest., Agency, § 220; Cal. Ann., § 220.)"

"The factual situation involved in the case was as follows: Perguica was constructing a house on his farm. Part of the necessary construction was to have affixed

to the outside of the house some wire netting to serve as lathing for the plasterer. One Walker agreed to furnish and to install the netting for fifteen cents per yard. Perguica knew nothing about lathing and did not discuss any of the details of the work with Walker. Payment was to be made after the work was completed according to the number of rolls of wire used. Perguica was to furnish the wire, but Walker was to use his own tools and equipment. Walker suffered fatal injuries in transporting certain materials to the job. No provision was made in the agreement as to how many men Walker was to use on the job, and there was no agreement that Perguica could discharge Walker. Perguica testified that the carpenters on the job were paid by the day and were loafing on the job, and for that reason hired Walker to do the complete job at fifteen cents per yard. The court held that those facts demonstrated 'this to be a case of independent contractorship.' (29 Cal.2d at page 861, 179 P.2d at page 814.)

"The respondents place their main reliance on the case of *Riskin v. Ind. Acc. Comm.*, 23 Cal.2d 248, 144 P.2d 16. There the Supreme Court affirmed an award based on a finding that the applicant was an employee. The carrier, as in the instant case, contended that the applicant was an independent contractor. The facts were these: The injured worker and another were hired to 'drive' a tunnel. They were to be paid at the rate of \$7.00 per foot of tunnel dug, and Riskin gave them specific directions as to the length, size and direction of the bore. Riskin furnished the tools, but the two men furnished the explosives. The court emphasized that Riskin had the right to discharge the two men at any time, and the opinion affirming the award is largely based on this factor.

"If these rules be applied to the present case it would appear that there is some evidence, weak it is true, from which it may be deduced that these men were employees of the hotel. There is nothing in the evidence to show whether Hall could have discharged the men, or whether the men could have quit, before completing the job, but it is a reasonable inference from the nature of the work being performed and

the method of payment—by the hour and not by the job—that the right of discharge by Hall and the right of quitting existed. That factor, alone, under the Riskin case, *supra*, supports the finding that the two men were employees. There is also evidence that Hall exercised some control over the work. It is a reasonable inference that Hall had the legal right to tell the gardeners what to plant, what to remove, and how the work should be done. In the very nature of the work it was impossible for Hall and the two gardeners to agree in advance concerning the details of the entire job. The record shows that Hall generally supervised the work as it progressed by giving orders as to what should or should not be planted or removed.

[6] "The fact that Christensen and Laurio considered themselves as partners for this job does not help petitioner. Section 3360 of the Labor Code provides: 'Workmen associating themselves under a partnership agreement, the principal purpose of which is the performance of the labor on a particular piece of work are employees of the person having such work executed.'

"It is undoubtedly true that there is evidence, substantial evidence, perhaps a preponderance of the evidence, that would have supported a finding that the men were independent contractors. But that is not the problem here presented. In this case the Commission has found that decedent was an employee. There is no doubt that decedent was rendering services for the hotel. That raises an inference, under the applicable statutes, that decedent was an employee, and places the burden of proof upon the hotel to prove the contrary. Under such circumstances we think that, under the record here presented, the Commission was justified in finding that the petitioner did not sustain the burden placed upon it, and was justified in finding that decedent was an employee."

[7] The petitioner contends that the widow of decedent was not entitled to a full death benefit of \$6,000, payable at \$25 per week as found by the Commission, it being urged that the average earnings of decedent were such as to require a smaller

award. Prior to the oral argument the widow died, and the adult children of the couple have been substituted as parties. None of these children was dependent on decedent. Section 4706 of the Labor Code provides that upon the death of a dependent beneficiary, where there is no surviving dependent, " * * * the death benefit terminates and does not survive to the estate of the deceased dependent, except that payments of the death benefit accrued and payable at the time of the death of the sole remaining dependent shall be paid upon the order of the commission to the heirs of the dependent * * * without administration." Thus the non-dependent children are entitled to all payments that accrued up to the date of the death of Mary Laurio. If the award had been for less than \$6,000, the weekly payments that would rightfully have accrued prior to Mary Laurio's death would have been less than \$25 per week, so that the correctness of the finding to the effect that she was entitled to the full death benefit is still in issue.

The evidence as to the earning capacity of Vincent Laurio prior to his death is somewhat sketchy and incomplete. Prior to the fatal accident he was in good health. The accident causing death occurred in March, 1947. A daughter of the deceased testified that prior to 1947 the decedent had worked intermittently, but that during 1947 he was in excellent health and worked regularly. In 1946 he worked intermittently and earned between \$900 and \$1,000. The only evidence as to his 1947 earnings was that he was paid \$2 per hour while working on the job where he was killed.

Section 4452 of the Labor Code provides that no death compensation award could exceed \$6,000. Section 4702 provides that in case of total dependency (and it is admitted that Mary Laurio was totally dependent), the death benefit shall be three and one-half times the average annual earnings of the deceased employee.

Petitioner contends that, at most, the death benefit could not exceed three and one-half times \$1,000 (that having been the employee's annual earnings for 1946), or a total benefit of \$3,500. The Labor Code provides, in some detail, how average

earnings shall be computed. Section 4453, as it read at the time of the accident, provided:

"In computing average annual earnings, the average weekly earnings shall be taken at not less than \$10, nor more than \$38.46. Between these limits the average weekly earnings, except as provided in sections 4456 to 4459, shall be arrived at as follows:

"(a) * * * Where the employment is for thirty or more hours a week and for five or more working days a week, the average weekly earnings shall be 95 per cent of the number of working days a week times the daily earnings at the time of the injury. * * *

"(d) * * * Where the employment is for less than thirty hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 95 per cent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments."

Subdivision (a) above would seem to be here applicable. When injured the employee had agreed to work eight hours a day for \$2 per hour, and the job was to take five or six days. Computed under subdivision (a), the average earnings far exceeded the maximum of \$38.46 per week, and required the maximum benefit.

[8,9] If subdivision (a) is not applicable, then subdivision (d) would be applicable. Under that section it was for the Commission, on the evidence, to calculate the average weekly earning capacity of the deceased employee. It must be held that in finding that the deceased employee's weekly earnings at the time of death were at least \$38.46 (thus warranting the \$6,000 award), the Commission did not abuse its powers. The correct rule is laid down in the concurring opinion in *Neahr v. Industrial Acc. Comm.*, 13 Cal.App.2d 146, at page 150, 56 P.2d 568, 570, as follows: "The law clearly contemplates that the judgment of the commission shall prevail and shall be conclusive unless there is an abuse of

discretion. Such an abuse of discretion is held to occur when there is a total absence of evidence to support the findings. On the other hand, if there is any evidence, even though it may be slight and afford a ground for a wide difference of opinion, the court is without authority in the premises to set the award aside."

[10,11] The evidence in the instant case is that the deceased employee, when injured, was making \$16 per day. Christensen, his associate, testified that, on the average, he was making, out of gardening work, about \$45 per week. The Commission could take judicial knowledge of the fact that during March of 1947 economic conditions were such that opportunities for employment were very good. *Gartner v. Roth*, 26 Cal.2d 184, 157 P.2d 361. The fact that Laurio worked but intermittently in 1946, apparently because of ill health, does not, as a matter of law, make him an intermittent employee for 1947, and does not make his earning record for 1946 conclusive as to his earning power in 1947. The evidence was that in 1947 he was in excellent health, and working regularly and steadily. This serves to distinguish the case of *West v. Industrial Acc. Comm.*, 79 Cal.App.2d 711, 180 P.2d 972, so strongly relied upon by petitioner. In that case the employee testified that she did not have the physical ability to work regularly, and therefore her past intermittent earnings were a guide to her earnings when injured. That is not this case.

In its closing brief the petitioner, for the first time, cites Labor Code § 4457. It provides: "In the event the average weekly earnings of workmen associating themselves under a partnership agreement, the principal purpose of which is the performance of labor on a particular piece of work, are not otherwise ascertainable, they shall be deemed to be twelve dollars."

[12] This section is not applicable because, as already pointed out, the Commission, under subdivision (a) of § 4453 had some evidence, weak though it may be, of the average weekly earnings. The above-quoted section is only applicable where the average weekly earnings "are not otherwise ascertainable." Thus, even if § 4457

is applicable to a "partnership" of the type here disclosed, it has no application to the present case.

The award, subject to the provisions of § 4706 of the Labor Code, is affirmed.

WARD and BRAY, JJ., concur.



87 Cal.App.2d 103

**LANGENDORF UNITED BAKERIES, Inc.
v. INDUSTRIAL ACCIDENT COM-
MISSION et al.**

Civ. 13792.

**District Court of Appeal, First District,
Division 2, California.**

Aug. 4, 1948.

Rehearing Denied Sept. 3, 1948.

Hearing Denied Sept. 30, 1948.

1. Workmen's compensation ☞1396

In workmen's compensation proceeding, referee erred in denying employer's request to cross-examine two physicians on issue covered by their written reports as to permanency of employee's industrial injury.

2. Constitutional law ☞301

Denial of right to cross-examine witnesses in workmen's compensation proceeding is deprivation of due process of law, whether evidence in chief was admitted during hearing or received after close of hearing.

3. Workmen's compensation ☞1396

A statement of employer's counsel to referee in workmen's compensation proceeding that they were "agreeable to only cross-examine" lay witness on subject of employee's permanent disability rating, in reply to referee's written notice that counsel would be permitted to cross-examine such witness and offer rebuttal evidence, was not waiver of their right, previously denied by referee, to cross-examine two medical experts and offer evidence rebutting their reports on issue of permanency of employee's industrial injury.

Proceeding by the Langendorf United Bakeries, Inc., to review an award of compensation by the Industrial Accident Commission to Orval B. Holt for injuries sustained in the course of his employment by petitioner.

Award annulled and proceeding remanded.

W. N. Mullen, of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Petitioner seeks review of an award of 100 per cent permanent disability for injuries claimed to have occurred to the respondent Holt during the course of his employment.

There is no dispute that the employee suffered a blow on the elbow while applying a wrench, and jerked his head backward and fell to the floor; that he thereafter complained of severe pains in his neck, arm and lower back. The back pains are the basis upon which the permanent award was made. Concededly the weight of the medical evidence is that the back pains were not caused by the industrial injury. The real cause was a subject of uncertainty and conflicting conclusions of the medical experts.

The petitioner attacks the award on two grounds—(1) that the evidence is insufficient to support the findings of permanent injury, and (2) that petitioner was denied due process when the referee refused to give him the right to cross-examine two of the medical witnesses.

[1] We will limit our discussion to the second ground. In the proceedings before the referee there was a sharp conflict in the evidence as to whether the back injuries were the result of the accident and as to whether any injuries caused permanent disability under the terms of the statute. At the conclusion of the hearing it was agreed that two physicians might submit their reports in writing and the referee then entered an order that the cause should "stand submitted on the filing" of these reports. The petitioner herein protested orally and in writing that it was denied the

right of cross-examination of these witnesses, that the subject matter of these reports covered the basic issue of the controversy, to wit, the permanency of the employee's industrial injury, and that it was vital to petitioner's case that it be permitted to develop that issue by cross-examination of these witnesses. This request was denied and therein lies the error.

[2] The denial of the right of cross-examination, both where the evidence in chief was admitted during the course of the hearing and where it was received after the hearing was closed, has been held a deprivation of due process in *Walker Mining Co. v. Industrial Accident Commission*, 35 Cal.App.2d 257, 95 P.2d 188; *Young v. Industrial Accident Commission*, 38 Cal.App.2d 250, 100 P.2d 1062; *Holmes Eureka Lumber Co. v. Industrial Accident Commission*, 41 Cal.App.2d 150, 106 P.2d 23; *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 47 Cal.App.2d 713, 118 P.2d 848; and *Massachusetts etc. Ins. Co. v. Industrial Accident Commission*, 74 Cal.App.2d 911, 170 P.2d 36.

[3] But respondents argue that this right of cross-examination of the two medical experts was waived. This is based on these facts: After the hearing was ordered submitted petitioner demanded in writing the right to cross-examine these witnesses and to offer rebuttal evidence. This demand was refused. Thereafter arrangements were made to take evidence of a lay witness on the subject of permanent disability rating. Thereafter the referee notified petitioner in writing that his request to cross-examine the medical witnesses would be denied and, on a later date, wrote petitioner: "You of course will be permitted to cross-examine Mr. Haggard and offer rebuttal evidence so far as the report of permanent disability rating is concerned." To this petitioner's counsel replied: "We are agreeable to only cross-examine Mr. Haggard and therefore, I will not file any reports. * * *" This last statement, the respondents argue, is a waiver of the prior request for leave to cross-examine the medical witnesses.

We cannot treat it as a waiver of that right and it is manifest that none of the

parties so treated it. The request to cross-examine those witnesses had been definitely and positively denied. The petitioner was given the right to cross-examine Mr. Haggard and to "offer rebuttal evidence" to the testimony of that witness alone. Counsel's letter agreeing to "only" cross-examine that witness was notice that he would not offer additional evidence rebutting that of Mr. Haggard. It meant no more and could not have been understood as waiving the right to cross-examine the medical witnesses.

The award is annulled and the proceeding remanded for further hearing.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER, J., dissenting.



86 Cal.App.2d 814

KIPP v. WARRINER.

Civ. 3921.

District Court of Appeal, Fourth District,
California.

July 19, 1948.

Hearing Denied Sept. 13, 1948.

Appeal and error ⇌ 671(3)

Where reporter's transcript referred to certain exhibits but did not disclose contents thereof and clerk's notice that appeal had been set for hearing contained memorandum that "if any exhibits are desired, arrange at once for their transfer," with reference to appropriate rule, and appellant failed to have exhibits transferred, contentions in appellant's brief based on exhibits were abandoned. Rules on Appeal, rule 10(b).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Solon S. Kipp against Harry W. Warriner to quiet title wherein defendant sought similar relief against plaintiff. From a judgment determining that parties owned property as tenants in common, plaintiff appeals. Pending the appeal, de-

fendant died and Maude S. Warriner, as executrix of the last will and testament of Harry W. Warriner, deceased, was substituted.

Affirmed.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellant.

James B. Abbey, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an ordinary quiet title action, each of the parties seeking to quiet his title to an unimproved lot in the city of San Diego. The plaintiff's claim of title rests upon a tax deed dated September 24, 1946, and based upon a tax delinquency for the year 1935. The defendant claims title through a treasurer's deed dated April 19, 1944, and based upon the foreclosure of a street bond dated August 1, 1929, and issued under the Improvement Act of 1911, St.1911, p. 730. Pending the appeal the defendant died and the executor of his will has been substituted.

The court found that each party had paid a certain amount for his deed and that each deed was valid, and concluded that the parties owned the property as tenants in common, with each having a lien for the amount which he had paid for his interest. Judgment was entered accordingly and the plaintiff has appealed, claiming that the defendant's deed is invalid because of alleged errors in the proceedings leading up to that deed.

The court fixed and determined the rights of the parties in accordance with the rules announced in *Monheit v. Cigna*, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995. Under those principles it seems unlikely, even upon a full showing, that this judgment could be reversed. Be that as it may, there is nothing in the record as here presented which discloses reversible error. The short reporter's transcript refers to various exhibits received in evidence but does not disclose their contents, and these exhibits have not been brought here as a part of the record.

While certain contentions based upon these exhibits are made in appellant's briefs, it may be assumed that he has abandoned these contentions since he has not desired

to arrange to have these exhibits sent here as a part of the record. Rule 10(b) of the Rules on Appeal requires a party to arrange for the transmission to the reviewing court of desired exhibits when he receives notice that the appeal is set for hearing. While it would seem that this rule is both clear and one easily complied with, we have had considerable difficulty with it in this district. In an attempt to meet the situation, and at the same time to prevent any default through mere inadvertence, we have for some years used a rubber stamp which reads: "If any exhibits are desired, arrange AT ONCE for their transfer. See Rule 10b." This warning is stamped on each card sent out by the clerk giving notice that an appeal has been set for hearing. This was done in this case.

No great difficulty or hardship is involved in requesting the transfer of exhibits if a party relies on them as an essential part of his record. On the other hand, much inconvenience and extra work has been caused in this court by the discovery, during the study of a case, that an important and much relied on exhibit has not been transferred. While the rule permits the court to then order the exhibit sent up this involves a delay, sometimes for many days. In a complicated case, where the materiality of the absent exhibit is discovered after working a number of days, this delay not infrequently causes considerable extra work upon later returning to that case. Moreover, the point affected by the exhibit may have been abandoned by the party who, after having the matter directly called to his attention, has expressed no desire to have the exhibit transferred.

Not only are we entitled to assume, under these circumstances, that the appellant did not desire the transfer of these exhibits but it may be assumed that he, being a lawyer, best knows whether or not they would be beneficial to him.

This rule has been in effect for five years and should now be well known to all attorneys. Aside from the personal notice in each case, above mentioned, we have repeatedly called attention to the necessity for complying with this rule from the bench, at bar meetings and even in opinions. This was done at the court session at which

this case was submitted. It would seem that more drastic action is necessary. This would seem to be a good case in which to begin such action since it seems probable that the ultimate result will not be affected and since, in any event, the judgment is just and equitable between the parties. Neither of them is the original owner, and each is claiming under a form of deed provided by law in connection with the collection of just debts for public purposes.

No error appearing in the record before us, the judgment is affirmed.

MARKS, J., concurs.

Hearing denied; CARTER, J., dissenting.



86 Cal.App.2d 817

ROGERS v. ROGERS.

Civ. 16307.

District Court of Appeal, Second District,
Division 1, California.

July 20, 1948.

1. Appeal and error ⇨996, 1011(1)

Finding of trial court that property is separate or community when supported by substantial evidence, notwithstanding there is evidence in conflict or that evidence is such that conflicting inferences may be drawn therefrom, is binding and conclusive upon appellate tribunal.

2. Appeal and error ⇨901

An appellant, in order to prevail on appeal involving a finding on substantial evidence that property was community, must show not only that evidence would support a finding that property is separate, but must show that it compels as a matter of law such finding.

3. Husband and wife ⇨263

Although property held in joint tenancy cannot be held as community property, nevertheless evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property.

4. Husband and wife ⇨249

Trial court in determining whether property is community property is not to base its conclusion as to character of property upon the deeds alone.

5. Husband and wife ⇨264

Finding of trial court in divorce action that property held in joint tenancy was community property and dividing it accordingly was amply supported by evidence tending to show an executed oral agreement between parties that all properties owned by them at time of marriage and all properties subsequently acquired should be community property.

6. Husband and wife ⇨266

An executed oral agreement between husband and wife that all properties owned by them at time of marriage and all property subsequently acquired should be community property serves to change the property from that of separate to community.

7. Husband and wife ⇨266

Rule that taking of title in name of spouses as joint tenants amounts to a binding agreement between them that though community funds may be invested therein, the property shall not thereafter be held as community property is applicable only in the absence of any evidence of an intent to the contrary.

8. Husband and wife ⇨264

Evidence to effect that husband had stated to wife, and that wife believed that property held in joint tenancy was community, was sufficient to support conclusion that both spouses considered and intended all of their property to be community property and that the joint tenancy form was utilized only to preserve the right of survivorship in both of them.

9. Divorce ⇨252

Trial court in divorce case has power to divide the property equally regardless of whether the property is a joint estate or community property.

10. Appeal and error ⇨226(2)

If an award of attorney's fees is to be reviewed on appeal, an objection should be made in the trial court, especially where it was stipulated that the court might deter-

mine that issue in the light of what to the court may be just for services rendered.

Appeal from Superior Court, Los Angeles County; Paul Vallee, Judge.

Divorce action by Emelie Marie Rogers against George Allen Rogers. Interlocutory judgment for plaintiff and from those portions of the judgment awarding to plaintiff as her share of community property certain parcels of land and awarding plaintiff's counsel additional legal fees and from the order denying defendant's motion for new trial, defendant appeals.

Attempted appeal from order denying motion for new trial dismissed and judgment affirmed.

Morris Lavine, of Los Angeles, for appellant.

Krag & Sweet, and David T. Sweet, all of Alhambra, for respondent.

WHITE, Justice.

This matter is before us on an appeal by defendant from (1) that portion of the judgment awarding to plaintiff, as her share of community property, certain parcels of land allegedly acquired by defendant through the exchange of various separate properties which he owned prior to marriage, and which, it is claimed, were separately converted into the two parcels here in question by a series of exchanges and business deals; (2) from that part of the judgment awarding plaintiff's counsel \$4,000.00 as additional fees for legal services rendered in the divorce action, and (3) from the order denying defendant's motion for a new trial.

Plaintiff and defendant intermarried on August 21, 1936. On February 27, 1946, the former instituted an action for divorce against the latter, and was awarded an interlocutory judgment on the ground of habitual intemperance. At the trial it was stipulated that all of the real property was community property save and except two parcels, designated in plaintiff's complaint as parcels 3 and 4. As to parcel 3, defendant contended that the community interest therein "is limited to an undivided one-half interest thereof, the remaining one-half

representing the separate property of defendant, being a transmutation and legal increase of property and money owned by the defendant prior to his marriage with plaintiff". As to parcel 4, it was asserted by defendant that the same was his separate property, representing the transmutation and legal increase of money and property owned by him prior to his said marriage. The court found both the aforesaid parcels to be community property, and in accordance with subdivision 2, section 146 of the Civil Code, divided the same equally between the parties. The question presented to us is whether there was sufficient evidence to sustain such finding and award.

Appellant husband had been engaged in the real estate business since 1924, and prior to his marriage he had acquired several properties as his separate property.

During the first year of their marriage, respondent was employed as a beauty shop operator, earning from \$16.00 to \$35.00 per week and thereafter, during the continuance of her marriage, respondent operated her own business. Her salary while employed and her earnings from her business were deposited in a joint banking account.

Insofar as the two properties here in question were concerned, the deeds thereto were taken in joint tenancy, with right of survivorship.

It is conceded by respondent that prior to his marriage appellant was possessed of certain separate properties, "and that said properties by sale and exchange ultimately comprised a portion of the interest in parcels 3 and 4", with which we are now concerned. However, respondent asserts that there is in the record substantial evidence to establish the fact that any such interest lost its separate character and became a part of the community property by agreement between the spouses, fully consummated by them during their marital life by their acts and conduct.

[1, 2] At the outset it should be noted that the finding of the trial court that the property is separate or community, when supported by substantial evidence, notwithstanding there is evidence in conflict therewith, or that the evidence is such that conflicting inferences may be drawn therefrom,

is binding and conclusive upon an appellate tribunal. Before he can prevail on this appeal, appellant must not only show that the evidence would support a finding that the property is separate, but must show that it compels, as a matter of law, such finding—in other words that the finding that it is community property is totally unsupported. *Estate of Trelut*, 26 Cal.App.2d 717, 723, 80 P.2d 147. Though it be conceded that the record contains ample evidence from which the trial court could have found in favor of the appellant, we are bound by a contrary finding unless it be made to appear that there is an entire failure of any substantial evidence to support the latter.

In the case at bar, there was testimony that the spouses had at all times taken their property as joint tenants, due to the fact that the husband advised the wife that doing so assured to each of them the right of survivorship. That on more than one occasion appellant had told respondent that everything that they had was community property. That "joint tenancy and community property were one and the same".

With reference to parcel 3, respondent testified that her husband stated to her that the same was community property, and that "we were putting all our properties in this one property, so that it would be easily handled". That the husband further stated "that it was our community property. We would take it in joint tenancy". With reference to their taking title to their properties in joint tenancy, respondent testified, "He (appellant) also told me that everything we had was community property, that it was our both, it belonged to both of us, equal valuations * * * well that every thing was equally mine, that we had equal valuations on everything, everything was community property".

[3,4] While it is true that property held in joint tenancy cannot be held as community property because certain incidents of the former would be inconsistent with incidents of community property, nevertheless, evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property. *Tomaier v. Tomaier*, 23 Cal.2d 754, 757, 146 P.2d 905; *LaMar v. LaMar*, 30 Cal.2d 898, 903, 186 P.2d 678;

Wood v. Wood, 81 Cal.App.2d 727, 728, 185 P.2d 53. And the trial court is not bound to base its conclusion as to the character of the property upon the deeds alone. The form of the deeds is not always necessarily controlling. As was said in *Estate of Wilson*, 64 Cal.App.2d 123, 126, 148 P.2d 390, 392: "It is now too well settled to justify more than the citation of the authorities that in spite of the mold into which a deed would seemingly press a title, either because of the intent with which the deed was made (*Horsman v. Maden*, 1941, 48 Cal.App.2d 635, 640, 120 P.2d 92), or made and received (*Williamson v. Kinney*, 1942, 52 Cal.App.2d 98, 102, 125 P.2d 920), or because of an oral agreement between a husband and wife, carried into effect, determining their respective interests in real estate (*Kenney v. Kenney*, 1934, 220 Cal. 134, 136, 30 P.2d 398; *Schipper v. Penkalski*, 1941, 46 Cal.App.2d 28, 32, 115 P.2d 231; *Marvin v. Marvin*, 1941, 46 Cal.App.2d 551, 556, 557, 116 P.2d 151; *Estate of Sehabiague*, 1941, 47 Cal.App.2d 793, 799, 119 P.2d 30; and see *Estate of Watkins*, 1940, 16 Cal.2d 793, 797, 108 P.2d 417, 109 P.2d 1 and cases cited) property which, measured by the deed, would not be community property, nevertheless may be just that. * * *

[5,6] The finding of the trial court herein is amply supported by evidence tending to show an executed oral agreement between the parties that all properties owned by them at the time of marriage and all properties subsequently acquired should be community property. It is now well settled that such an executed oral agreement serves to change the property from that of separate to community. *Kenney v. Kenney*, 220 Cal. 134, 136, 30 P.2d 398.

[7] That the taking of title in the name of the spouses as joint tenants amounts to a binding agreement between them that though community funds may be invested therein, the property shall not thereafter be held as community property must be regarded as stating the applicable rule only "in the absence of any evidence of an intent to the contrary." *Tomaier v. Tomaier*, supra, 23 Cal.2d. at page 758, 146 P.2d at page 907.

Added strength is given the finding here under attack when it is remembered that throughout their married life the spouses commingled their holdings. They maintained a joint bank account, into which respondent wife deposited her earnings resulting from her employment and operation of her business throughout their married life, and into which account appellant placed moneys acquired from the sale of property and collection of rents.

[8] We are persuaded that in the instant case there is sufficient evidence, if believed by the court, to support the conclusion that both spouses considered and intended all of their property to be community property, and that the joint tenancy form was utilized only to preserve the right of survivorship in both of them.

[9] Furthermore, appellant was not prejudiced by the finding of the court and the division of the property made thereunder for the reason that in a divorce case, whether the property is a joint estate or community property, the trial court has the power to divide the same equally. *Siberell v. Siberell*, 214 Cal. 767, 775, 7 P.2d 1003; *Tomaier v. Tomaier*, supra, 23 Cal.2d at page 758, 146 P.2d at page 907. On the record before us it is manifest that no injustice was done the rights of appellant by the court below in the matter of the division of the property.

Appellant's final contention is that the court erred in allowing respondent the sum of \$4,000.00 for additional attorneys' fees, the point being that the amount was excessive, and that whatever allowance was made should be chargeable against the share of the property awarded to respondent.

At the trial it was stipulated that "the court shall also make an award of counsel fees for respective counsel as may be just for services rendered". At the hearing relative to attorneys' fees counsel on both sides

testified as to the amount of time spent and work done in the case by each of them, following which a finding was made that the sum of \$4,000.00 was a reasonable and proper sum to be allowed respondent for attorneys' fees, \$1,170.00 to appellant's attorney "considering the volume of work that the respective attorneys have done".

In its conclusions of law the court directed "That plaintiff and cross-defendant Emelie Marie Rogers be ordered to withdraw from the community assets and pay direct to Krag & Sweet, her attorneys, the sum of \$4,000.00 as additional attorneys' fees, and pay direct to C. E. Christopher, Esq., attorney for defendant and cross-complaint, the sum of \$1,170.00 as additional attorney's fees." The attorneys' fees were thus ordered paid from the community assets, thereby requiring each party to bear one-half thereof.

[10] Appellant's counsel on this appeal did not represent him at the trial, but his counsel at that time voiced no objection to the amount of attorneys' fees as allowed. Manifestly, if an award of attorneys' fees is to be reviewed on appeal, an objection to the amount thereof should be made in the trial court, especially where, as here, it was stipulated that the court might determine that issue in the light of what to the court "may be just for services rendered". As was said in *Meyer v. Meyer*, 184 Cal. 687, 690, 195 P. 387, 388: "Furthermore, no objection whatever to the allowance was made in the trial court by the defendant. If he had objection, he should have made it."

For the foregoing reasons, the attempted appeal from the order denying defendant's motion for a new trial is dismissed. The portions of the judgment from which this appeal was taken are, and each is affirmed.

YORK, P. J., and DORAN, J., concur.

36 Cal.App.2d 890

In re SULLIVAN'S ESTATE.

SEIDLER et al. v. GOODSPEED.

Civ. 16323.

District Court of Appeal, Second District,
Division 2, California.

July 26, 1948.

Hearing Denied Sept. 23, 1948.

1. Wills $\hookrightarrow$ 439

In order to ascertain the intention of the testatrix the court must place itself as nearly as possible in the position she occupied when the will was executed.

2. Wills $\hookrightarrow$ 488

Finding that ambiguous provision of will devising property by street number and also by lot number devised only the residence of street number, was supported by evidence showing that testatrix while occupying the residence had erected a duplex on the other portion of the lot and maintained a fence separating such portions, together with the fact that residuary clause referred to residue as both real and personal and was no evidence that testatrix owned any other real property.

3. Wills $\hookrightarrow$ 300, 322, 386

The rules of evidence, the weight to be accorded to the evidence and the province of the reviewing court, are the same in a will contest as in any other civil case.

4. Wills $\hookrightarrow$ 386

If the construction given to a will by the trial court is tenable and appears to be reasonable and consistent with the intent of the testator, a reviewing court will not substitute a different interpretation even though it seems possible and equally tenable.

5. Wills $\hookrightarrow$ 386

When a provision in a will is ambiguous and evidence is admitted in order to arrive at the testator's intention, the inferences and conclusions drawn by the trial court from the evidence and the court's findings made therefrom will not be disturbed unless such conclusion is contrary to the inference a reasonable mind might properly draw from the evidence.

6. Appeal and error $\hookrightarrow$ 931(1)

An appellate court in considering the facts will interpret the evidence so as to support the findings to the extent that they are susceptible of being sustained by it.

7. Appeal and error $\hookrightarrow$ 931(1)Trial $\hookrightarrow$ 375

When a trial judge views premises in question during a trial, what he sees is not a part of the transcript of the record but is independent evidence which may be considered by him in arriving at a decision and which reviewing court will assume supports the findings.

8. Wills $\hookrightarrow$ 439, 450

The interpretation of disputed language in a will must be made in the light of the rule that the testator's intention must be followed and that the words of the will must be interpreted so as to give some effect to every expression, rather than one which will render any one of the expressions inoperative. Probate Code, § 102.

9. Wills $\hookrightarrow$ 706

Where the evidence in a case involving construction of a will sustains the findings of the trial court, the reviewing court must accept the will as it reads and as interpreted by the probate court.

10. Appeal and error $\hookrightarrow$ 882(3)

Where case was tried on theory that sole issue to be determined was whether or not will was ambiguous and if so what was the intention of the testatrix, appellants cannot raise the objection on appeal that such issue was not before the court.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Proceedings in the matter of the estate of Emma Arnold Sullivan wherein Ben Seidler and another appeal from that portion of the order settling final account and decree of distribution, distributing to Nina Goodspeed certain real property which appellants contend was devised to them by the will.

Order affirmed.

Walker & Horn, of Long Beach, for appellants.

Geo. W. Trammell and E. P. Mulholland, both of Long Beach, for respondent.

WILSON, Justice.

Appellants Ben Seidler and Grace Seidler have appealed from that portion of the order settling final account and decree of distribution under the will of decedent distributing to Nina Goodspeed certain real property which appellants contend was devised to them by the will.

The provision of decedent's will which gave rise to the controversy reads as follows: "Third: I hereby give, devise and bequeath to the following named persons, the following described personal property and the sums of money set after their names * * * B. To Ben Seidler and Mrs. Grace Seidler of 1216 East Eighth Street, Long Beach California, and formerly of 2443 Woodmere Avenue, Detroit Michigan, as partial repayment for the care and kindness shown me over the past four years and during my illness, all of my property at 1215 Hellman Street, also known and described as Lot 1 Tract 1772 in the City of Long Beach, County of Los Angeles, State of California, together with the furniture, furnishings and contents therein, except my sewing machine and vacuum sweeper. * * * All of the rest, residue and remainder of my estate, both real and personal, of whatsoever kind and character, and wheresoever situated, I hereby give, devise and bequeath to First Congregational Church of Long Beach, California, and to my niece Mrs. Nina Goodspeed of 2905 Boyd Street, Milwaukie, Portland, Oregon, share and share alike."

Decedent having died within 30 days after the execution of the will, the court found the devise to First Congregational Church of Long Beach to be invalid (Prob. Code, sec. 41) and adjudged that the entire residue of the estate vested in respondent Goodspeed. There is no appeal on behalf of the church.

Lot 1 of Tract 1772, referred to in the will, extends through an entire block having a frontage on Hellman Street on the south and on Eighth Street on the north. The streets are parallel, each being a full

size paved street, with sidewalks and curbs on both sides. Decedent's home, in which she had resided for 30 years prior to her death, was a single family residence designated as 1215 Hellman Street. A garage building is also situated on that part of the lot fronting on Hellman Street. On the north portion of the lot fronting on Eighth Street is a duplex or two family residence which had been erected for income purposes by decedent and her husband who had predeceased her. These two dwelling units are designated as 1214 and 1216 East Eighth Street. A wooden fence about two feet in height, situated about 57.80 feet south of the north line of the lot, extends across the entire lot separating the southern portion of the lot from the northern fraction. The fence was erected several years ago by the decedent's husband. Decedent maintained the lawn south of the fence but made no use of the northerly portion of the lot. The tenants of the duplex maintained the lawn and shrubbery north of the fence and had nothing to do with the Hellman Street frontage except during periods when one of the tenants rented the garage. For several years appellants have been tenants in one of the units of the duplex. Insofar as use and appearance are concerned the two portions of the lot were as separate and apart from each other as if they had been in different ownerships.

Appellants maintain that by the provisions of the will they were given the entire lot with both the single family residence and the duplex. Respondent contends that the testatrix intended that appellants should receive only the single family residence fronting on Hellman Street together with that portion of the lot lying south of the fence and that she, respondent, is entitled, as found by the court, to distribution of the duplex fronting on Eighth Street and that part of the lot north of the fence.

The sole issue to be determined is whether the trial court was correct in construing the will and in ordering distribution according to respondent's contention. The alleged ambiguous language appears in subparagraph B wherein the testatrix devised to appellants "all of my property at 1215 Hellman Street, also known and described

as Lot 1, Tract 1772" with the furniture and furnishings therein.

After hearing the evidence of the respective parties as to the physical conditions existing upon the lot and viewing the premises the court found that it was the intention of the testatrix that her residence on Hellman Street and the land south of the division fence should go to appellants, and that that portion of the lot north of the fence together with the duplex building was intended to be a part of the remainder and residue which would vest in respondent Goodspeed.

[1] In order to ascertain the intention of the testatrix the court must place itself as nearly as possible in the position she occupied when the will was executed. For this purpose the physical conditions existing upon the property are circumstances to be taken into consideration, to wit, two residence buildings fronting in opposite directions, each with its separate lawn and garden individually maintained, and the division fence which constituted a severance of one part of the lot from the other.

Since the residence at 1215 Hellman Street occupied only the southerly portion of Lot 1, the duplex fronting on Eighth Street occupying the remainder, the residence on Hellman Street was not "also known and described as Lot 1 Tract 1772" as stated in the will.

The fence indicated the purpose of the testatrix and her deceased husband to divide the lot into two separable parts and the reference in the will to the residence at 1215 Hellman Street evidenced the intention of the testatrix to devise to appellants only that fraction of the lot lying south of the fence.

[2, 3] The ambiguity in the description of the property having been determined by the court on substantial evidence, we find no reason to disturb the findings or the judgment. "The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case." Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690; Estate of Boyd, 24 Cal.App.2d 287, 290, 74 P.2d 1049; Estate of Pessagno, 58 Cal.App.2d 390,

392, 136 P.2d 644; Estate of Snowball, 157 Cal. 301, 305, 107 P. 508; Estate of Barr, 69 Cal.App. 16, 33, 230 P. 181.

[4-6] If the construction given to a will by the trial court is tenable and appears to be reasonable and consistent with the intent of the testator, a reviewing court will not substitute a different interpretation even though it seems possible and equally tenable. Estate of Bourn, 25 Cal.App.2d 590, 600, 78 P.2d 193; Kautz v. Zurich etc. Co., Ltd., 212 Cal. 576, 582, 300 P. 34; Manley v. Pacific Mill & Timber Co., 79 Cal.App. 641, 648, 250 P. 710. When a provision in a will is ambiguous and evidence is admitted in order to arrive at the testator's intention, the inferences and conclusions drawn by the trial court from the evidence and the court's findings made therefrom will not be disturbed unless such conclusion is "contrary to the inference a reasonable mind might properly draw from the evidence" and such a determination will not be disturbed by a reviewing court unless it is clearly erroneous. Estate of Boyd, supra [24 Cal.App.2d 287, 74 P.2d 1050]. An appellate court in considering the facts will interpret the evidence so as to support the findings to the extent that they are susceptible of being sustained by it. Estate of Barr, supra; Estate of Russell, 189 Cal. 759, 763, 210 P. 249.

[7] When the trial judge views the premises in question during a trial what he sees is not a part of the transcript of the record but is independent evidence which may be considered by him in arriving at his decision and which this court will assume supports the findings. Ng v. Warren, 79 Cal.App.2d 54, 57, 179 P.2d 41; Pohl v. Anderson, 13 Cal.App.2d 241, 244, 56 P.2d 992; Hatton v. Gregg, 4 Cal.App. 537, 540, 88 P. 592; Gates v. McKinnon, 18 Cal.2d 179, 183, 114 P.2d 576; MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 466, 271 P. 509.

[8] The interpretation of disputed language in a will must be made in the light of the rule that the testator's intention must be followed and that the words of the will must be interpreted so as to give some effect to every expression, rather than one which will render any one of the expres-

sions inoperative. Probate Code, sec. 102; Estate of Clark, 17 Cal.App.2d 323, 325, 61 P.2d 1221; Estate of Thompson, 18 Cal. App.2d 680, 683, 64 P.2d 984; Estate of Mayne, 28 Cal.App.2d 340, 342, 82 P.2d 504. In arriving at the intention of the testatrix the court had before it the physical conditions above enumerated, the fact that she had resided on the Hellman Street frontage of the property for 30 years, that she referred to the property by its street number, and that she had knowledge of the fence which for many years had set off her residence from the duplex. From all these facts it must be assumed that she had in mind devising to appellants only that residence and the portion of the lot on which it was located.

[9] There was introduced in evidence a letter dated February 12, 1945, written by decedent to one of her attorneys in her own handwriting in which she made directions as to the distribution of her property, the following being an excerpt: "to Mrs. Grace Seidler—1216 E. 8th St. Long Beach Calif. lot #1—Tract #1772 assessed to Emma A. Sullivan, 1215 Hellman St. Long Beach Calif. with buildings & contents—value 9000—this does not pay for all the care & kindness shown me the last 4 yrs and in my sickness." Pursuant to this letter a will dated February 14, 1945, was drafted and was executed by decedent, in which the property devised to appellant Grace Seidler is described in exactly the same words and figures as found in the will now under discussion which is dated April 25, 1945. Notwithstanding the letter, neither of the two wills, which were executed 71 days apart, devised the entire lot 1 to appellants. There is no evidence in the record as to the value of the entire lot or of the part south of the fence, hence the words and figures in the letter "value 9000" afford no aid in ascertaining the decedent's intent. Where the evidence sustains the finding of the trial court, as it does in the instant case, the reviewing court must accept the will as it reads and as interpreted by the probate court.

Another fact before the court which supports its interpretation of the will is that the residuary clause refers to the residue

and remainder of decedent's estate as "both *real* and *personal*." Since there is evidence that the testatrix owned no real property other than Lot 1 in Tract 1772, of the interpretation given to the will by the trial court should be set aside the reference to real property in the residuary clause would be meaningless and the apparent intent of the testatrix to devise real property thereby would be nullified. Such result would be violative of the rule above stated with reference to the interpretation of a will in such manner that every expression will be given some effect and not suffer any one to be inoperative.

[10] Although appellants now contend that there is no ambiguity in the will the case was tried throughout, without objection from appellants, on the theory that the will was ambiguous and that the only issue before the court was the meaning of the language in subdivision B and the intent of the testatrix. To sustain her contention that she was entitled under the will to the duplex and the northerly portion of the lot, respondent introduced oral evidence describing the location and the frontage of the buildings on the lot, the location and age of the fence, and the care given to the lawn and shrubbery on each portion of the property. No objection was made by appellants to any of such evidence. The only objection offered to any evidence on the subject of ambiguity was to the introduction of a map showing the location of the dwelling houses, the garage and the fence. Evidence was also presented on behalf of appellants in support of their claim that the testatrix intended to devise the entire lot to them. Since the case was tried on the theory that the sole issue to be determined was whether or not the will was ambiguous and if so what was the intention of the testatrix, appellants cannot raise the objection on appeal that such issue was not before the court. *Asnon v. Foley*, 105 Cal.App. 624, 628, 288 P. 792; *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal.App. 318, 325, 147 P. 90; *Hirsch v. James S. Remick Co.*, 38 Cal.App. 764, 767, 177 P. 876; *Guidera v. Lapiana*, 52 Cal.App. 460, 463, 199 P. 557; *Meer v. Cerati*, 53 Cal. App. 497, 505, 200 P. 501; *City of Redding*

v. Dozier, 56 Cal.App. 590, 593, 206 P. 465; Grimes v. Richfield Oil Co., 106 Cal.App. 416, 422, 289 P. 245.

The order settling final account and decree of distribution is affirmed.

MOORE, P. J., and McCOMB, J., concur.



86 Cal.App.2d 721

**SANDERS et al. v. HOWARD PARK
CO. et al.
Civ. 16316.**

District Court of Appeal, Second District,
Division 2, California.

July 13, 1948.

Rehearing Denied July 30, 1948.

Hearing Denied Sept. 8, 1948.

1. Judgment ☞720

Corporation's motion to quash service of summons, which had been served on Secretary of State, and for other relief on ground that affidavits in support of order for service on Secretary of State were insufficient, was properly denied where record disclosed two final judgments determining sufficiency of such affidavits. Civ. Code, § 373.

On Petition for Rehearing.

2. Appeal and error ☞832(4)

An argument based upon a point not mentioned in original brief of petitioner is of no avail on petitioner's demand for a rehearing, under rule that judgments of appellate courts will not be upset in order to grant a rehearing unless basis of petitioner's demand was presented in opening brief.

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by Mary Pratt Sanders and others against Howard Park Company and others to declare an abandonment and to quiet title under a lease. From an order deny-

ing its motion to quash service of summons to set aside judgment and to dismiss the action, defendant Coburg Oil Company appeals.

Affirmed.

Anthony J. Fritz, of Los Angeles, for appellant.

Joseph R. Vaughan, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the motion to be relieved of a default is defeated by former final orders relative thereto.

On July 10, 1942, respondents commenced an action (Case No. 478,480) to declare an abandonment and to quiet title under a lease executed on May 29, 1924, between respondent lessors and appellant's assignors. No service of summons was made on appellant until February 11, 1944, pursuant to which the default of appellant was entered April 18, 1944, and on July 11, 1944, judgment was entered quieting title in respondents. No appeal was taken.

September 2, 1947, appellant served and filed its notice of motion to quash the service of summons, to set aside the judgment and to dismiss the action. On September 16, 1947, the motion was denied. This appeal is from the order denying the motion. From the record it is clear that such act was not erroneous.

[1] Appellant's basic contention is that judgment could not have been legally entered against it for the reason that the court had not acquired jurisdiction in that the order for service on the Secretary of State was based upon affidavits which were insufficient to show due diligence to locate and serve the officers of appellant. But prior to the instant order it had already been judicially determined three times that such affidavits *were* sufficient to support the order for such service of summons. (1) In the original action the court found from the affidavits "that the defendant is a California corporation and that defendant has not filed with the Secretary of State of California, a designation of natural person as its agent for the service of process, as required by Civil Code § 373; and * * *

that *personal service against said defendant cannot be made with the exercise of due diligence in any other manner provided by law.*" Upon such finding and evidence the order for service on the Secretary of State was made. (2) As a basis for entering its judgment the court "examined the affidavits" filed as a basis for the order, and the order directing such service and the proof thereof; and after having taken testimony on the merits, the court found "that ever since January 5, 1943, said corporation did not maintain a place of business in the State of California during the pendency of this action, that *personal service could not be made on said corporation, that plaintiffs did with exercise of due diligence endeavor to make personal service upon said corporation*" and thereupon rendered judgment. No appeal was taken from the judgment. (3) Thereafter, in action No. 516,496, appellant, then plaintiff, made the same allegations "that the affidavits upon which said order for said service was obtained were insufficient in failing to show that plaintiff [respondent herein] exercised due diligence to locate any officers of plaintiff." In that action a judgment of nonsuit was entered which became final when plaintiff [appellant here] failed to appeal.

Thus by two final judgments the issue involved herein had been adjudicated. Having admitted in evidence the file in action No. 516,496 and the corporation file No. 63,401 showing that Coburg Oil Company is the new name of Petroleum Development Company, the court properly denied appellant's requested relief.

The order is affirmed.

McCOMB and WILSON, JJ., concur.

On Petition for Rehearing.

PER CURIAM.

[2] In its petition for a rehearing appellant urges for the first time that judgment may not be taken against a corporation while it is suspended for nonpayment of its franchise tax and has cited authorities in support thereof. An argument based upon a point not mentioned in the original brief of the petitioner will be of no avail on its

demand for a rehearing. The judgments of appellate courts will not be upset in order to grant a rehearing unless the basis of the petitioner's demand was presented in his opening brief. *Prince v. Hill*, 170 Cal. 192, 195, 149 P. 578; *Merchants' Ice & Cold Storage Co. v. Globe Brewing Company*, 73 Cal.App.2d 828, 838, 167 P.2d 503.

The petition for rehearing is denied.



87 Cal.App.2d 63

JENNINGS et ux. v. PETROL
CORPORATION.

Civ. 16141.

District Court of Appeal, Second District,
Division 3, California.

Aug. 2, 1948.

1. Evidence ~~C~~433(6), 434(8), 442(1), 448

When an agreement has been reduced to writing, it is to be taken as the entire agreement of the parties with respect to all matters embraced within the writing, and no contemporaneous oral agreements respecting such matters can be given effect to add to, subtract from, or otherwise vary the terms of the writing, but the rule does not embrace writings which, through mistake or imperfection of expression, fail to state the true intention of the parties, nor does it bar proof to explain ambiguities or to establish illegality or fraud. Civ.Code, §§ 1625, 1698; Code Civ.Proc. § 1856.

2. Evidence ~~C~~441(4)

In action against oil company by sublessees of gasoline service station to recover damages for termination by company of sublease under provision of sublease giving company right to terminate sublease at any time on three days' notice, evidence of alleged oral agreement by oil company not to revoke sublease if sublessees performed their obligations was improperly admitted, where there was no allegation by sublessees of fraud on part of company in

making representations. Civ.Code, §§ 1625, 1698; Code Civ.Proc. § 1856.

3. Evidence — 441(4)

In action against oil company to recover damages for termination by company of sublease under provision of sublease giving company right to terminate at any time on three days' notice, on ground that company allegedly agreed orally not to terminate sublease, judgment in plaintiffs' favor was not sustainable, and defendant's motion for nonsuit was properly granted, in absence of any allegation of fraud.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Lawrence A. Jennings and Evelyn S. Jennings, his wife, against the Petrol Corporation, a corporation, for damages because of the termination of a gasoline service station sublease. From a judgment of nonsuit, the plaintiffs appeal.

Judgment affirmed.

John Gratton and David P. Hatch, both of Los Angeles, for appellants.

Gordon Lawson and Orris R. Hedges, both of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Appeal by plaintiffs from a judgment of nonsuit in an action for damages based upon the termination of a gasoline service station sublease. One Vales owned a lot on Manchester Avenue in Inglewood. Plaintiff, Lawrence A. Jennings, took a five-year lease running from November 1, 1941, on a portion of the lot, a garage building and wash rack, at a rental of \$40 per month. Vales built a service station on the lot and leased the same to the Petrol Corporation at \$60 per month for the same term as that of the Jennings lease. Jennings subleased to Petrol the garage building and wash rack at \$1 per month, and Petrol then subleased the entire property to Jennings at a rental of one cent per gallon for Petrol products purchased by Jennings, with a minimum of \$60 and a maximum of \$110 per month. At the same time Petrol and Jennings entered into an agreement for the sale of Petrol products in the station, the term of the agreement to be co-extensive with the

term of the sublease to Jennings. The entire property was occupied and operated by Jennings until March 1, 1943, at which time the parties terminated the sublease and sales agreement and entered into a new lease and a new agreement which differed from the first ones only in respect of the rental for the service station, the guarantee of the minimum rental being waived by Petrol. Evelyn S. Jennings was a party to the new lease and agreement. Jennings carried on his business on the property until June 7, 1945, when he received a notice from Petrol of termination of the sublease and agreement. This action by Petrol was taken pursuant to a provision of the sublease, which also was in the original lease, reading, "sublessor may terminate this lease at any time by giving sublessee three (3) days written notice of its intention to do so." It was alleged in the complaint that plaintiffs had first refused to enter into the sublease unless the quoted paragraph should be deleted, "But defendants and its agents promised and assured plaintiffs that if they would accept these instruments and perform their obligations to the defendant thereunder that these instruments would not be cancelled by defendant during the unexpired term of their lease on said garage building and wash rack"; that defendants believed the promises and assurances, executed the instruments in reliance thereon and would not have done so except for said promises and assurances. It was alleged that plaintiffs had built up a business which made them a profit of over \$8,000 per year and that they had been damaged by the termination of the agreements in the sum of \$56,000. Plaintiffs' evidence was to the effect that the agents of Petrol represented to them that Petrol would not avail itself of its right to terminate the lease and agreement except in the event of the failure by plaintiffs to conduct their business in a proper and businesslike manner, and the evidence was to the further effect that plaintiffs' business had been run properly and without any disagreement with defendant until Petrol expressed the desire to purchase the business and plaintiffs fixed a price for it that Petrol was unwilling to pay. Inasmuch as a nonsuit was granted the evidence fails to disclose any reason or ground for termin-

ation of the lease and agreement other than Petrol's desire to avail itself of the privilege reserved as aforesaid.

[1-3] It was not alleged in the complaint that the promises and assurances of Petrol were made without intention to keep and perform the same nor that they were made in bad faith. Defendant made timely objection to the receipt of evidence of the representations allegedly made by Petrol. The court overruled the objections, stating that the evidence would be received not to alter or add to the written agreement, but as evidence tending to prove fraud on the part of Petrol. The evidence was admitted under a misconception as to the scope of the issues. There was no issue of fraud. It was the theory of the plaintiffs in their complaint, and it is their theory on appeal, that the alleged oral promise of Petrol not to terminate the lease except for cause was valid and enforceable. The law is otherwise. It is the settled rule that when an agreement has been reduced to writing it is to be taken as the entire agreement of the parties with respect to all matters embraced within the writing and that no contemporaneous oral agreements respecting such matters can be given effect to add to, subtract from, or otherwise vary the terms of the writing. Civ.Code, secs. 1625, 1698; *Lindemann v. Coryell*, 59 Cal. App. 788, 212 P. 47; *Bank of Americ Nat. Trust & Savings Ass'n v. Pendergrass*, 4 Cal.2d 258, 48 P.2d 659; *Pacific States Securities Co. v. Steiner*, 192 Cal. 376, 220 P. 304. The rule, of course, does not embrace writings which, through mistake or imperfection of expression fail to state the true intention of the parties, nor does it bar proof to explain ambiguities or to establish illegality or fraud. Code Civ. Proc., sec. 1856. But we have a case governed by the rule and not by any of the exceptions. Petrol was given the unconditional right to terminate the sublease upon three days notice. The oral agreement was merely to the effect that this clause would not be invoked against Jennings, or in other words, it was, in substance, an oral agreement to delete the provision in question. To give effect to the oral agreement would be to reform the lease by depriving Petrol of the right to terminate it except

for cause, under other clauses which provided for termination by Petrol in case of the lessees' failure to perform their obligations. In the absence of any allegation of fraud on Petrol's part in making the alleged promises, and without other allegations which would be sufficient to bar Petrol from exercising its right under the questioned clause, the complaint stated no cause of action, and the evidence of the alleged promises was improperly admitted. Inasmuch as a judgment in plaintiffs' favor would have been unsustainable the motion for nonsuit was properly granted.

The judgment is affirmed.

WOOD, J., and McCOMB, Judge Assigned, concur.



McCLURE v. DONOVAN.
Civ. 16154.

District Court of Appeal, Second District,
Division 2, California.
July 14, 1948.

Rehearing Denied July 30, 1948.

Hearing Granted Sept. 8, 1948.*

I. Action ⇨59
Judgment ⇨202
Trial ⇨2

Consolidated actions may be disposed of by one set of findings and one judgment, but when consolidation is only for purpose of trial, separate findings and judgments must be made and entered in each case though evidence in one case is deemed applicable in the other so far as material. Code Civ.Proc. §§ 1048, 1184a.

Appeal and error ⇨1046(1)
Trial ⇨2

Consolidation, for trial only, of action to annul marriage and proceeding for appointment of guardian for allegedly incompetent husband, was not error and not prejudicial to wife where husband's unsoundness of mind was the only issue to be determined. Code Civ.Proc. §§ 1048, 1184a.

* Subsequent opinion 205 P.2d 17.

3. Trial ⇨2

Where one counsel for defendant consented to consolidation of cases for trial but at time of trial recently associated counsel for defendant refused to stipulate to trial of cases together, and suggested that after first case had been heard the testimony of witnesses therein might be considered as introduced in the other proceeding, such suggestion amounted to affirmation of original counsel's consent to consolidation.

4. Parties ⇨76(7)

Sister's want of legal capacity to sue to annul allegedly incompetent brother's marriage was waived when not raised by demurrer or answer, notwithstanding oral statement by defendant's counsel at preliminary hearing that he desired to make special appearance on ground of lack of plaintiff's capacity to sue. Code Civ.Proc. §§ 430, 434.

5. Pleading ⇨211

The only objections to complaint that may be made orally are lack of jurisdiction and failure to state cause of action. Code Civ.Proc. §§ 430, 434.

6. Marriage ⇨60(1, 5)

Allegedly incompetent husband was not a necessary party to action to annul marriage, and his sister could commence and prosecute the action to judgment. Code Civ.Proc. § 434; Civ.Code, §§ 82, 83.

7. Marriage ⇨2, 60(1, 5)

Legislature may determine conditions under which marital status may be created and terminated, and may authorize relative of person who is unable to act for himself to act in his behalf without naming him as a party. Code Civ.Proc. § 434; Civ.Code, §§ 82, 83.

8. Parties ⇨8

Where right of action is statutory, action must be brought in name of party authorized by statute to do so without regard to any question as to real party in interest. Code Civ.Proc. §§ 367, 369, 372; Civ.Code, § 83.

9. Marriage ⇨60(1)

Statutory power of relative to maintain action to annul marriage is independ-

ent of statutes requiring action to be prosecuted in name of real party in interest, or requiring insane or incompetent party to appear by guardian, or other statutes relating to maintenance of actions. Code Civ.Proc. §§ 367, 369, 372; Civ.Code, § 83.

10. Parties ⇨84(1)**Pleading** ⇨406(5)

Where no demurrer was filed to complaint and no objection offered to introduction of evidence on ground of failure to state facts sufficient to constitute cause of action, defendant's points as to lack of necessary party, name in which defendant was sued, and use of term "alleged" in referring to marriage sought to be annulled and to defendant's wife, were waived by failure to make timely objection.

11. Appeal and error ⇨187(1)

In action to annul marriage, objection that defendant was sued in her name before marriage and not her married name could not be raised on appeal where complaint mentioned that she was also known by married name, and she answered complaint without making objection in trial court. Code Civ.Proc. § 473; Civ.Code, § 82.

12. Marriage ⇨60(6)

In action to annul marriage, complaint was not improper in referring to "alleged" marriage and to defendant as "alleged" wife.

13. Pleading ⇨427

Error in complaint seeking annulment of marriage, in referring only to husband's incompetency instead of alleging that he was "of unsound mind," was cured by evidence of unsound mind received without objection. Code Civ.Proc. § 473; Civ.Code, § 82.

14. Pleading ⇨427

If case is tried on theory that complaint is sufficient and evidence is received without objection, unsuccessful party cannot later object to sufficiency of pleading.

15. Marriage ⇨60(7)

Evidence authorized annulment of marriage on ground of husband's unsoundness of mind at time of marriage.

16. Appeal and error ⇨1008(1)

Defendant's criticism of plaintiff's evidence and comparison thereof with testimony of defendant's witnesses should be addressed to trial court, not reviewing court.

17. Appeal and error ⇨1011(1)

To compare or evaluate conflicting evidence is not within reviewing court's province unless evidence introduced by one party is inherently improbable and unbelievable.

18. Trial ⇨405(2)

In action to annul marriage on ground of husband's unsoundness of mind, where defendant's counsel, without notice to plaintiff or plaintiff's counsel, procured from presiding judge, who was unaware of necessity of avoiding delay in entering judgment resulting from husband's mental and physical condition, an order extending time for filing objections to proposed findings of fact and conclusions of law, trial judge did not err in vacating such order upon his own motion and without notice to defendant's counsel.

19. Appeal and error ⇨1074(1)

Vacation of order extending time for filing objections to proposed findings of fact and conclusions of law was not prejudicial to defendant where evidence sustained findings for plaintiff and it did not appear what amendments defendant desired to submit nor that any amendments would have been of any avail to defendant.

20. Witnesses ⇨246(2)

In action to annul alleged incompetent's marriage consolidated for trial with guardianship proceeding, trial court could interrogate witnesses to bring out facts and opinions as to competency that were not covered to court's satisfaction by questions of counsel.

21. Trial ⇨29(1)

In action to annul alleged incompetent's marriage, consolidated for trial with guardianship proceeding, court's comments criticising defendant for unwillingness to call alleged incompetent as a witness were not objectionable.

22. Trial ⇨2

Court had right to take motion for severance of proceedings which had been consolidated for trial under submission, without ruling thereon immediately on its presentation, and to deny it later.

23. Appeal and error ⇨1046(1)

Refusal of severance of proceedings to annul marriage and for guardianship of alleged incompetent was not prejudicial to wife whose counsel were well aware of issues to be tried and of fact that same witnesses would testify and same evidence would be given in both proceedings.

24. Appeal and error ⇨110, 782

Order denying motion for new trial was not appealable and appeal therefrom would be dismissed.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Martha McClure, on behalf of Jefferson D. Caruthers, against Laura Alpha Donovan, also known as Laura Alpha Caruthers, to annul a marriage. From a judgment annulling a marriage, defendant appeals.

Affirmed, and appeal from order denying motion for new trial dismissed.

See also 82 Cal.App.2d 664, 186 P.2d 718.

Irving M. Walker, of Los Angeles, Lee J. Myers, of El Monte, and William Kay Crawford, of Los Angeles, for appellant.

Martin, Hahn & Camusi, of Los Angeles, for respondent.

WILSON. Justice.

On the ground of the unsoundness of mind of Jefferson D. Caruthers, this action was brought by Martha McClure, his sister, to annul a marriage that had been solemnized between him and defendant. Coincidentally with the commencement of this action a proceeding was instituted for the appointment of a guardian of the person and estate of Mr. Caruthers on the ground of his alleged incompetency. An appeal from the order appointing a guardian has been dismissed. 82 Cal.App.2d 664, 186 P.2d 718. The appeal now before the court

is from the judgment annulling the marriage.

Prior to the time when the two proceedings came on for trial the court made an order that they be consolidated for the purpose of trial. This and other rulings of the court are assigned as error by defendant.

[1] 1. *Consolidation of the annulment and the guardianship proceedings.* Defendant contends that the court erred in consolidating the two proceedings for the purpose of trial and asserts that there was no stipulation to that effect. There is a vast difference between a consolidation of two or more pending actions or proceedings relating to the same subject matter, e. g., actions to foreclose mechanics' liens (Code Civ.Proc., sec. 1184a), and a consolidation merely for the purpose of trial. Actions may be consolidated in the discretion of the court whenever a substantial right will not be prejudiced. (Code Civ.Proc., sec. 1048.) Consolidated actions may be disposed of by one set of findings and one judgment. A different situation exists when actions or proceedings are consolidated only for the purpose of trial. In such event the evidence adduced in one case is to be deemed applicable in the other insofar as it is material thereto, but separate findings and judgments must be made and entered in each case.

From an examination of the reporter's and clerk's transcripts it is manifest that the only order of consolidation made by the court of the two proceedings was for the purpose of trial. This was done in the interest of saving the time of the court and of avoiding a repetition of the evidence that would be offered in either proceeding that would be applicable to the other. After a colloquy in which all counsel and the court took part, Mr. Crawford being sole counsel for defendant at that time, the court said "Then that [the guardianship proceeding] will be consolidated with this [the annulment case], and we will try it all together." After further colloquy the court remarked that in the two proceedings "there will be the same doctors and the same witnesses * * * and stipulate the testimony as to one may apply to the testimony [in] the

other. Is that agreeable, counsel?" Mr. Crawford replied, "Yes, provided the date is satisfactory." Counsel for plaintiff at all times expressed their willingness to accede to the court's suggestion. Further statements were made by the court and counsel but the record does not disclose any objection to the trial of the two matters at the same time in order to avoid the iteration of medical and lay evidence in the trial of the second proceeding.

The order appearing in the minutes of the court recites that "the guardianship proceedings filed on behalf of Jefferson D. Caruthers may be consolidated with this matter for the purpose of hearing and hearing on guardianship, annulment and restraining order be had on September 10, 1946, at 9:30 A.M. * * * Cause is set for trial September 10, 1946, at 9:30 A.M. * * * Notice is waived."

When the two proceedings came on for trial on September 10 Mr. Myers, who had become associated with Mr. Crawford as counsel, refused to stipulate to the trial of the two cases together. After the court referred to the proceedings had at the previous hearing Mr. Myers made a suggestion that in effect was the same as the court's order previously made, to wit, that after the annulment action had been heard the testimony of certain witnesses might be considered as having been introduced in the guardianship proceeding. The trial then proceeded. At its conclusion the court made and filed its decision and entered judgment in the annulment action and made separate findings and an order appointing a guardian in the incompetency proceedings.

[2, 3] The court did not err in its action and defendant was not prejudiced in any manner by such procedure since Mr. Caruthers' incompetency and unsoundness of mind constituted the real and only issue to be determined by the court. Mr. Crawford consented to the order and Mr. Myers' suggestion at the beginning of the trial amounted to an affirmance of that consent and a waiver of any further objection to the court's order. The evidence offered by both plaintiff and defendant as to the condition of Mr. Caruthers' mind was therefore properly applied to each proceeding.

[4] 2. *Plaintiff's capacity to maintain the action.* Defendant contends that Mrs. McClure did not have legal capacity to commence and maintain the action on behalf of Mr. Caruthers and for that reason the entire proceedings and the judgment are void. The want of legal capacity of a party to sue is one of the grounds of demurrer to a complaint (Code Civ.Proc., sec. 430), and since defendant did not raise the objection by either demurrer or answer it is deemed to have been waived. (Sec. 434.)

[5] By defendant's allusion to an alleged oral demurrer made during one of the preliminary hearings prior to the trial she no doubt refers to an oral statement made by her counsel that he desired to make a special appearance "to resist any further action of this order at this time for the reason that there is absolutely no color of right for this plaintiff to be in court. * * * There is no capacity set forth." Neither this statement nor any purported oral demurrer need be noticed since an oral demurrer is unknown to procedure in this state. The only objections to a complaint that may be made orally are (1) that the court is without jurisdiction of the case and (2) that the complaint does not state facts sufficient to constitute a cause of action. (Code Civ.Proc., sec. 434.)

However, the contention that the right of plaintiff to maintain the action may be raised by a general demurrer for the reason that the complaint does not state a cause of action which she is permitted to prosecute invites a consideration of the question on its merits.

Plaintiff's right to maintain the action is found in sections 82 and 83 of the Civil Code. Section 82 provides that a marriage may be annulled if either party was of unsound mind at the time of the marriage, unless such party, after coming to reason, freely cohabits with the other as husband or wife. Section 83 provides that an action to obtain a decree of nullity of marriage on the ground of unsound mind of one of the parties must be commenced "by the party injured, or *relative* or guardian of the party of unsound mind, at any time before the death of either party." Such language

places the relative on an equal footing with the guardian.

[6,7] Although this provision permits an action to be prosecuted by a party to the marriage through his guardian, Mr. Caruthers was not a necessary party to the action. Mrs. McClure, as a relative, had power under the same provision to commence and prosecute it to judgment. *Jones v. Alameda*, 85 Cal.App. 607, 612, 259 P. 976. Since the subject of marriage is within the control of the legislature it may determine the conditions under which the marital status may be created and terminated. It is within its power to authorize a relative of a person who is unable to act for himself to act in his behalf without naming him as a party.

[8] There is no authority for defendant's contention that since Mr. Caruthers is the party in interest he is an indispensable party to the action. A person expressly authorized by statute so to do may sue without joining the person for whose benefit the action is prosecuted. (Code Civ.Proc., sec. 369.) The universal rule is that when a right of action is statutory it is necessary to bring the action in the name of the party authorized by the statute to do so without regard to any question as to the real party in interest. *Black Rock P. M. Dist. v. Summit W. & I. Co.*, 56 Cal.App.2d 513, 516, 517, 133 P.2d 58; *Salmon v. Rathjens*, 152 Cal. 290, 294, 92 P. 733.

[9] The provisions of the Civil Code above referred to are not modified or limited by section 367 of the Code of Civil Procedure requiring that every action must be prosecuted in the name of the real party in interest, or by section 372 which provides that when an insane or incompetent person is a party he must appear by a general guardian or by a guardian ad litem. The power given by section 83 of the Civil Code to a relative to maintain such an action is independent of other statutory provisions relating to the maintenance of actions. *Estate of Karau*, 26 Cal.App.2d 606, 609, 80 P.2d 108, 109, cited by defendant, does not sustain her contention but on the contrary holds that "it was the legislative intent that the provisions of said sections 82 and 83 should be exclusive and hence controlling

in the matter of annulment of marriage contracts [upon the ground of unsoundness of mind] regardless of the degree of the unsoundness of mind." *Dunphy v. Dunphy*, 161 Cal. 380, 119 P. 512, 38 L.R.A., N.S., 818, Am.Cas.1913B, 1230, is also relied on by defendant. That action was commenced by one of the parties to the marriage for an annulment on the ground that at the time of the ceremony he was intoxicated and had no comprehension of what he was doing. Subsequently an amended complaint was filed in the name of the plaintiff by his guardian ad litem, alleging that at the time of the marriage he was and ever since had been of unsound mind. The court held, 161 Cal. page 389, 119 P. 516, that there was no error in appointing a guardian ad litem under sections 372 and 373 of the Code of Civil Procedure. It did not hold that such method of procedure is exclusive of the right of a relative to prosecute such an action by virtue of sections 82 and 83 of the Civil Code.

Section 196a of the Civil Code is analogous to section 83 in that it provides that a civil suit to enforce the obligations of a father to support an illegitimate child may be maintained by his mother or guardian. The child is not a necessary party. Pursuant to section 196a actions may be brought by and in the name of the mother of a minor illegitimate child on its behalf against the father. *Fernandez v. Aburrea*, 42 Cal.App. 131, 133, 183 P. 366; *McLain v. Meadows*, 44 Cal.App.402, 404, 186 P. 411.

Other cases cited by defendant are equally inapplicable in such an action as this, in which the incompetent person is not, as contended by defendant, an indispensable party, *Dixon v. Cardozo*, 106 Cal. 506, 39 P. 857, was an action to foreclose a mortgage after the commencement of which the plaintiff became insane and a guardian of his person and estate was appointed. The guardian was substituted as plaintiff. Such substitution eliminated the original plaintiff as a party and made the guardian ad litem the sole plaintiff. The court held that such substitution was error and that the suit should have been prosecuted in the name of the plaintiff by his guardian. In *Keane v. Penha*, 76 Cal.App.2d 693, 173 P.2d 835, the action was brought against,

not by or on behalf of, the minor, and his court held that an infant *defendant* must appear by his general guardian or by a guardian ad litem. Obviously neither of the cases cited has any application to the right of a person to maintain an action in his own name on behalf of a relative who is under legal disability where such right is expressly authorized by statute. Other decisions cited by defendant have been examined. They are not in point since they discuss (1) the disposition to be made of litigation when a necessary or indispensable party is not brought into the case and (2) the requisite allegations to be made when a person sues or is sued in a representative capacity. The case at bar is not within either category.

[10] 3. *The sufficiency of the complaint.* No objection was offered to the introduction of evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action, and, as above noted, no demurrer to the complaint was filed. Although the first three points raised by defendant against the sufficiency of the complaint are waived by her failure to make timely objection, they will be briefly noted. The fourth point goes to the sufficiency of facts and may be raised by general demurrer.

(a) Objection that Mr. Caruthers was not a party to the action has already been disposed of adversely to defendant's contention.

[11] (b) Objection that defendant was sued in her former name, Laura Alpha Donovan, and not in her married name, Caruthers, is of no moment. She was named in the complaint as Laura Alpha Donovan, also known as Laura Alpha Caruthers, and answered the complaint without remonstrance. No such objection having been made in the trial court, it cannot be raised on appeal. If she had suggested that she had been incorrectly named the court below could have ordered a correction. (Code Civ.Proc., sec. 473.)

[12] (c) Objection to the allegations referring to defendant as the "alleged" wife of Mr. Caruthers and to the "alleged" marriage is without merit. Since plaintiff was seeking a decree voiding the marriage she

was justified in using such language as was proper to indicate that she did not recognize the marriage as valid or defendant as the lawful wife of Mr. Caruthers.

[13] (d) The only objection that merits attention is that the complaint is insufficient for the reason that it is not alleged in the language of section 82 of the Civil Code that Mr. Caruthers, at the time of the marriage, was of "unsound mind," the allegation being that he was wholly incompetent and continued to be incompetent at the time of the commencement of the action. The error was cured by evidence that was received without objection from defendant.

The record demonstrates that the cause was tried on the theory that the contested issue was the unsoundness of Mr. Caruthers' mind. There was evidence as to his incompetency. There was also ample positive evidence that he was, at the time of the marriage and continued to be at the time of the trial, of unsound mind. A medical witness was asked whether Mr. Caruthers' mind was "either sound or unsound." He answered: "It is unsound." He was also asked "would you say he was of unsound mind" on or about August 1, the date of the marriage? The witness answered: "I think so." Another witness testified that "this condition of unsound mind" was noticed first in 1942 or 1943. Another was asked whether Mr. Caruthers' mind was sound or unsound and he answered: "He was unsound." There was other evidence that he was "irrational" and that he was "completely unbalanced." Another witness was asked "In your opinion is he insane?" and the answer was, "Absolutely." His condition was described by witnesses as senile dementia, medically incompetent, mental enfeeblement.

All the foregoing evidence was received without objection that the complaint was insufficient. Twice objection was made that the proper foundation for the evidence had not been laid and this was the only challenge offered to any of the questions.

The introduction of the foregoing evidence without objection shows that the parties were not in disagreement during the trial as to the issue to be determined by

the court. If there had been any formal defect in the complaint the pleading was cured by the evidence. The court permitted an amendment to conform to the proof alleging that Mr. Caruthers was of unsound mind and made a finding of fact that prior and subsequent to the purported marriage and at the time of the trial he "was of unsound mind" and that by reason of such unsoundness of mind he was incapable of contracting the marriage.

[14] The objection to the sufficiency of the complaint comes too late. Even though a complaint is deficient in some particular if the case is tried on the theory that it is sufficient and evidence is received without objection the unsuccessful party cannot maintain an objection at a later time to the sufficiency of the pleading. *Asnon v. Foley*, 105 Cal.App. 624, 628, 288 P. 792; *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal.App. 318, 325, 147 P. 90; *Hirsch v. James S. Remick Co.*, 38 Cal.App. 764, 767, 177 P. 876; *Guidera v. Lapiana*, 52 Cal. App. 460, 463, 199 P. 557; *Meer v. Cerati*, 53 Cal.App. 497, 505, 200 P. 501; *City of Redding v. Dozier*, 56 Cal.App. 590, 593, 206 P. 465; *Grimes v. Richfield Oil Co.*, 106 Cal.App. 416, 422, 289 P. 245. The *Slaughter*, *Hirsch* and *Guidera* cases were to recover damages for wrongful death. In such cases the existence of heirs is an element of the cause of action and in the absence of an allegation of that fact a cause of action is not stated. The complaints in the *Slaughter* and *Hirsch* cases omitted the allegations of the existence of heirs of the decedent, and in the *Guidera* case it was not alleged that the persons named were all the heirs left by decedent. In each case it was held that the introduction without objection of evidence that heirs survived the decedent and that those named in the evidence constituted all his heirs, cured the objection to the sufficiency of the complaint to which a general demurrer should have been sustained by reason of the omission of an allegation of fact specifically required by the statute.

[15] 4. *Sufficiency of the evidence to sustain the judgment.* Defendant refers to evidence given by medical and lay witnesses

regarding Mr. Caruthers' incompetency, mental enfeeblement, and describing his condition as senile dementia, and contends that such evidence is insufficient to sustain the finding and judgment that at the time of the marriage he was of unsound mind. The finding is sustained by the evidence to which we have referred and by that which will be hereinafter recited, all of which is ignored in defendant's argument.

[16,17] Defendant's criticism of the character of the evidence given on behalf of plaintiff and her comparison of it with that given by her witnesses should have been addressed to the trial court. It is not within the province of a court of review to compare or to evaluate conflicting evidence unless that introduced by one party is inherently improbable and unbelievable.

The evidence hereinbefore narrated and the testimony concerning the facts surrounding the marriage and the actions and statements of Mr. Caruthers, both before and after the ceremony, furnish ample support of the court's finding that he was of unsound mind and that he "did not have the mental capacity and understanding to understand the subject matter of the marriage contract, its nature and probable consequences and was incapable by reason of such unsoundness of mind of contracting said marriage and at the present time is and continues to manifest a state of mind which renders him and he is a person of unsound mind. That it is true and the court is of the firm conviction from the evidence and the preponderance thereof that Jefferson D. Carruthers was and is incapable of comprehending and understanding the contract of marriage, its nature and probable consequences, and that the said Jefferson D. Carruthers, subsequent to the said marriage, was incapable of freely cohabiting with the said Laura Alpha Donovan, also known as Laura Alpha Caruthers, in that during said period the said Jefferson D. Carruthers was of unsound mind. That at no time since the consummation of the said purported marriage has the said Jefferson D. Carruthers regained his soundness of mind nor will he do so."

On the day of the marriage Mr. Caruthers and the defendant, accompanied by

Mr. and Mrs. Gill in their automobile, went from Mr. Caruthers' home near El Monte to the branch office of the county clerk in Pasadena and obtained a marriage license. Prior to starting to Pasadena and during the trip no mention was made of the wedding that was shortly to be solemnized. The conversation related to scenes along the highway and to general topics of the day. After obtaining the license the parties went to a garage in El Monte owned by a justice of the peace and then proceeded with him to his home where he performed the ceremony, the justice of the peace and his wife being the only parties present other than those above mentioned. It was frequently necessary to prompt Mr. Caruthers with reference to his part in the proceeding. He apparently was ignorant of the fact that he was being married and interjected remarks concerning matters foreign to such a solemn occasion. At one time defendant told him to "quit your clowning."

There was no wedding ring nor any of the usual accompaniments of a wedding. After the ceremony had been completed there was no conversation concerning the event. The justice of the peace testified that the parties remained in his home for about ten minutes and that during that time the conversation related principally to the raising of apples and to events that happened during Mr. Caruthers' early years.

About two days after the wedding relatives of Mr. Caruthers went to visit him, as had been their custom on Saturdays and Sundays, at which time defendant was absent from the premises. Mr. Caruthers made no mention of his having been married. Although he had sold 16½ acres of his 17-acre farm a short time previously to Mr. and Mrs. Gill he said to his relatives during their visit, "I have had this place now for 40 years and I think I will keep it until I die. I am not going to sell it." His visitors did not know at that time that he had been married or that he had sold his property. One witness testified that during the conversation "he commenced to laugh and he said, 'I had a funny thing happen to me.' I said, 'Let's hear it, Uncle Jeff, I have heard a lot of funny things on you so far.' 'Well,' he said,

'somebody came in here and wanted me to go up and stand up with them to get married.' He said, 'I don't know what the hell they wanted with me; I didn't know them, so anyway they came and helped me put on my clothes and hustled off to Long Beach and I stood up with them; she was a hell of a pretty girl, I didn't know what she was, what they wanted me to stand up for I don't know, but they came back and dumped me out and away they went and I haven't seen them since.'" His lack of understanding of the events that had occurred is indicated not only by his statement about the marriage but by his declaration that he had been taken to Long Beach which was several miles farther from his home than Pasadena and in a different direction. Since he had resided on his farm for 40 years it will be presumed that he was acquainted with his surroundings and that if he had been in his right mind he would have known whether he was taken to Long Beach or Pasadena.

A week later, during another visit of the relatives, some mention was made of the fact that Mr. Caruthers had only a few of the livestock which he had previously had on his farm. He was asked whether or not he had sold his horses and mules. He said "No, someone came up here and carted them down below here." Defendant who was present on this occasion said, "You sold them for \$300 and gave the man a bill of sale for them." Mr. Caruthers replied "you are all wrong about that. I didn't sell any mules or stock." Defendant repeated that he had sold the animals and said to the visiting relatives, "Well, it doesn't make any difference. It is none of your business anyway. Jeff and I are married and I own this place." This was the first notice to the relatives of the marriage. When one of them asked Mr. Caruthers whether he was married he said, "No, honey, now don't worry, I am not married." When told that Laura, the defendant, said he had married her he replied: "Who is Laura, you mean that woman that drinks and smokes so much?" * * * Oh, no, I wouldn't marry her."

The sale of Mr. Caruthers' farm was made in June, slightly more than a month previous to the marriage. Defendant ac-

panied him to the bank for the purpose of opening an escrow and signing the necessary documents to complete the conveyance. During a visit of his relatives about a week after the occasion above mentioned they inquired whether he had sold his property. He answered that he would not do so. When one of them stated that it was rumored that he had sold it he answered, "Well, boy, if anybody would know about my selling surely I should know. When I tell you it has not been sold, it has not been sold." His lack of knowledge of the sale is further shown by the fact that after the conveyance had been made he dug post holes for fencing the property and continued to work on the land in the same manner as before.

There was additional evidence sustaining the allegation and the finding that Mr. Caruthers was of unsound mind at the date of the marriage and at the time of the trial but its recitation is unnecessary since the foregoing is sufficient. There was also evidence from defendant's witnesses that he knew he had been married to her. Since it is in conflict with the evidence offered by plaintiff and since the trial court has indicated by his finding of fact which witnesses he believed this court cannot disturb the finding.

5. *Other alleged errors.* Appellant assigns four other errors, any one of which, standing alone, she admits would not be a ground of reversal, but she contends that when taken together, in addition to the other points raised in her brief, show that she did not have a fair trial.

[18,19] (a) Defendant's counsel, without notice to plaintiff or her counsel, procured from the presiding judge an order extending time for the filing of objections to the proposed findings of fact and conclusions of law. Two days later the trial judge, upon his own motion and without notice to defendant's counsel, vacated and set aside the order. The facts of the case and the mental and physical condition of Mr. Caruthers were not known to the presiding judge but were within the knowledge of the trial judge. The latter knew the necessity of avoiding delay in entering the judgment. The trial judge made an order reciting that

he had previously instructed all counsel in the case that he desired the findings of fact and conclusions of law and any exceptions, objections or amendments thereto to be filed within the statutory period and without any extension of time, and that he would be in Los Angeles at a certain time for the purpose of disposing of the case. There was no error in vacating the order. Defendant was not prejudiced since (1) it does not appear what amendments she desired to submit nor that any amendments to the proposed findings would have been of any avail to her and (2) the findings signed by the trial judge are sustained by the evidence.

[20] (b) Defendant alleges "abuse of discretion by the court in his lengthy examination of witnesses." She admits, as she must, that considerable latitude is allowed the trial court in the conduct of a trial and in performing his duty to ascertain the facts appertaining to the issues which he must determine. We have inspected the record and find that the court's examination of witnesses was for the purpose of ascertaining the condition of Mr. Caruthers' mind in order to determine what disposition should be made of both the incompetency and the annulment cases. Such a proceeding is an important and solemn matter and a finding that a person is incompetent or of unsound mind should not be made lightly, nor at all, unless the court is convinced that it is warranted by the facts. It was the court's duty to ascertain the mental condition of Mr. Caruthers and to that end he was justified in interrogating witnesses in order to bring out facts and opinions that were not covered to his satisfaction by the questions of counsel. The examination of the witnesses by the court was reasonable and proper.

[21] (c) Defendant complains that the court criticized her because her counsel did

not call Mr. Caruthers as a witness. Mr. Caruthers was in court during the entire trial. When the court expressed a desire to have him testify defendant's counsel objected to his being called while plaintiff's counsel not only did not object but expressly agreed to his testifying. The remarks of the court to which defendant takes exception were made during an argument as to whether Mr. Caruthers should be called as a witness and we find nothing objectionable in them.

[22, 23] (d) Defendant alleges that the court committed error in failing to rule promptly upon her motion to be relieved of the stipulation for consolidation of the two proceedings and to sever the cases for trial. We have already indicated that the consolidation of the cases for the purpose of trial was within the discretion of the court, was agreed to by defendant's counsel and was made in the interest of conserving time and of avoiding two trials of practically the same issue. The court had a right to give proper consideration to the motion and to take it under submission for that purpose. There was no error in failing to rule upon the motion immediately upon its presentation and there was no error in denying it at a subsequent point in the trial. Defendant was not prejudiced by the ruling since her counsel were well aware of the issues to be tried and of the fact that the same witnesses would testify and the same evidence would be given in both the annulment and the guardianship proceedings.

[24] Judgment affirmed. The order denying defendant's motion for a new trial not being an appealable order, the appeal therefrom is dismissed.

MOORE, P. J., and McCOMB, J., concur.

86 Cal.App.2d 747

McCLURE v. DONOVAN.

Civ. 16233.

District Court of Appeal, Second District,
Division 2, California.

July 14, 1948.

Irving M. Walker, of Los Angeles, Lee J. Myers, of El Monte, and William Kay Crawford, of Los Angeles, for appellant.

Martin, Hahn & Camusi, of Los Angeles, for respondent.

WILSON, Justice.

1. Marriage ⇨62

In action to annul marriage, trial court had no power to require payment for attorneys' services rendered prior to application for allowance of fees. Civ.Code, § 137.

2. Husband and wife ⇨205(6)

Under statute providing that husband may be required to pay money necessary to enable wife to prosecute or defend action, award cannot be made except upon finding of "necessity," which does not exist when services have already been rendered. Civ. Code, § 137.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessity".

3. Divorce ⇨188, 197

Award for costs and attorneys' fees in divorce action is not a matter of right but rests in trial court's sound discretion, which is not arbitrary but must be exercised reasonably and fairly, taking into consideration all facts exhibited to court in evidence submitted at hearing of motion for allowance. Civ.Code, § 137.

4. Marriage ⇨62

Evidence did not show abuse of discretion in denying allowance of additional attorneys' fees to wife in action to annul marriage to alleged incompetent, after \$350 had already been awarded. Civ.Code, § 137.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Martha McClure, on behalf of Jefferson B. Caruthers, against Laura Alpha Donovan, also known as Laura Alpha Caruthers, to annul a marriage. From an order denying defendant's motion for allowance of attorneys' fees, defendant appeals.

Affirmed.

This appeal is from an order denying defendant's motion for an allowance of attorneys' fees in an action for annulment of marriage, the appeal from the judgment in which has been affirmed in an opinion this day filed, 195 P.2d 901.

When the trial of the cause began on September 10, 1946, defendant made an oral motion, without previous notice, for an allowance of attorneys' fees and costs. Plaintiff objected on the ground that no notice of the motion had been served. It was suggested that it might be stipulated that an order to show cause had been filed and a hearing be had on a later date. Plaintiff declined to join in such stipulation and demanded a formal notice with supporting affidavits. It was then stipulated that defendant might file an application for an allowance on which the court would rule if plaintiff offered objection. On September 12, the third day of the trial, defendant filed her motion for suit money and attorneys' fees which was noticed for hearing on September 17. The hearing was continued to September 30 at which time the court announced an award of \$350 for fees and expenses. On October 1 a minute order was entered awarding that amount "to finance the defense" of the action, the court reserving "the right to make further allowances to said defendant for the said purpose." In making the order the court said that defendant was entitled to funds with which to procure witnesses and that "As to attorneys' fees, of course, that will have to go over. There is no order to show cause pendente lite to the extent it is being defended on the other side. It is merely a request that on notice an order be made."

On February 8, 1947, more than three months after the completion of the trial, defendant filed a notice of motion for an allowance of "additional attorneys' fees" on the ground that "said attorneys have rendered services reasonably worth far in ex-

cess of the sum heretofore allowed." The notice was accompanied by affidavits itemizing the services rendered. The motion was heard on February 24 and taken under advisement. On May 19 the court made an order denying the motion. The appeal is from the latter order.

Counsel are in agreement that the rule relating to the award of attorneys' fees in the annulment case is the same as in actions for divorce.

[1,2] The order must be affirmed since the court was without power to require payment for attorneys' services rendered prior to the application for the allowance of fees. The power of the court to allow fees derives solely from section 137 of the Civil Code which provides that a husband may be required to pay "any money necessary to enable the wife * * * to prosecute or defend the action." The court is not empowered by section 137 to make an award to the wife except upon a finding of necessity (*Mudd v. Mudd*, 98 Cal. 320, 322, 33 P. 114), and necessity does not exist when the services have already been rendered. *Lacey v. Lacey*, 108 Cal. 45, 40 P. 1056; *Loveren v. Loveren*, 100 Cal. 493, 35 P. 87.

When the previous allowance of \$350 was made the court stated that the matter of attorneys' fees would "have to go over" but plaintiff's counsel did not agree that a further hearing might be had on the motion then pending nor did they stipulate that the court might make an order for fees at a later date on a motion or an order to show cause subsequently filed. A similar situation arose in *Lacey v. Lacey*, supra, wherein, pending the action, the court made an award of counsel fees with "leave to apply for a further allowance." No other allowance was made until the final judgment in which an additional award was made. The court held that such allowance was for past services and was clearly not necessary to enable the wife to prosecute the action. In *Loveren v. Loveren*, supra, the court reversed an order for payment by the husband of expenses previously incurred by the wife, saying that if the expenses of an action have been incurred or paid with moneys derived from the wife's separate estate or upon her credit there is no necessity for an allowance to do that which she has already done, and

without the necessity the court is without authority to make an award. The services performed by defendant's attorneys and costs incurred must have been on her credit or on payment made as the case progressed.

The cases cited by defendant do not aid her cause. In *Thomas v. Thomas*, 66 Cal. App.2d 818, 153 P.2d 389, previous to the trial the application for fees had been presented and the court had ordered payment to be made but postponed the determination of the amount until the time of trial. The court held that this was not error. *Collins v. Welsh*, 2 Cal.App.2d 103, 37 P.2d 505, was an action by the assignee of an attorney against the latter's client to recover for services performed for her in a divorce action wherein she had entered into a property settlement which waived her attorney's fees. The power of the court to award fees was not involved in the case except for the defense that an allowance ordered by the court and paid by the husband at the inception of the action was a bar to the action. The court held that this contention was without merit. In the course of the opinion it is said that the award of counsel fees to the wife pursuant to section 137 of the Civil Code is not a determination of the reasonable value of all legal services to be rendered since the amount and nature of the services cannot be ascertained at that time. This was said in response to the point above referred to which was raised as a defense to the effort of the attorney to recover the reasonable value of the services rendered by him to the wife. In *Bohnert v. Bohnert*, 91 Cal. 428, 27 P. 732, the fee allowed was for conducting an appeal in a divorce action, not for past services.

[3] The award for payment of costs and attorneys' fees in a divorce action is not a matter of right but rests in the sound discretion of the trial court. *Stewart v. Stewart*, 156 Cal. 651, 655, 105 P. 955. The discretion is not arbitrary but must be exercised reasonably and fairly taking into consideration all the facts and circumstances exhibited to the court in the evidence submitted at the hearing of the motion for an allowance.

[4] A perusal of the record, including all affidavits presented in support of and in

opposition to defendant's motion, does not disclose an abuse of discretion.

The order appealed from is affirmed.

MOORE, P. J., and McCOMB, J., concur.



86 Cal.App.2d 875

ORO LOMA SANITARY DIST. v. VALLEY
et al.

Civ. 13721.

District Court of Appeal, First District,
Division 1, California.

July 26, 1948.

Rehearing Denied Aug. 25, 1948.

Hearing Denied Sept. 23, 1948.

1. Eminent domain ⇨145(1)

In eminent domain proceedings by a public corporation such as a drainage district, court must diminish amount of severance damages to be awarded in the amount of any proved special benefits which accrue to the defendant's land not taken. Code Civ.Proc. § 1248, subd. 3; Const. art. 1, § 14.

2. Eminent domain ⇨74

Under the constitution, an ordinary corporation may not appropriate a right of way without first compensating the owner thereof irrespective of any benefits to be derived from the improvement. Const. art. 1, § 14.

3. Eminent domain ⇨146

In condemnation proceedings, "special benefits" are those which result from the mere construction of the improvement and are peculiar to the land in question, and they must be such as are reasonably certain to result from the construction of the work. Code Civ.Proc. § 1248; Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Benefits".

4. Drains ⇨43

Under the statute requiring a sanitary district board to adopt a resolution of in-

195 P.2d—58

tention to do proposed work and to file an estimate of cost of improvement and of lands, rights of way and easements and to file a proposed assessment based on cost in proportion to estimated "benefits" to be received by subdivisions from the improvements, "benefits" means both general and special benefits and does not limit the cost to the land, right of way or easement actually taken excluding the cost of severance damages to property not taken. Gen.Laws, Act 5215, § 2; Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Benefits".

5. Drains ⇨43

When "cost of land, rights of way and easements" are spoken of in statute governing estimates by sanitary district board there are necessarily included and commonly understood to be included all of costs which condemning power will have to pay to obtain same so that improvement can be constructed, and obviously that includes the damages to be paid. Gen.Laws, Act 5215, §§ 2, 15.

See Words and Phrases, Permanent Edition, for all other definitions of "Cost of Land, Right of Way and Easement".

6. Municipal corporations ⇨438

Special assessments are based upon all benefits to be received by land from a proposed improvement and not only upon the general benefits resulting therefrom.

7. Municipal corporations ⇨405

"Special assessments" are charges imposed against particular parcels of real property as distinguished from taxes against an individual, and a statute authorizing such special assessments will not be enlarged.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Assessments".

8. Eminent domain ⇨146

Generally, in condemnation proceedings, a set-off of special benefits against severance damages is to be condemned as double taxation where an original assessment was made.

9. Drains Ⓒ71

Special assessments against property owners by sanitary district board for construction of storm water drains pursuant to provisions of municipal improvement act of 1913, must be in proportion to the special as well as general benefits. Gen.Laws, Act 5215, §§ 2, 15.

10. Evidence Ⓒ83(2)

It will be presumed in absence of evidence to the contrary that Board of Sanitary District performed its statutory duty in making a special assessment for construction of storm water drains. Gen.Laws, Act 5215, §§ 2, 15.

11. Eminent domain Ⓒ146

Where sanitary district after levying necessary assessment to cover cost of proposed storm water drains brought action in eminent domain to acquire necessary easements for proposed drains, court properly refused to off-set against amount allowed as severance damages, claimed benefits to the severed land by reason of construction of the improvements. Gen.Laws, Act 5215, §§ 2, 15.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action in eminent domain by the Oro Loma Sanitary District, a public corporation, against F. W. Valley and others to condemn certain real property to permit construction of storm water drains. From the judgment, plaintiff appeals.

Judgment affirmed.

Kirkbride, Wilson, Sutton, Harzfeld & Wallace, of San Mateo, for appellant.

J. W. O'Neill and A. A. Rogers, both of Oakland, for respondent.

BRAY, Justice.

Appeal by plaintiff district from that portion of an interlocutory judgment in condemnation which allowed defendant Dorothy Giacometti certain sums as severance damages, and "which fails to allow the plaintiff any off-set, or deduction from said damages, for the benefits accrued to defendant's property."

The single question presented is—in an action in eminent domain brought by a sanitary district against the owner of property which has been specially assessed under the Municipal Improvement Act of 1913, is the sanitary district entitled to have the benefits which accrue to the property set off or deducted from the amount of severance damages?

Plaintiff, a public corporation organized under Part 1, Division 6 of the Health and Safety Code, took the necessary proceedings under the Municipal Improvement Act of 1913 (Stats.1913, p. 421, as amended; General Laws, Act 5215), to construct certain storm water drains. After levying the necessary assessment to cover the cost of the proposed improvement, the district brought this action in eminent domain against the owners of 38 parcels of land to acquire the necessary easements for the proposed drains. The court allowed the defendant Giacometti the following sums:

Value of land taken for easement	\$ 933.50
Severance damage	
(a) Triangular piece .03933 acres (which the court found was made valueless by the taking)	137.65
(b) 1.968 acres valued at \$3500 per acre, depreciated 65%	4170.20
Total	\$5241.35

No appeal is made from the allowance for the value of the land taken or for the damage to the triangular piece. The appeal is from the refusal of the court to consider as an offset against the \$4170.20 allowed as severance damage, the claimed benefits to the severed land by reason of the construction of the improvement. The district prior to the time of trial had actually constructed the planned improvement.

Finding XI sets forth the position taken by the trial court in this behalf: "That plaintiff heretofore levied and collected assessments against all of the real properties lying within the Oro Loma Sanitary District, including the real property owned by defendant Dorothy Giacometti and particularly described in paragraph II of these

findings, pursuant to the provisions of the Municipal Improvement Act of 1913, as amended (General Laws, Act 5215), and that any benefits resulting to or received by any and all of the real property described in paragraph II of these findings, by reason of the construction and maintenance of said storm water drainage ditch, were so assessed against all of said property of said defendant Dorothy Giacometti, and for said reason no such benefits are considered or allowed by the Court herein."

Plaintiff contends, and offered evidence, to the effect that the construction of the drain on defendant's property changed the character of the property from purely agricultural, and of comparatively little value, to residential subdivision property of high value, and that such change constituted a special benefit, rather than a general benefit to the remaining land. Defendant contended, and offered evidence, that prior to the improvement the land was subdivision property; also, that if the construction of the improvement caused such change in its character, it was a change enjoyed by all the other property in the district; hence such change was a general benefit and not the special benefit which the eminent domain law permits to be offset against the damage to the severed land. Inasmuch as the court refused to consider any offset for benefit derived, the court did not pass upon these questions, except possibly by the fact that the value per acre which it placed upon the property is apparently subdivision rather than agricultural value.

For the purposes of this opinion, we will assume that prior to the construction of the improvement the land was solely agricultural, and by the construction was changed to residential subdivision property, and that such change was a special benefit not received by other lands in the district.

[1] The law concerning eminent domain proceedings by a public corporation such as a drainage district provides that the court must diminish the amount of severance damages to be awarded in the amount of any proved special benefits

which accrue to the defendant's land not taken.¹ Defendant concedes this to be the general rule, but contends that where, as here, the land of the owner has been assessed to pay for the improvement in proportion to the benefit derived, to set off in the eminent domain proceeding the benefits against the damages would constitute double taxation, or payment. Plaintiff contends that the benefits upon which the assessment is based can only be the general benefits; in other words, the benefits which the land in question receives generally with all the other lands in the district, and that special benefits, that is, benefits which "result from the mere construction of the improvement, and are peculiar to the land in question"² can only, and must be, considered in the eminent domain proceeding.

[2, 3] Section 1248 of the Code of Civil Procedure provides: "The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: * * * 3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision two, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value; * * *."

"It is true that the state would be entitled to have the award of severance damages assessed against it diminished in the amount of any proved special benefits which accrued to the defendants' land which was not condemned. Article 1, section 14, of the California Constitution * * * provides * * * [quoting]

"It clearly appears from the preceding provision that an ordinary corporation may not appropriate a right of way without first compensating the owner therefor *irrespec-*

¹Art. I, Sec. 14, Const. of Cal.

² People v. McReynolds, 31 Cal.App.2d 219, 223, 87 P.2d 734, 737, quoting from

Los Angeles County v. Marblehead Land Co., 95 Cal.App. 602, 614, 273 P. 131.

tive of any benefits to be derived from the improvement. But municipal corporations, counties and the state are specifically excepted from that rule. It is clearly inferred that when a right of way is condemned by a municipal corporation, a county or the state, such appropriators are entitled to have the severance damages which are awarded against them reduced in the amount of the benefits which accrue to the property not taken on account of the proposed improvements. However, such benefits must be special in character as distinguished from general benefits enjoyed by the public at large. * * * Special benefits are defined in the Marblehead Land Company case, supra, as those which 'result from the mere construction of the improvement, and are peculiar to the land in question. These special benefits must be such as are reasonably certain to result from the construction of the work.'" *People v. McReynolds*, supra, 31 Cal.App.2d at pages 222, 223, 87 P.2d at page 737. See also *Collier v. Merced Irr. Dist.*, 213 Cal. 554, 2 P.2d 790, and Sec. 1248, Code Civ. Proc.

To determine whether the general law allowing special benefits to be set off in eminent domain proceedings applies here, requires a construction of the meaning of section 2 of the Municipal Improvement Act of 1913. That section provides for the adoption by the district of a resolution of intention to do the proposed work, and requires the proper officer to file with the clerk of the board of the district a report containing (1) plans and specifications of the proposed improvement; (2) "An estimate of the cost of said improvement and of the cost of lands, rights of way and easements and of the incidental expenses in connection therewith"; (3) a diagram showing the assessment district; (4) "A proposed assessment of the total amount of the cost and expenses of the proposed improvement upon the several subdivisions of land in said district *in proportion to the estimated benefits to be received by such subdivisions, respectively, from said improvements*; * * * ." (Emphasis added.)

[4, 5] That "benefits" here means both general and special benefits is the only reasonable construction of the language used.

It is obvious that there is required to be filed a report which will show the board of the district and the landowners within it, what the contemplated improvement is to cost, including "cost of lands, rights of way and easements." It is impossible to estimate these costs without estimating as to each subdivision of land, not only the cost of the land, right of way, or easement actually taken, but the severance damage caused thereby. It would be a strained construction of the phrase "cost of lands, rights of way and easements" to hold, as suggested by plaintiff, that it limited the cost to the land, right of way or easement actually taken, and did not include the cost of the severance damage to the property not taken. When the cost of land, rights of way and easements are spoken of, there is necessarily included and commonly understood to be included all of the cost which the condemning power will have to pay to obtain the same so that the improvement can be constructed, and obviously that includes the damages to be paid. If, in estimating the severance damage, no estimate were made of the benefits to be derived, which under the law could be set off against that damage, then an entirely false estimate of the cost would be made. While the act provides for supplemental assessments (Sec. 15), that fact does not change the situation that the first assessment must give as accurate an estimate of all costs as possible and does not mean that the word "benefits" in subdivision 4 shall have other than its common meaning. To adopt the interpretation asked by plaintiff would mean that we would be required to read into the statute, before the word "benefits," the words "general, but not special." This we cannot do.

This precise question has never before been passed upon in California. The nearest approach to it was in the case of *Jacobus v. City of Oakland*, 42 Cal. 21. There the wording of a special act authorizing improvements in the city of Oakland provided a method of assessment which expressly required all benefits to be considered at the time of making the assessment. The Oakland act provided that the commissioners "shall proceed to examine the land and improvements to be affected by the proposed

improvement, and *shall first ascertain the amount of damages* to be sustained, the names of the owners of the property to be damaged, *and the amount to be paid to each of such owners therefor*. They shall then assess upon the property to be benefited by such improvement a sum sufficient to pay the whole amount of such damages * * *, and shall apportion the same among the owners of the several parcels of property to be thus benefited, in proportion to the amount of benefits to accrue to each." (Emphasis the court's.) While the wording of that act is different from the Municipal Improvement Act of 1913, the court in its decision answers the contention of plaintiff that the interpretation we are giving the latter act would be unworkable.

"The owner of land taken for the street would then receive, in money, the value of the land taken for public use; and if he owned adjoining or other lands benefited by the improvement, he would be required to pay, by an assessment upon such benefits, his proportionate share of the aggregate damages and expenses of such improvement, without reference to any compensation due him for lands taken; and the owner of other lands benefited, no portion of whose lands had been taken for the street, would be assessed upon his benefits in precisely the same ratio of benefits, to meet the aggregate damages and costs.

"By this method the costs of the improvement would be apportioned to the parties benefited, upon terms of proximate equality, and each party whose lands were taken for the street would receive compensation therefor." 42 Cal. at pages 26, 27.

[6, 7] The very theory of special assessments shows that they are based upon all benefits to be received by the land from the proposed improvement, and not only upon the general benefits resulting therefrom. In *City of Los Angeles v. Howard*, 23 Cal.App.2d 624, 73 P.2d 1234, in holding that the lien of a street improvement assessment should attach to the buildings as well as the land, the court stated, 23 Cal. App.2d at page 628, 73 P.2d at page 1236: "It is true that special assessments are charges imposed by statute against particular parcels of real property as distinguished from taxes against an individual. Special

assessments are imposed to defray the expenses in whole or in part of local improvements made by a municipality, on the theory that the owner of the property will receive special benefits from the improvement in excess of the benefits accruing to the general public. 44 C.J. 481, § 2806. The statute authorizing such special assessments will not be enlarged."

Cases from other jurisdictions are of little value for the reason that the statutory provisions of other states vary considerably from the provisions of the Municipal Improvement Act of 1913, as well as from each other. In *San Luis Valley Irr. Dist. v. Noffsinger*, 85 Colo. 202, 274 P. 827, cited by plaintiff, the assessment was made on an acreage basis, rather than on the basis of benefits to be received from the proposed improvement. The court in its opinion points out the fact that had the assessment been on the basis of benefit received, as in the case of *Gutschow v. Washington County*, 74 Neb. 794, 105 N.W. 548, 107 N.W. 127, which the owner had cited, the district could not have been entitled in the condemnation suit to set off the benefits received by the land from the improvement. In *Stocker v. Nemaha Valley Drainage Dist. No. 2*, 99 Neb. 38, 154 N.W. 862, the court does not discuss the question of how the assessment was arrived at and hence is no value here.

[8] Cases from other jurisdictions are helpful in stating the general principle of law condemning as double taxation a setoff of special benefits against severance damages where an original assessment was made.

In *Brittingham v. Board of Com'rs of Drainage Dist. No. 1*, 1928, 167 La. 368, 119 So. 259, 261, it was said: "Defendants seek to offset the damages suffered by plaintiff by the benefits that the remainder of the tract has derived from the enterprise. Defendants are not entitled to such an offset. Plaintiff is presumed to pay for these benefits by the taxes he pays on the land for the digging of the canal. He cannot be made to pay twice for the improvement—once, by way of taxation, and again, by way of offsetting the damages he has suffered with the benefits that his land has received."

In *Gutschow v. Washington County*, supra, 74 Neb. 794, 105 N.W. 548, 549, the court said: "In the case of a highway being opened across his premises or of a railway being constructed thereon, the landowner may in a sense be said to pay the value of the special benefits which he derives by reason thereof, by such value being deducted from whatever damages the land not actually taken for the improvement may suffer by reason of the same. In the case of a drainage ditch, however, these benefits are assessed against him by the very act of the public authorities which appropriate his land to the public use. To allow these benefits to be deducted from any damages which he may suffer to the land not taken would be to compel him to pay twice to the public the value of the special benefits which he has received. This would manifestly be unjust and inequitable and would impose a burden upon him in excess of that borne by those whose lands were not damaged." See also *Anderson v. Board of Com'rs*, 1920, 107 Kan. 655, 193 P. 329, 330; *Young v. City of Toledo*, 1931, 39 Ohio App. 553, 178 N.E. 33, 34; and *City of Detroit v. Loula*, 1924, 227 Mich. 189, 198 N.W. 837, 838.

In 145 A.L.R. 135 appears the following: "The question whether benefits accruing to property which has been damaged, or to property remaining after part thereof has been taken, for the construction of a public improvement, may be set off against the compensation for the damage or for the part taken, in a situation in which the property remaining or damaged is subject to a special assessment, may arise in a confusingly great variety of situations. * * * But there is one safe standard which applies irrespective of the situation in which the question arises—that is, benefits cannot be deducted if, in a particular situation, to allow such deduction would in effect compel the condemnee to pay twice

for the same benefit. * * * In accordance with the above rule, benefits accruing to land which has been damaged, or part of which has been taken, for the construction of a public improvement, cannot be set off against the compensation awarded for the taking or injury, *where the same benefits* have been made the subject of a special assessment, irrespective of whether such assessment has already been paid by the owner, or is still open to payment. This rule has also been applied where property was subject to taxation for benefits, even though it does not appear that an assessment had been made at the time the condemnation proceedings were decided, or although the tax authorities failed to levy such an assessment." (pp. 136-141.) (Emphasis added.)

[9,10] The evidence fails to disclose whether the district board in making its assessment based it upon the estimated special as well as general benefits to be received by defendant's land from the construction of the improvement. (It was stipulated at the trial that assessments were levied by the district against the land of defendant pursuant to the provisions of the Municipal Improvement Act of 1913.) This fact is immaterial, because if it is the law, and we hold that it is, that the assessment must be in proportion to the special as well as general benefits, then it must be presumed that the board did its duty and made its assessment that way.

[11] The trial court was correct in its refusal to offset against severance damages the special benefits, if any, derived from the construction of the improvement, for the reason that under the Municipal Improvement Act of 1913, the defendant had already paid for such benefits.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 16396.

District Court of Appeal, Second District,
Division 2, California.

July 13, 1948.

Rehearing Denied July 30, 1948.

Hearing Denied Sept. 8, 1948.

1. Workmen's compensation ⇨604

An employee's injury to be compensable must arise out of and occur in course of employment, must result proximately therefrom, and at time of its occurrence employee must be performing service growing out of and incidental to his employment. Labor Code, § 3600.

2. Workmen's compensation ⇨609

If there is causal connection between employment and injury, the workmen should be awarded compensation for injury, and each case must be decided upon its own facts. Labor Code, § 3600.

3. Workmen's compensation ⇨605, 610

The term "employment", as used in Workmen's Compensation Act, does not contemplate the bare fact of workman's presence and performance of his labors at time of injury, and to justify award it is not necessary that proof show that immediate cause of injury was a part of any work done for his employer. Labor Code, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Employment".

4. Workmen's compensation ⇨610

The theory of workmen's compensation laws does not require that evidence establish all factors of workman's environment, but in order to receive an award he need only show that his work brought him within range of danger by requiring his presence in precincts of his employer's premises at time the peril struck. Labor Code, § 3600.

5. Workmen's compensation ⇨6

The fact that employer was without fault is not a material consideration in determining right to workmen's compensation, since liability is not founded on want of care on part of employer. Labor Code, § 3600.

6. Workmen's compensation ⇨610

Compensable injuries need not be of the kind anticipated by employer or peculiar to employment, but it is sufficient that injury results from a danger to which employee was exposed as an employee. Labor Code, § 3600.

7. Workmen's compensation ⇨11

Under statutes and the constitutional amendment providing for employers' liability for injuries to their workmen, the social public policy became fixed as to its remedial and humanitarian purposes. St. 1917, p. 831 et seq; Const. art. 20, § 21.

8. Workmen's compensation ⇨52

Any reasonable doubt as to whether an incident of an applicant's employment is contemplated as one entitling him to compensation must be resolved in favor of the employee. Const. art. 20, § 21.

9. Workmen's compensation ⇨6

Under constitutional amendment authorizing workmen's compensation legislation, the Legislature was, in effect, required to provide workmen's compensation which would compensate for injuries sustained by workmen in the course of their employment irrespective of the fault of any party. Const. art. 20, § 21.

10. Workmen's compensation ⇨632

Injuries sustained by employee when steel-framed window of building in which she was working was blown upon her by an explosion in a building across the street were compensable injuries "arising out of employment", and were not result of an unforeseen, fortuitous circumstance. Health and Safety Code, § 12000; Labor Code, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of Employment".

11. Workmen's compensation ⇨1172

A stipulation in compensation case, that injuries sustained by employee when window of building was blown upon her by an explosion occurring in a building across the street were caused by concussion which was caused by explosion, did not preclude award of compensation, since commission may either base its findings upon stipula-

tion of facts or take further testimony. Labor Code, §§ 5307(a), 5702.

Proceeding by the Pacific Indemnity Company to review an order of the Industrial Accident Commission awarding compensation for disability to Mae Raymond.

Writ discharged and the award affirmed.

Herlihy & Herlihy, of Los Angeles, for petitioner.

T. Groezinger, of San Francisco, for respondents.

MOORE, Presiding Justice.

February 20, 1947, Mae Raymond was in the employ of petitioner's insured, Rothchild & Kaufman Company, whose factory was located at 931 East Pico street in Los Angeles. While sitting at and operating a power machine for her employer an explosion occurred at an electro-plating establishment across the street at 922. Her machine was stationed about a foot from the west wall of her employer's building. She did not see or hear anything but a flash of light just before losing consciousness. On awakening a steel-framed window was pressed upon her head and shoulders. It had been blown from the west wall by the force of the explosion. It was twelve by fifteen feet and enclosed steel sashes with panes reinforced with wire. Its momentum caused serious bodily injuries to Mrs. Raymond on account of which she applied to respondent commission for adjustment of her compensation. The extent of her injuries and the amount of the award are not issues on this review. Inasmuch as petitioner denies all liability by reason of the fact that the window was dislodged by the force of the explosion in the plating plant the circumstances of the event will first be scheduled.

The plating company's process required the presence of certain chemicals which, unless properly refrigerated, were, in combination, likely to produce a high velocity explosion. The use of such chemicals was prohibited in the zone (light industrial) of the plating works. It was not an exclusively industrial area; it contained some residences and light manufacturing plants.

The zoning laws of the city as well as the statutes prohibited the manufacture, storage or use of such explosive acids as those kept by the plating company. Ordinance 90500, Los Angeles Municipal Code, sec. 54.75; Health and Safety Code of Calif., sec. 12000. It was established by satisfactory proof that the substances used by the plating plant were explosives as contemplated by the laws cited. Also, a statute prohibited the possession, use and storage of explosives except only when completely enclosed in a tight container at an explosive manufacturing plant. Health and Safety Code, sec. 12150. The danger of the explosion was not anticipated, foreseen or suspected by the employer.

[1,2] Petitioner as insurance carrier of the employer demands that the award made to the applicant be annulled on the ground that the latter's injury did not arise out of her employment but was the result of an unforeseen, fortuitous circumstance.

Concededly an employee's injury to be compensable by the employer must arise out of, and occur in the course of the employment and must result proximately therefrom; and at the time of its occurrence the employee must be performing "service growing out of and incidental to his employment." Labor Code, sec. 3600. It is the rule that so long as there is causal connection between the employment and the injury the workman should be awarded compensation for his injury, and that each case must be decided upon its own facts. See *Pacific Employers Ins. Company v. Industrial Accident Commission*, 19 Cal.2d 622, 628, 122 P.2d 570, 141 A.L.R. 798.

[3-6] The term "employment" as used in the statute does not contemplate the bare fact of the workman's presence and the performance of his labors at the time of the injury. To justify an award it is not necessary that the proof show that the immediate cause of his injury was a part of any work done for his employer. The theory upon which the workmens' compensation laws were enacted was that evidence should not be required to establish all the factors of the workman's environment, but that in order to receive an award

he needs show merely that his work brought him within the range of danger by requiring his presence in the precincts of his employer's premises at the time the peril struck. *Hartford Accident & Indemnity Company v. Cardillo*, 72 App.D.C. 52, 112 F.2d 11, 15. That the employer was utterly without fault is not a material consideration for the reason that his liability "is not founded on any want of care on the part of the employer." *Kimbol v. Industrial Accident Commission*, 173 Cal. 351, 355, 160 P. 150, 152, L.R.A.1917B, 595, Ann.Cas.1917E, 312. Compensable injuries need not be of the kind anticipated by the employer or peculiar to the employment. *Pacific Employers Insurance Company v. Industrial Accident Commission*, 19 Cal.2d 622, 628, 122 P.2d 570, 141 A.L.R. 798. It is sufficient that the injury results from a danger to which he was exposed as an employee. *California Casualty Indemnity Exchange v. Industrial Accident Commission*, 21 Cal.2d 461, 465, 132 P.2d 815.

[7-9] By the acts of 1911, 1913, and 1917 (Stats. 1917, ch. 586, p. 831), and by all subsequent statutes and constitutional amendments providing for employers' liability for injuries to their workmen, the social public policy has become fixed as to its remedial and humanitarian purposes. *Bartlett Hayward Company v. Industrial Accident Commission*, 203 Cal. 522, 529, 265 P. 195. At the same time the judicial policy of liberally interpreting such public acts has effected such a complete system of workmens' compensation that any reasonable doubt as to whether an incident of an applicant's employment is contemplated as one entitling him to compensation must be resolved in favor of the employee. *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 26 Cal.2d 286, 289, 158 P.2d 9, 159 A.L.R. 313; *Tingey v. Industrial Accident Commission*, 22 Cal.2d 636, 641, 140 P.2d 410. By the constitutional amendment of 1918 (Art. XX, sec. 21) the legislature was, in effect, required to create a statute to provide a system of workmen's compensation whereby to create and enforce a liability to compensate for injuries "sustained by the said workmen in the course of their employ-

ment, irrespective of the fault of any party."

[10] The "fortuitous and unforeseen circumstance" projected by petitioner herein as the sole cause of applicant's injuries was the explosion in the neighborhood of the employer's plant. The arguments are: (1) That if an employee while in the pathway of a dangerous instrumentality is injured the resulting injury does not arise out of his employment even though he was acting in the course of his employment; (2) the fact that a risk is common to the neighborhood of the employer's plant does not make the injury received thereby one arising out of the employment; (3) that his permitting his employees to work where they are more exposed to a particular risk of that neighborhood than are persons in another location does not constitute a compensable injury if the risk is unforeseen and not contemplated by the employer. Following each of such propositions petitioner presents a formidable list of authorities, some of which tend to support the argument. Each of them is distinguishable on its facts, or in some the authors of the opinion had not appropriated the social philosophy which supports the workmen's compensation statutes but were still fettered by the common law rules as to "proximate cause" involving personal injuries. See *Truck Insurance Exchange v. Industrial Accident Commission*, 27 Cal.2d 813, 816, 167 P.2d 705.

Not discounting the effectiveness of the explosion in setting in motion the forces that caused applicant's injuries it is to be remembered that she was in the building occupied by the industrial plant of her employer; that it contained windows and window frames that were circumstances or instrumentalities of the employment; that by virtue of the falling of one of the frames with its window upon applicant it thereby became a proximate, if not the proximate, cause of the injury. If it was the proximate cause the explosion was the remote cause. If the explosion was merely a proximate cause then it deserves no higher rank in the scale of causes than the steel window frame. The explosion itself did not affect applicant except by

first removing the employer's window frame which crushed her body. The frame was one of the conditions or incidents of the employment, directly connected with it and out of which alone the injury resulted.

These views have had wide recognition for more than three decades and are the established law in many jurisdictions. In 1927 this court decided that the truck driver of a dairy who was injured while loading his truck in his employer's garage with milk from his employer's refrigerator was injured as the result of the falling of a brick wall of an adjoining two-story building through the roof of the garage. The fact that the wall's falling was caused by an earthquake did not effect an annulment of the award. *Enterprise Dairy Company v. Industrial Accident Commission*, 202 Cal. 247, 259 P. 1099, citing *Central Illinois Public Service Co., v. Industrial Commission*, 291 Ill. 256, 126 N.E. 144, 3 A.L.R. 967. One of the early authorities to clarify the principle which controls in such a situation as that presented by the instant cause was decided by the British House of Lords. *Simpson v. Sinclair* arose in Scotland. Mrs. Simpson was the employee and was assigned to pack kippered herring in respondent's shed, made of corrugated iron. While she was so engaged a brick wall, 20 feet high, was being erected near the Sinclair premises. By reason of its own instability the wall fell upon the shed, burying the woman beneath the wreckage. The award by the Sheriff-Substitute was reversed by the Court Session in Scotland, but the House of Lords (1917) swept aside the contention that the woman's injuries were caused by the falling wall and that they did not arise out of her employment. The decision of the Lords was in substance as follows: The falling of the employer's roof could only happen in one place, and the presence of the applicant there was due to her employment which was the distinctive cause of her injury rather than the falling of the wall. Only her employment gave rise to the circumstance of the accident. If, therefore, the statute, liberally construed, excludes the necessity of looking for remoter causes, and treats the employer

rather as a mere insurer, the question is simplified. If the accident arose because the claimant was assigned to work in the particular spot where the roof fell then it arose out of the employment and there is no necessity to go back in the search for causes to anything more remote than the immediate event, to wit, the fall of the roof. There need be no other connection between the accident and the nature of the work in which the applicant was engaged. Behind the fact that the roof fell the courts cannot go. The limiting words in the act do not refer to any negligence of the employer that must be considered but they merely restrict the class of accidents against which he is to provide insurance. Applicant was injured because she was working in the shed in which she was employed to work. Whether the remoter cause of the roof's falling was the collapse of the neighboring wall or a stroke of lightening is immaterial. That she was required to work in the shed and was in consequence injured by an accident to its roof suffices to establish that her injury arose out of her employment just the same as if the fall of the roof had been occasioned by its inherent weakness. If by reason of the nature, conditions or obligations of the employment the workman is brought within the zone of special danger and so injured or killed the words "arising out of the employment" apply. *Simpson v. Sinclair*, 1917, 10 B.W.C.C., 220, 226, 232.

Paraphrasing the language of the Lords (p. 235) it may be said that Mrs. Raymond's service to her employer in its plant and not anywhere else brought her to the position of danger. She suffered a peril attached to the particular location in which her duty to her employer placed her.

In affirming an award to an employee injured when a roof, torn from the building in which he worked, fell upon him, the Supreme Judicial Court of Massachusetts, after observing that an injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment, held that an employee who in the course of his employment is *hurt by contact with something directly connected with his employment* receives a

personal injury arising out of his employment; also, if he is injured by physical contact with some part of the building he works in, nothing further need be considered. If the wall falls upon him or if he slips upon the floor, there is no necessity for further inquiry as to why the accident happened. *Caswell's Case*, 1940, 305 Mass. 500, 26 N.E.2d 328.

In a Louisiana case an award was made to the dependent sister of one Crawford, after the latter had been killed while at work in the hull house of defendant when it was struck and demolished by a cyclone. The matter was transferred to the Supreme Court of Louisiana. Contrary to the employer's contention that the accident did not arise out of the employment that court held that the phrase "arise out of" means that the "accident must be the result of some risk to which the employee is subjected * * * and to which he would not have been subjected had he not been so employed." By reason of his employment deceased was required to be in the house that fell upon him. His death was due to the fact that his work necessitated his presence there. Therefore, under a liberal interpretation of the compensation act, the accident arose out of and was incidental to the employee's duties. The court there declared that the test, in cases where the accident originates from a force disconnected with the employment, is whether the employee is exposed to greater danger by reason of his assignments than that to which the public is subjected, whether the cause is an act of God or of a mundane inhabitant.

The same court's illustration in a former decision (*Kern v. Southport Mill*, 174 La. 432, 141 So. 19) by the story of the ill-fated Titanic demonstrates the principle with a symbolism that cannot escape the comprehension of mediocrity. All on board were situated alike as to *time and place*, but not as to *circumstance*. Those who traveled for pleasure were present by choice; those who were aboard for business were there of necessity, and if any of the latter were injured, their injuries arose out of the necessity of their traveling on the Titanic. From the illustration it is clear that if one of the passengers had

been required by his employer to be aboard the vessel the necessity of his presence would have entitled him to an award. From the analogy and the doctrine underlying the act the court concluded that if the employee was in pursuit of his employer's interests and not his own, and if his employer's business reasonably required him to be aboard the liner, his death arose out of his employment.

The conclusion derived in the *Kern* case was confirmed by the *Harvey* decision in which the court based its conclusions upon the fact that "the deceased by reason of his employment was required to be in a building which fell upon him; that his death was due to the fact that his employment necessitated that he be at the place where the accident occurred and that, therefore * * * the accident arose out of, and was incident to the employment." *Harvey v. Caddo De Soto Cotton Oil Co.*, 199 La. 720, 6 So.2d 747, 751.

The Supreme court of Ohio held that because the decedent was killed in a large house in which he found asylum from a storm his dependents were entitled to compensation. *Industrial Commission of Ohio v. Hampton*, 123 Ohio St. 500; 176 N.E. 74, 76.

In an appeal from an award to an industrial claimant whose injuries were due to her fall resulting from a cardiac condition, the New York Court of Appeals observed that accidental industrial injuries do "not always" arise from risks related to the employment. "When a clerk sustains injuries from a fall, through mischance, while working in a countinghouse, the employment is one of the factors which produces the fortuitous combination of circumstances which resulted in the accidental injury. * * * The Workmen's Compensation Law * * * provides compensation for accidental injuries from any risk incident to the employment, whether that risk be great or small, usual or extraordinary, and every risk is incident to the employment where the employment is a factor in the combination of circumstances out of which the accidental injury arose. The distinction is between the fortuitous exposure of a workman in the course of his employment to a general risk

not related to the employment, and the exposure of the employee to a risk that, because of the employment, the combination of circumstances which resulted in the accidental injury might arise." *Connolly v. Samaritan Hospital*, 259 N.Y. 137, 181 N.E. 76, 77.

Where a person had sustained injuries through a fall on a public street on which his employment had placed him his injuries were held compensable. In the *Matter of Andrews v. L. & S. Amusement Corporation*, 253 N.Y. 97, 170 N.E. 506. In an action where the employee met death through the accidental burning of the building in which he was employed and the cause of the fire was not disclosed, the same court held that the hazard of "the burning of a particular place of work is a special danger incident to employment in that place and therefore * * * the injury arose out of the employment." His employment stationed him in a place of potential danger from that source. *Giliotti v. Hoffman Catering Co.*, 246 N.Y. 279, 283, 158 N.E. 621, 622, 56 A.L.R. 500. Kindred sentiments were pronounced by the same court in a case where the claimant was injured while digging a hole in which to insert an iron beam. While bending over he was struck by a piece of cornice which fell from an adjoining building. The danger of its falling attached to the spot where the claimant was at work; it was peculiar to the situation, and a risk which arose from working alongside the building. Therefore the claimant was at work "within the zone of special danger" * * * and was, therefore, injured through an accident arising out of his employment." *Filitti v. Lerode Homes Corporation*, 244 N.Y. 291, 155 N.E. 579.

Petitioner's misconception of its rights in the instant proceeding is well illustrated by the arguments of counsel in the *Filitti* case whereby they attempted to analogize the position of *Filitti* to that of *McCarter* in *McCarter v. La Rock*, 240 N.Y. 282, 148 N.E. 523. The latter while at work on a building was hit by a fragment of a souvenir bomb which exploded on the adjoining premises with deadly effect to five

others beside claimant. His award was annulled by the Court of Appeals because the statute requires "that the injuries must arise out of the employment * * * the employment in a reasonable sense must lead to the injuries and requires that there shall be some perceptible, causal connection between the employment and the accident causing the injuries. There was not * * * any such connection." In the instant cause there was such connection, to wit, the steel window frame in the very building in which applicant was at work. It was "incidental to the employment," a part of the employee's environment as she worked. In those cases in which the employee was denied an award because he was injured by a force which traveled through space to reach the body of the employee the annulment of the award resulted from the fact that neither the building in which he was at work nor any other incident of his employment joined with the traveling force to effect the injury. See *Kowalek v. New York Consol. R. Co.*, 229 N.Y. 489, 128 N.E. 888; *DeSalvo v. Jenkins*, 239 N.Y. 531, 147 N.E. 182; *Auman v. Breckenridge Tel. Co.*, 188 Minn. 256, 246 N.W. 889; *Whitley v. North Carolina State Highway Commission*, 201 N.C. 539, 160 S.E. 827; *Bain v. Travora Mfg. Co.*, 203 N.C. 466, 166 S.E. 301; *Conaway v. Marine Oil Co.*, 162 La. 147, 110 So. 181; *In re Habroe*, 223 Mass. 139, 111 N.E. 709, L.R.A.1916D, 933; *Knyvett v. Wilkinson Bros. Ltd.*, 87 L.J. K.B. 722; *Allcock v. Rogers*, 87 L.J.K.B. 639; *Ward v. Industrial Accident Commission*, 175 Cal. 42, 164 P. 1123, L.R.A. 1918A, 233. It is not so here, where the window frame near the applicant crushed her.

[11] Petitioner contends that respondent commission exceeded its authority in finding that applicant sustained injury arising out of her employment in view of the stipulation that the injuries were caused by the concussion which was caused by the explosion. The law is that following a stipulation as to the facts the commission may either base its findings upon such stipulation or "take further testimony or make the further investigation necessary

to enable it to determine the matter in controversy." Labor Code, secs. 5702, 5307(a); Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 58, 159 P. 150; Calif. Admin. Code, sec. 10744.

The writ is discharged; the award is affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



86 Cal.App.2d 923

PACIFIC INDEMNITY COMPANY, a Corporation, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION of State of California and Dolores Acedo, Respondents.

Civ. 16397.

District Court of Appeal, Second District,
Division 2, California.

July 13, 1948.

Rehearing Denied July 30, 1948.

Hearing Denied Sept. 8, 1948.

Proceeding to review an order of the Industrial Accident Commission awarding compensation for disability. Award affirmed.

Herlihy & Herlihy, of Los Angeles, for petitioner.

T. Groezinger, of San Francisco, for respondents.

MOORE, Presiding Justice.

The facts in this case are identical with those in Pacific Indemnity Company v. Industrial Accident Commission, et al., Cal. App., 195 P.2d 919, with the exception that "pieces of windows of the employer's premises" were the instrumentality that directly caused the employee's injuries. Basing the

decision herein upon the conclusion derived from the review of 195 P.2d 919 the writ is discharged and the award is affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



86 Cal.App.2d 924

PACIFIC INDEMNITY COMPANY, a Corporation, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION of State of California and Celia Angulo, Respondents.

Civ. 16398.

District Court of Appeal, Second District,
Division 2, California.

July 13, 1948.

Rehearing Denied July 30, 1948.

Hearing Denied Sept. 8, 1948.

Proceeding to review an order of the Industrial Accident Commission awarding compensation for disability. Award affirmed.

Herlihy & Herlihy, of Los Angeles, for petitioner.

T. Groezinger, of San Francisco, for respondents.

MOORE, Presiding Justice.

Celia Angulo was an employee of Rothschild-Kaufman Company on February 20, 1947, and was injured in the course of her employment. The facts are identical with those set forth in Pacific Indemnity v. Industrial Accident Commission et al., Cal.App., 195 P.2d 919 this day filed. The same authorities apply and the same conclusion has been reached. Basing the decision upon the opinion filed in that action the award is affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

36 Cal.App.2d 925

PACIFIC INDEMNITY COMPANY, a Corporation, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION of State of California and Arthur J. Rothschild, Respondents.

Civ. 16414.

District Court of Appeal, Second District,
Division 2, California.

July 13, 1948.

Rehearing Denied July 30, 1948.

Hearing Denied Sept. 8, 1948.

Proceeding to review an order of the Industrial Accident Commission awarding compensation for disability. Award affirmed.

Herlihy & Herlihy, of Los Angeles, for petitioner.

T. Groezinger, of San Francisco, for respondents.

MOORE, Presiding Justice.

The facts in this case are identical with those in *Pacific Indemnity Company v. Industrial Accident Commission*, Cal.App., 195 P.2d 919 with the exception that a wall partition fell upon the applicant Rothschild at the time of the explosion causing his injuries. Basing the decision herein upon the opinion derived in that case the award is affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



86 Cal.App.2d 885

PEOPLE v. OLIVER et al.

Civ. 13753.

District Court of Appeal, First District,
Division 1, California.

July 26, 1948.

Hearing Denied Sept. 23, 1948.

1. Trial ⚔375

In action to abate certain structures and materials as a public nuisance, what trial judge, who was the trier of the facts,

saw on his visit to premises with the consent of counsel and in their presence, was "evidence."

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

2. Nuisance ⚔84

In action to abate as a public nuisance certain structures and materials, evidence sustained finding that defendants' realty was surrounded in the immediate proximity by numerous attractive single family residence dwellings and that surrounding territory was closely populated by several hundred people.

3. Nuisance ⚔59

The unsightly condition of premises will not alone make a condition a "public nuisance." Civ. Code, §§ 3479, 3480.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Nuisance".

4. Nuisance ⚔84

In action to abate as a public nuisance certain structures and materials located on certain realty, evidence sustained finding that building as constructed and presence of waste materials constituted a definite fire hazard endangering surrounding neighborhood and several hundred inhabitants and interfered with the comfortable enjoyment of life and property in the neighborhood.

5. Nuisance ⚔79

A fire hazard, at least when coupled with other conditions, can be found to be a "public nuisance" and be abated. Civ. Code, §§ 3479, 3480.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Nuisance".

6. Nuisance ⚔79

Where owners of realty in a somewhat congested area moved a skeleton of a building onto their premises and refused to complete the building or to protect it, and building was a dangerous fire hazard, and use of the property was seriously aggravated by piling and storing of highly inflammable materials all about, under and in the building, an abatable "public nuisance" was properly held to exist. Civ. Code §§ 3479, 3480.

7. Nuisance — 59

Though owners of realty have the right to use their realty, within certain limits, as they see fit, even if it annoys the neighbors or depreciates the value of adjoining property, they have no legal right to put their land to an unnatural use and to create thereon an unnecessary hazard to other properties.

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by the People of the State of California through the District Attorney of Contra Costa County against Xoral Oliver and Carol Oliver [Borges] to abate as a public nuisance certain structures and materials located on premises owned by defendants. From a judgment adjudging that certain structures and materials on defendants' realty constituted a public nuisance and directing defendants to remove them within 90 days, defendants appeal.

Judgment affirmed.

Edward E. Craig, of Berkeley, for appellants.

Francis W. Collins, Dist. Atty., Contra Costa County, and Wakefield Taylor, Deputy Atty., Contra Costa County, both of Martinez, for respondents.

PETERS, Presiding Justice.

The District Attorney of Contra Costa County brought this action to abate as a public nuisance certain structures and materials located on premises owned by Xoral Oliver and her daughter, Carol Borges. The court adjudged that a certain elevated structure and certain piles of lumber and waste materials on the property constituted a public nuisance, and defendants were directed to remove the same within 90 days. From this judgment defendants appeal, contending that the findings are not supported, and that, as a matter of law, the conditions shown to exist do not constitute a public nuisance.

The defendants, for the past seven years, have been the owners of three contiguous lots in Richmond Annex, an unincorporated area adjoining the city of Richmond. They have partially constructed various struc-

tures on the property, and have piled all over the area lumber, waste material and rubbish. The two defendants, with the help of one hired man, are doing their own intermittent building. Various pictures of the premises were introduced into evidence, and the trial judge, with counsel, visited the area. It appears that defendants have started the building of two residential structures, designated as structures numbered 1 and 2. Structure number 1 is at least inclosed, but unfinished inside. The defendants live in that structure and it is not involved in this proceeding. Structure number 2 was started in 1944, and is far from complete. No one lives in this building. It has been elevated on stilts and no work has been done on it for some time. This structure was abated.

The following finding is attacked as being unsupported by the evidence " * * * said property is surrounded in the immediate proximity by numerous attractive single family residential dwelling[s] and said surrounding territory is closely populated by several hundred people."

Also attacked as being unsupported by the evidence is the following finding, and, in addition, appellants contend that it does not support, as a matter of law, the conclusion that the conditions shown to exist constituted a public nuisance: " * * * for several years last past said defendants have and do not maintain upon Lots seven (7) and eight (8), in Block 96, Richmond Annex, Contra Costa County, California, an unsightly and inflammable elevated residential structure. That defendants have surrounded said structure with stacks of wooden and paper boxes and piles of lumber and other waste materials, which are located on Lots seven (7), eight (8) and nine (9) of said block. That said building as constructed and the presence of said waste materials constitute a definite fire hazard, endangering the surrounding neighborhood and several hundred people, are offensive to the sense of sight, and interfere with the comfortable enjoyment of life and property in said neighborhood."

Both of these basic findings are supported. The fire chief of the city of Richmond testified that during the two years prior to trial he had inspected the premises on num-

erous occasions; that his last inspection was the day before trial; that "there is no question but what it is definitely a very serious fire hazard"; that building number 2, here involved, is "built without regard to building codes, safety or—and safety in general"; that in his opinion the structure and piles of material constitute a fire menace to the entire neighborhood, which he described as being thickly populated; that he had not gone on the property to inspect it, but had done so from the adjoining properties and from the street; that he carefully inspected the premises from all four sides; that in structure number 2 "the manner of construction, the supports, the framework is very flimsy. * * * it has up-rights carrying through from the first floor up of 2 x 4's with a span between the 2 x 4's for roof joists of 2 x 4's, of perhaps 10 feet. Through the center of one part of the building, it has a span of I would say 18 or 20 feet with one, I believe a 2 x 10, about 18 or 20 feet long with no supports in between. It is built with no fire stops of any kind, and the building has been continually built onto * * *

[1,2] There was a great deal of other evidence on the fire hazard issue, as well as on the issue as to whether the premises were unsightly and whether they constituted a health menace to the community. Most of this testimony was from neighbors. There was substantial evidence to the effect that defendants' premises were in an area that is almost completely built up, mainly with single family residences. Some of the pictures introduced into evidence show some of the adjoining houses. Moreover, with consent of counsel, and in their presence, the trial judge visited the premises. What he saw on that visit is, of course, evidence. The first challenged finding is amply supported by the evidence.

[3] The evidence as to the unsightly condition of the premises may be disregarded on this appeal. It seems to be settled that that factor alone will not make the condition a public nuisance. *Dean v. Powell Undertaking Co.*, 55 Cal.App. 545, 203 P. 1015; see cases collected 39 Am.Jur. p. 310, § 29. Plaintiff makes no contention to the contrary, and in fact seems to concede

that an unsightly condition, alone, will not make the property a public nuisance.

The health hazard evidence must also be disregarded. There was ample evidence that would have supported a finding, had such a finding been made, that the property was maintained in such a condition that it became a breeding place for rats and that such rats invaded the adjoining properties. But the trial court did not find in accord with that testimony, in this connection apparently believing a city sanitary inspector who was called as a witness for plaintiff and who, while admitting the property was a "potential" health hazard, also testified that he could find no evidence that rats were present.

[4] So far the sufficiency of the evidence is concerned, the only question presented is whether the finding that the premises as maintained constitute a fire hazard is supported. As already pointed out, the fire chief so testified and gave his reasons for his belief. The other evidence on this issue was to the effect that all over the property were piles of lumber, bales of newspapers, piles of cardboard cartons, old mattresses, rag scraps, broken furniture, debris, and rubbish of all kinds and nature, and that much of this was piled under, around and in structure number 2. Testimony was offered that defendants did a considerable amount of burning on the property. Various neighbors testified to the physical conditions, and, without objection, gave it as their opinion that the storing of all of this highly inflammable material and rubbish made the premises a very definite fire hazard to the entire area. One witness, whose property adjoined that of defendants, testified that she and her husband could not go on vacations together because both felt that some one should be at home to protect their property against the danger of a fire spreading from defendants' premises. Another witness, an operator of a nearby auto court, testified that he had purchased a lot between the auto court and defendants' premises to protect his property from defendants'. Other testimony was introduced on the issue, but the above sufficiently indicates the general nature of that testimony. Moreover, as already pointed

cut, the trial judge visited the premises with counsel, and what he saw on that visit, is evidence. There can be no reasonable doubt that the finding describing this condition and finding "That said building as constructed and the presence of said waste materials constitute a definite fire hazard, endangering the surrounding neighborhood and several hundred people, * * * and interfere with the comfortable enjoyment of life and property in said neighborhood" is amply supported. The only real question in the case is not whether the findings are supported, but whether such findings support the conclusion that such conditions constitute a public nuisance.

[5] A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated. *People v. Foerst*, 10 Cal.App.2d 274, 51 P.2d 455; *People v. United Capital Corporation*, 26 Cal.App.2d 297, 79 P.2d 186. A nuisance is defined in § 3479 of the Civil Code as "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property * * *." Section 3480 of the Civil Code provides that "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

[6,7] Defendants contend that, as a matter of law, the maintenance of a wooden building, even of a dilapidated wooden building, and even though it increases the fire hazard to, and insurance rates on, and depreciates the value of, adjoining property, does not constitute a private or public nuisance. See cases collected 46 Cor.Jur. p. 699, § 147; see, also, *Liebman v. Richmond*, 103 Cal.App. 354, 284 P. 731; *McCloskey v. Kreling*, 76 Cal. 511, 18 P. 433; *Siskiyou Lumber etc. Co. v. Rostel*, 121 Cal. 511, 53 P. 1118; *Biber v. O'Brien*, 138 Cal.App. 353, 32 P.2d 425. There can be no doubt that defendants had the right to construct

a wooden building on the premises, and that neither the public nor the neighbors had a legal right to complain that such a building was located on the property. But the present case goes far beyond that picture. Here, a skeleton of a building has been moved onto the premises. Defendants have refused to complete the building, or to protect it. As it exists, that building is a dangerous fire hazard. This use of the property has been seriously aggravated by the piling and storing of highly inflammable materials all about, under and in the building. This was done in an area almost completely built up. Under such circumstances, the trial judge was justified in finding, as a fact, that a public nuisance existed. While there seems to be no California case directly in point holding that a condition such as is here shown to exist constitutes a nuisance (and we have found none on either side of this issue), on principle, the solution of the problem does not appear difficult. When people live in urban and congested areas they acquire certain rights against, and they assume certain responsibilities towards, their neighbors. While they have the right to use their property, within certain limits, as they see fit, even if it annoys the neighbors or depreciates the value of adjoining property, they have no legal right to put their land to an unnatural use and to create thereon an unnecessary hazard to other properties. In a very real sense there must be a balancing of conveniences and of rights. Where the danger to an entire neighborhood is demonstrated, as it was in this case, and where the condition created is unnecessary and can be remedied, prudence, common sense, fair play and justice require that the danger to the entire neighborhood be eliminated. In such a situation the condition may be found to be a nuisance and abated.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

86 Cal.App.2d 766

FOSHEE et al. v. WOLTERS et al.**CLOES et al. v. FOSHEE.****WOLTERS et al. v. RUDY et al.**

Civ. 3686.

District Court of Appeal, Fourth District,
California.

July 14, 1948.

1. Evidence ⇨5(2)

It is 'common knowledge that automobiles have an overhang extending beyond the wheels.

2. Evidence ⇨8

It is common knowledge that in a violent collision a car may be driven some distance in the opposite direction from which the impact comes.

3. Appeal and error ⇨994(3), 1012(1)

The trier of fact is the sole judge of the weight of the evidence and the credibility of the witness.

4. Evidence ⇨588

A trial judge sitting without a jury may accept as true any part of the competent evidence before him and may reject any part of it as either untrue or given in honest mistake.

5. Automobiles ⇨244(1)

Evidence in automobile collision case consisting of testimony of highway officers describing oil and water on pavement, also scratches on it, and tire marks leading to wheels of both cars supported inference of trial judge that point of impact was marked by circle of oil and water and warranted judgment based on conclusions drawn therefrom.

6. Appeal and error ⇨1004(1)

It is only when the amount of damages awarded are so disproportionate to the injuries received as to suggest passion, prejudice or corruption on the part of the trier of fact that an appellate court may control the amount of damages awarded.

7. Damages ⇨130(1)

\$6,002.81 divided into \$5,000 general damages, \$900 for loss of earnings, which item was supported by evidence and on

\$102.81 for medicine and hospital bills for injuries consisting of fracture of humerus, dislocation of shoulder and severe lacerations and bruises was not excessive.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Separate actions consolidated for trial by Kenneth Foshee and another against Wesley Wolters and another and by William G. Cloes and another against John K. Foshee and by Wesley J. Wolters and another against Jack Rudy, doing business under the fictitious name of California and Arizona Produce Company, and another arising out of damages as a result of an automobile collision. Judgment for defendants in the first case and for plaintiffs in the last two cases and plaintiffs in the first case and defendants in the last two cases appeal.

Affirmed.

Horton & Knox and Smith & Dickenson, all of El Centro, for appellant John Kenneth Foshee.

Clarence Harden and Monroe & McInnis, all of San Diego, for respondents.

MARKS, Justice.

The three cases involved in this appeal were consolidated for trial and appeal, and grew out of an automobile collision which happened at about 6 o'clock p. m. on May 17, 1946, on U. S. Highway No. 80 about six miles east of Holtville in Imperial County.

Judgment went against plaintiffs and appellants, Kenneth and Virginia Foshee. Plaintiffs and respondents William G. Cloes and Arthur F. Wollgast were given judgment against John Kenneth Foshee; William G. Cloes in the sum of \$6,002.81, and Arthur F. Wollgast in the sum of \$2,007.21. The plaintiffs and respondents Wesley J. Wolters and Iona S. Wolters were given judgment against Jack Rudy and John Kenneth Foshee in the sum of \$17,196.31. The actions against California & Arizona Produce Company, a corporation, and all defendants sued under fictitious names, other than Jack Rudy, were dismissed. Kenneth Foshee, John K. Fo-

shee, and John Kenneth Foshee are names used by the same person.

An appeal was taken by plaintiffs and appellants and by all defendants and appellants, but only one brief has been filed and is on behalf of John Kenneth Foshee. The other appellants have made no appearance either by brief or oral argument. For brevity, except when otherwise necessary, we will hereafter refer to John Kenneth Foshee as the defendant, to the respondents as the plaintiffs, and to U. S. Highway Number 80 as the highway.

At the place of the accident the highway runs in a general easterly and westerly direction and is straight with an unobstructed view for about a mile. It is a concrete roadway about twenty feet wide with a white line in its center. On the southerly side is a four foot oiled shoulder, a five foot gravel shoulder and a borrow pit about five feet deep. On the northerly side is a three foot oiled shoulder, a four foot graveled shoulder and a like borrow pit. The plaintiffs and two other persons who were riding in the car, all of whom testified at the trial, were traveling easterly on the highway in a Buick sedan owned and operated by Wesley Wolters. Defendant was driving his Plymouth sedan westerly at the same time.

The testimony of the occupants of the Wolters car may be very generally summarized as follows: That Wolters was driving his car easterly on his right hand half of the pavement at a speed of not more than 45 miles per hour; that when defendant's car was around two or three hundred feet from them it swerved onto the southerly half of the pavement; that as the two cars approached each other, and to avoid a head-on collision, Wolters swerved his car northerly to his left so that part of it, at least the left wheels, were northerly of the center line; that at the same time defendant swerved his car northerly to his right and into the Wolters car causing both vehicles to skid to the southerly side of the highway. The principal damage was on the right sides of the two cars.

The story of the defendant was in sharp conflict with the foregoing. He main-

tained that at all times his car was on its right hand half of the road; that at the time of the collision its right wheels were off the pavement and into the weeds on the northerly side; that Wolters drove onto the northerly half of the highway in front of him; that the impact occurred near the northerly edge of the pavement and on Foshee's half of the highway.

Two members of the California Highway Patrol reached the scene shortly after the accident. They found a large spot of oil and water about two feet southerly from the northerly edge of the pavement and glass scattered over that part of the cement. Both cars were on the southerly part of the highway with the Wolters car thirty-six feet southeast of the spot and the Foshee car 39 feet southwest of it. 62 feet separated the cars after they came to rest. Tire marks led from the oil and water spot to the wheels of the two cars.

All of the complaints alleged negligence in general terms and the trial judge found in general terms that Foshee was negligent; that his negligence was the proximate cause of the injuries to plaintiffs; that plaintiffs were not contributorily negligent.

Defendant's chief ground for a reversal of the judgment is based on an oral summary of the evidence by the trial judge at the close of the trial, and his opinion on how the accident happened, as disclosed in this summary. Defendant argues that the trial judge refused to accept either the Wolters or the Foshee version of how the accident happened but reached into thin air and concocted a version of his own which is not only unsupported by, but is contrary to all of the evidence in the case. From this he argues that the opinion shows the erroneous process of reasoning used by the trial judge in reaching his conclusions, which, being unsupported by any evidence, furnished sufficient grounds for a reversal of the judgment, citing, *Union Sugar Co. v. Hollister Estate Co.*, 3 Cal. 2d 740, 47 P.2d 273, and *Noble v. Kartz & Sons Feed Co.*, 72 Cal.App.2d 153, 164 P. 2d 257.

This argument lacks convincing force when considered in the light of all the ev-

idence in the case both oral and documentary and the summary as given by the judge.

It is clear that the trial judge accepted as true the evidence offered by plaintiffs to the effect that the Wolters car was proceeding easterly on its own proper side of the highway when the Foshee car swerved from its proper position onto the southerly half of the roadway and that the two automobiles were thus approaching each other on this southerly half which was ten feet in width. He also accepted as true, evidence that both cars were turned northerly and that the impact occurred where the oil and water spot appeared on the pavement which he described as within about one foot from the northerly edge of the concrete.

[1,2] It thus appears that the chief difference between the evidence of plaintiffs and the summary of the trial judge was as to the exact point of the impact. The witnesses for plaintiffs, or some of them, admitted that the left wheels of their car might have been as much as two feet northerly from the center line, while the judge placed the point of impact at the oil and water circle, the northerly side of which he said was about one foot south of the northerly edge of the cement. Witnesses described the circle as about four feet in diameter. Thus, if we assume that the estimates of plaintiffs were exact and that the left wheels were exactly two feet north of the center line, which would be a violent assumption under the circumstances, there would remain only three feet of pavement between those wheels and the southerly edge of the circle assuming again that the other estimates were exactly correct. It is common knowledge that automobiles have an overhang extending beyond the wheels. It is also common knowledge that in a violent collision a car may be driven some distance in the opposite direction from which the impact comes. Therefore the inference may be drawn from the evidence in this case that there is little important difference in the plaintiffs' evidence as to the point of impact and the summary of the trial judge on the same question.

[3,4] That the trier of fact is the sole judge of the weight of the evidence and the credibility of the witnesses is too well established to need citation of authority. The trial judge sitting without a jury may accept as true any part of the competent evidence before him and may reject any part of it as either untrue or given in honest mistake. The variance here is too unimportant to justify a reversal of the judgment.

[5] The trial judge in his summary concluded that the circle of oil and water marked the point of impact. The argument of defendant to the effect that this conclusion is without evidentiary support is not borne out by the record. The officers described the oil and water on the pavement, also scratches in it, and tire marks leading to the wheels of both cars. This evidence amply supports the inference of the trial judge that the point of impact was marked by the circle.

A motion for new trial was made and denied. A similar question was before us in *Sassano v. Roullard*, 27 Cal.App.2d 372, 81 P.2d 213, 215, and was disposed of as follows:

"It is argued that it must be concluded from the foregoing statement that the verdict was inadequate and that it was the result of a compromise within the rule announced in the case of *Bencich v. Market St. Ry. Co.*, 20 Cal.App.2d 518, 67 P.2d 398. Of course, the trial judge's statement supports both of those arguments.

"The question for us to decide here is not what were the views of the trial judge immediately after the verdict was announced, but what they were when he ruled on the motion for new trial after the lapse of time had given him occasion for mature reflection and study on the question. If he entertained those views when he ruled on the motion he should have promptly granted a new trial. Otherwise he would have been derelict in his duty. We must presume that in ruling on the motion for new trial the trial judge faithfully performed his duty. *Olinger v. Pacific Greyhound Lines*, 7 Cal.App.2d 484, 46 P.2d 774. In other words, we must conclude that after mature reflection the judicial

mind had been changed and that the views expressed when the verdict was received were no longer the views of the judge. We make these observations with the rule in mind that the oral or written opinion of a trial judge stating his reasons why he did or did not take a certain action are not controlling on appeal." See, also, *Jones v. Tierney-Sinclair*, 71 Cal.App.2d 366, 162 P.2d 669.

The conclusion follows that the argument to the effect that the trial judge's process of reasoning by which the judgment was arrived at was unsupported by the evidence and was contrary to the evidence is without merit.

The only other question argued by defendant is that the award of \$6,002.81 damages to William G. Cloes is excessive. This award is divided into \$5,000 general damages, \$900 for loss of earnings and \$102.81 for medicine and hospital bills. The last item is not questioned.

In his complaint Cloes alleged that his injuries consisted of a fracture of the humerus, a dislocation of the left shoulder and severe lacerations and bruises all of which caused him great pain and suffering, and that some of the injuries would be permanent.

Cloes testified to these injuries and that they caused him pain and suffering. The trial started on January 13, 1947, almost eight months after the accident. Mr. Cloes testified that the movement of his arm was then restricted in both the elbow and shoulder joints and that during cold weather he suffered pain in the shoulder.

It is argued that the award of \$5,000 general damages is excessive. It is also argued that the award of \$900 for loss of earnings is excessive. The statement that there is evidence supporting this latter award should dispose of that question.

[6,7] It is only when the amount of damages awarded are so disproportionate to the injuries received as to suggest passion, prejudice or corruption on the part of the trier of fact that an appellate court may control the amount of damages awarded. While the award to Cloes may be liberal it is not so grossly excessive as to bring the case within that rule. See, *Bond*

v. *United Railway Co.*, 159 Cal. 270, 113 P. 366, 48 L.R.A., N.S., 687, Ann.Cas.1912 C, 50; *Johnston v. Long*, 30 Cal.2d 54, 181 P.2d 645; *Sassano v. Roullard*, supra; *Ure v. Maggio Bros.*, 24 Cal.App.2d 490, 75 P.2d 534, and 32 Cal.App.2d 111, 89 P. 2d 436; *Clark v. Huddleston*, 50 Cal.App. 2d 311, 122 P.2d 952; *Prunty v. Allred*, 73 Cal.App.2d 67, 165 P.2d 935.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



86 Cal.App.2d 823

JONES v. FAT.

Civ. 7458.

District Court of Appeal, Third District,
California.

July 20, 1948.

1. Automobiles ⇨245(72)

Evidence that pedestrian was intoxicated, dressed in dark clothing, and crossing street elsewhere than at intersection when struck by automobile, with headlights normal and burning, shortly after midnight, was sufficient to take to jury question of his contributory negligence. Vehicle Code, §§ 562, 565.

2. Automobiles ⇨168(2)

Operation of automobile at speed exceeding specified limit amounts to negligence only if surrounding circumstances indicate negligence. Vehicle Code, § 513.

3. Automobiles ⇨245(6)

Whether operation of automobile at speed exceeding specified limit at time of striking pedestrian crossing street constituted negligence under circumstances was fact question for jury. Vehicle Code, § 513.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Ollie M. Jones against Frank Fat for the death of Carl Brown as the result of being struck by an automobile driven by defendant. Judgment for defendant, and plaintiff appeals.

Affirmed.

Roy Daily, of Sacramento, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondent.

PEEK, Justice.

This is an action for alleged wrongful death brought by appellant as the mother and sole surviving heir of one Carl Brown, an adult, who, while crossing East El Camino Avenue in North Sacramento shortly after midnight on the morning of May 16, 1945, was struck and killed by a car being driven by defendant Frank Fat. Defendant's answer denied negligence and alleged contributory negligence. Plaintiff has appealed from the judgment entered pursuant to the verdict of the jury in favor of the defendant and from the order denying her motion for a new trial.

Substantially all of the evidence concerning the pertinent facts of the accident was given by the defendant on his examination under section 2055 of the Code of Civil Procedure, and may be summarized as follows:

At the time of the accident he was alone and driving home from his restaurant in Sacramento. The brakes and lights on his car were in good condition although he had no recollection of when either was last inspected. The weather was good but it seemed rather dark, there being no street lights in the area where the accident occurred. Immediately before the impact he was traveling between 25 and 30 miles per hour in an easterly direction on El Camino Avenue just to the right of the center or passing line. The street was clear and he had an unobstructed view. When he was about ninety feet past Empress Street he noticed "some kind of shadow, just a black shadow", and immediately thereafter realized he had struck something. He drove on and parked his car at the next corner and came back. He was unable to state positively whether or not he applied his brakes at the time of the impact, but stated

that he "tried" to do so. He stated that he did not know whether or not he dragged the body. After finding the body of the decedent at a point which he estimated as being about sixty-six feet from the point of impact, he called two men asking them to call an ambulance.

Alonzo F. Seamans, who was called as a witness for plaintiff, testified that he was in a bar on the evening in question and shortly before it closed at 12:00 o'clock he had one beer with decedent. Thereafter the witness left with a friend, and as they crossed the street he noticed the decedent about thirty or forty feet behind them but did not see defendant's car strike him.

Chief of Police Wilson, of the North Sacramento Police Department, also called as a witness for plaintiff, testified that dirt and debris were found about ninety feet easterly from the cross-walk of Empress Street, that there were no skid marks but there were scrape marks on the street from the point of impact to where the body was found some sixty-six feet away, and three feet from the curb. He also testified the weather was clear but visibility was not good.

The remaining witnesses called by plaintiff merely testified as to the sobriety of decedent.

The pertinent testimony of officer Garihan, the only witness called by defendant, was that decedent was intoxicated when he first saw him at about 11:20 o'clock in the evening, that the decedent was dressed in dark clothes and that the lighting at the scene of the accident was very bad.

Appellant's first contention, which is made without citation of authority, is that the intoxication of decedent must have been such as to constitute an offense within the prohibition of Vehicle Code section 565 before it could be the basis for a defense of contributory negligence, and as there was no evidence that decedent was intoxicated when he crossed the street, the trial court erred in not permitting evidence to be introduced concerning the events occurring during the forty-five minute period immediately prior to the accident and particularly at the time the witness officer Garihan saw and talked to Brown. However, our

examination of the record shows that such evidence would have been given by officer Garihan had not counsel for plaintiff objected to its admission.

[1] It is readily apparent from the record that the intoxication, if any, of the decedent, was not the only evidence bearing on the question of contributory negligence as said counsel contends nor was it so relied upon by defendant. Such evidence was but one of several facts on this issue. *Drury v. Hagerstrom*, 68 Cal.App.2d 742, 157 P.2d 878. The record conclusively shows without contradiction that the headlights of defendant's car were normal and burning; that decedent was dressed in dark clothing; that he was not crossing at an intersection but was jaywalking, and therefore under section 562 of the Vehicle Code was obliged to yield the right of way to defendant—all of which was in addition to the element of intoxication. It cannot be denied that from such facts reasonable minds might well draw the same conclusions as that reached by the jury herein: that decedent was contributorily negligent. *Finkle v. Tait*, 55 Cal.App. 425, 203 P. 1031; *Fox v. Sherwood*, 7 Cal.App.2d 265, 45 P.2d 1026.

[2,3] Secondly appellant contends that defendant was guilty of negligence as a matter of law in that at the time the accident occurred he was driving within the

city limits in excess of twenty-five miles per hour, citing *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 177 P.2d 279. The only evidence on the question of speed was that of defendant who testified he was driving between twenty-five and thirty miles per hour. Section 513 of the Vehicle Code specifically provides that mere proof of speed in excess of the specified limit is not negligence as a matter of law, and that in all civil actions where proof of speed is introduced "it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence." Thus speed in excess of the specified limits amounts to negligence only if in fact the circumstances surrounding the operation of the vehicle at such speed constitutes negligence. Obviously such a question is one of fact for the jury. This was recognized in the *Satterlee* case, 29 Cal.2d at page 588, 177 P.2d at page 283, *supra*, cited by counsel for plaintiff, where, the court stated: "* * * section 513 of the Vehicle Code now makes it necessary to establish as a fact that the operation of a vehicle at a greater than prescribed speed constitutes negligence."

The judgment and order from which appellant appeals are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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SECOND SERIES

32 Cal.2d 265

In re PIERCE'S ESTATE.

No. 20156.

Supreme Court of California.

July 30, 1948.

1. Wills ⇨440, 441

Testator's intent must be derived from language of will itself or, when uncertainty appears on face of will, from circumstances under which it was executed. Probate Code, § 105.

2. Adoption ⇨1

The procedure for adoption, unknown at common law, is entirely statutory.

3. Adoption ⇨18

Adoption creates a status to which legal incidents of relation of parent and child attach.

4. Deeds ⇨105

Trusts ⇨124

Wills ⇨498

The statute requiring adoptive parents to regard their adopted children as children born of such parents does not require others than adoptive parents to do so in drafting of private instruments, such as wills, trusts, and deeds, as adoption statutes do not affect relationship of others than parents by blood, adopting parents, and adopted children. Civ.Code, § 228.

5. Adoption ⇨21

Even under statute of succession, adopted children are not regarded as children born of adoptive parents with respect to inheritance from such parents' relatives.

6. Adoption ⇨18

Adoption simply fixes adopted child's status as to its former and adopted parents, and child does not acquire new grandparents in persons of adopting parents' father and mother.

7. Wills ⇨498

In determining adopted child's rights under will, controlling question is, not whether child would inherit from its adoptive parent under statute of succession, but whether child is included among persons testator intended to share in his estate.

8. Wills ⇨493

The statutory amendment, eliminating term "issue" from Probate Code provision that testamentary disposition to heirs, relations, representatives, family, or nearest or next of kin of any person, without words of qualification, vests such person's property according to succession provisions of code, indicates that statute of succession does not control interpretation of such term as used in will. Probate Code, §§ 92, 108.

9. Wills ⇨498

When statutes like Probate Code section providing that testamentary disposition to heirs, relations, representatives, family, or nearest or next of kin of any person, without other words of qualification, vests such person's property according to succession provisions of code, are inapplicable, rules of intestate succession apply only if testator expresses intention in will to adopt such rules. Probate Code, §§ 92, 108.

10. Wills ⇨498

The statutes preventing lapse of testamentary devise or bequest to testator's kindred, if devisee or legatee predeceases testator, but leaves lineal descendants surviving testator, and providing that adoptive parent and adopted child shall sustain toward each other legal relation of parent and child, without prescribing standard meaning for terms "lineal descendant" or "lawful issue", as used in wills or other private instruments, are not controlling in interpretation of such instruments. Probate Code, § 92; Civ.Code, § 228.

11. Wills Ⓒ498

Whether adopted child is within meaning of term "lawful issue" as used in will usually turns on particular circumstances of each case.

12. Wills Ⓒ440, 441

Each will must be construed in light of its own particular phraseology and facts and circumstances surrounding testator at time of its execution.

13. Wills Ⓒ440

Where terms of will are unambiguous and susceptible of only one meaning, testator's intent must be gathered from face of instrument itself.

14. Wills Ⓒ498

A holographic will being uncertain on its face as to whether words "lawful issue" in provisions that annuity of any of testator's deceased brother's children or grandchildren, dying before final distribution of estate, should be distributed equally to his or her children (lawful issue), and that estate, at last annuitant's death, should be distributed equally among such brother's surviving grandchildren, being his lawful issue, were intended to distinguish legitimate from illegitimate children, adopted from natural children, or legitimate children of testator's blood from adopted or illegitimate children, evidence of circumstances preceding execution of will was admissible to determine meaning of such words. Probate Code, § 105.

15. Wills Ⓒ489(4)

Testimony of testator's widow as to testator's oral statement before execution of will that he was going to disinherit one of testamentary trust beneficiaries, if he adopted certain children, and that testator disliked such children because their mother's husband stated that he was not father of one of them, was relevant to testator's attitude toward children and not inadmissible as too remote from date of execution of will.

16. Appeal and error Ⓒ231(3)

Where respondent interposed only general objection to admission of testimony on question of testator's intent, its inadmissibility as too remote from date of execution of will cannot be considered on appeal.

17. Appeal and error Ⓒ231(3)

A party, whose general objection to admission of evidence is overruled by trial court, cannot raise specific objection therefor for first time on appeal, unless evidence is inadmissible for any purpose.

18. Wills Ⓒ441

Circumstances relating to events occurring before execution of will may be considered in interpretation thereof as relevant on question of testator's intention when will was executed.

19. Wills Ⓒ489(1)

Evidence of circumstances before execution of will providing that annuity of any of testator's deceased brother's children or grandchildren, dying before final distribution of estate, should be distributed equally to deceased annuitant's children (lawful issue) and that estate should be distributed equally among such brother's surviving grandchildren, being "lawful issue" of his children, at last annuitant's death, was sufficient, without testator's oral declarations, to support conclusion that he intended to exclude adopted children from taking under will.

20. Appeal and error Ⓒ907(3)

On appeal on agreed statement of facts, Supreme Court must determine from record alone whether there was any evidence to support trial court's judgment. Rules on Appeal, rule 52.

CARTER and SCHAUER, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

In the matter of the trust estate of Edwin Pierce, deceased. From an order determining that two adopted children of Harry A. Pierce, a deceased trust beneficiary, and his wife, Marjorie A. Pierce, were entitled to such beneficiary's annuity, Helen Pierce Sontheimer, trustee and beneficiary, and other beneficiaries appeal.

Reversed.

Prior opinion 186 P.2d 995.

Warner, Peracca & Magana, of Los Angeles, Wagener & Brailsford, of Oakland, and James O. Warner, Henry N. Cowan,

W. C. Shelton, and George W. Burch, Jr., all of Los Angeles, for appellants.

Bailey & Poe and Rufus Bailey, all of Los Angeles, and Carl N. Huff, of San Marino, for respondents.

TRAYNOR, Justice.

By a holographic will dated March 1, 1933, Edwin Pierce left his entire estate in trust. The will provided that a monthly annuity be paid to his widow, Edna Dyer Pierce and that the residue of the net income be divided in ten equal shares, two shares to each of the four children of a deceased brother and one share to each of the two children of a deceased niece. The provisions requiring construction are:

1) "Should any of the *annuitants*, children or grandchildren of my late brother, W. A. Pierce, die before the final distribution of my estate, his or her annuity shall be distributed in equal shares to his or her children (*lawful issue*), until final distribution.

2) "At the death of the last of the annuitants, Edna Dyer Pierce, William J. Pierce, Grace P. Holland, Chas. A. Pierce and Harry A. Pierce, it is my will that my estate be liquidated and distributed in equal shares, to and among the surviving grandchildren of my late brother William A. Pierce, said grandchildren being the *lawful issue*, of the children of my late brother, William A. Pierce." (Italics by the testator.)

At the date of the testator's death on April 14, 1935, Harry A. Pierce, one of the designated beneficiaries of the trust, had no children. In 1943 he and his wife, Marjorie A. Pierce, adopted Iola Ann Pierce, and in 1944 they adopted Dolores Amelia Pierce. Harry A. Pierce died in 1945 and Marjorie A. Pierce, acting as guardian ad litem for the two children, made a claim in their behalf for his annuity upon the trustee. The trustee then petitioned the trial court for instructions to determine whether the adopted children were entitled to receive the annuity. The trial court entered an order that they were. The trustee and beneficiaries appeal.

The question for determination on this appeal is whether the testator used the

term "lawful issue" to exclude adopted children. Respondent contends that the statutes governing the status of the children and their rights to inherit control the construction of this term. Section 228 of the Civil Code establishes the relationship of parent and child between an adopted child and the adoptive parent, and section 257 of the Probate Code, incorporating the rule of *In re Newman*, 75 Cal. 213, 219, 16 P. 887, 7 Am.St.Rep. 146, provides that an adopted child succeeds to the estate of an adoptive parent in the same manner as a natural child. It was held in *In re Newman*, supra, that an adopted child is included within the meaning of the term "issue" as then used in the statute of succession. "If the adopted child is, by virtue of its status, to be 'regarded and treated in all respects as the child of the person adopting,' and is to 'have all the rights, and be subject to all the duties, of the legal relation of parent and child,' the right to succeed to the estate of the deceased parent must be included." *In re Newman*, supra, 75 Cal. 213, 219, 16 P. 887, 883.

[1] Even though an adopted child has a status with respect to its adoptive parent identical to that of a child born of such parent and succeeds to the estate of an adoptive parent in the same manner as a child born of such parent, it does not follow that such status is determinative in construing the terms of a will. It is fundamental in the interpretation of wills that the testator's intent be derived from the language of the will itself and, under Probate Code section 105, when an uncertainty appears upon the face of the will, from the circumstances under which it was executed.

[2-6] The procedure for adoption, unknown at common law, is entirely statutory. *Matter of Cozza*, 163 Cal. 514, 522, 126 P. 161, Ann.Cas.1914A, 214. Adoption creates a status to which attach the legal incidents of the relation of parent and child. Section 228 of the Civil Code defines the rights and duties between an adoptive parent and the adopted child and requires adoptive parents to regard adopted children as children born of such parents. It does not, however, require persons other than

adoptive parents to regard them as such in the drafting of private instruments such as wills, trusts, and deeds. "The adoption statutes of this state do not purport to affect the relationship of any person other than that of the parents by blood, the adopting parents, and the child. It is the person adopting the child who, by the express terms of the section, after adoption 'shall sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation * * *.' In re Darling, 173 Cal. 221, 225, 159 P. 606, 608. Even under the statute of succession, adopted children are not regarded as children born of the adoptive parents with respect to inheritance from relatives of the adoptive parents. Estate of Pence, 117 Cal.App. 323, 333, 4 P.2d 202; Estate of Jones, 3 Cal.App.2d 395, 400, 39 P.2d 847. "The adoption simply fixes the status of the child as to its former and adopted parents. To its grandparents by blood it continues to be a grandchild, and the child of its parents by blood. It does not acquire new grandparents in the persons of the father and mother of an adopting parent." In re Darling, supra, 173 Cal. 221, 225, 159 P. 606, 608.

[7] In the determination of the rights of an adopted child under a will, the controlling question is not whether the adopted child would inherit from its adoptive parent under the statute of succession, but whether the adopted child is included among the persons the testator intended to share in his estate. Puterbaugh's Estate, 61 Pa. 235, 241, 104 A. 601, 5 A.L.R. 1277; Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420, 424, 144 A.L.R. 664; see 1 Am.Jur. 665.

[8,9] Section 108 of the Probate Code provides: "A testamentary disposition to 'heirs,' 'relations,' 'nearest relations,' 'representatives,' 'legal representatives,' 'personal representatives,' 'family,' 'nearest (or next) of kin' of any person, without other words of qualification, * * * vests the property * * * of such person, according to the provisions of Division II of this code. * * *" Before its amendment in 1931 this section also included the

term "issue." This amendment clearly indicates that the statute of succession was not to control the interpretation of the term "issue" as used in a will. When statutes like section 108 are not applicable, the rules of intestate succession apply only if the testator expresses an intention in the will to adopt such rules. See Estate of Watts, 179 Cal. 20, 22, 175 P. 415.

[10] Respondent also relies on Estate of Moore, 7 Cal.App.2d 722, 724, 47 P.2d 533, 48 P.2d 28; Estate of Tippetts, 48 Cal.App. 2d 177, 178, 119 P.2d 368; and Estate of Esposito, 57 Cal.App.2d 859, 865, 135 P.2d 167, holding that adopted children are "lineal descendants" within the meaning of section 92 of the Probate Code, which prevents the lapse of a testamentary devise or bequest to kindred, if the devisee or legatee predeceases the testator but leaves lineal descendants surviving the testator. Although a beneficiary takes directly under the will of the testator under such an anti-lapse statute, he does so because the statute substitutes him for the predeceased devisee or legatee. He takes, not by virtue of the expressed intentions of the testator, but solely by virtue of the statute. Section 228 of the Civil Code compels the result in these cases as it does in the succession cases. As stated in Estate of Moore, supra, 7 Cal.App. 2d at page 724, 47 P.2d at page 534: "The law applicable to the present controversy and creating the status is found in section 228 of the Civil Code, providing that 'after adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.' * * * That such adopted child is to be considered as 'issue' and a lineal descendant of the adopting parent, has been on several occasions recognized by our courts. * * * To exclude adopted children from its scope would be to say that they are not entitled as to the adopting parent, to the full rights of natural children, which is contrary to the express provision of the statute."

In construing the statutes of succession and the anti-lapse statute, the courts were concerned primarily with carrying out the intention of the Legislature (Civ.Code

section 228) that adopted children be given the same rights under the statutes of this state as those enjoyed by natural children. See also *Estate of Winchester*, 140 Cal. 468, 469, 74 P. 10. These statutes and the cases thereunder, however, unlike section 108 of the Probate Code, do not purport to prescribe a standard meaning for the terms "lineal descendant" or "lawful issue" as used in wills or other private instruments, and are therefore not controlling in the interpretation of wills or other private instruments.

[11, 12] The question whether an adopted child is included within the meaning of "lawful issue" as used in a will usually turns on the particular circumstances of each case. Thus the meaning of "lawful issue" has been determined from the general scheme or purpose of a will considered as a whole (*Middletown Trust Co. v. Gaffey*, 96 Conn. 61, 69, 112 A. 689; *Mooney v. Tolles*, 111 Conn. 1, 11, 149 A. 515, 70 A.L.R. 608; *New York Life Ins. & Trust Co. v. Viele*, 161 N.Y. 11, 20, 55 N.E. 311, 76 Am.St.Rep. 238; *Comer v. Comer*, supra, 195 Ga. 79, 23 S.E.2d 420, 424, 144 A.L.R. 664; *Woods v. Crump*, 283 Ky. 675, 681, 142 S.W.2d 680), or from the fact that the testator used different terms such as heirs, issue, and children interchangeably to identify the same persons. *Hall v. Crandall*, 25 Del.Ch. 339, 20 A.2d 545, 547; *Smith v. Thomas*, 317 Ill. 150, 158, 159, 147 N.E. 788; *Cook v. Underwood*, 209 Iowa 641, 644, 228 N.W. 629; see *Everitt v. LaSpeyre*, 195 Ga. 377, 24 S.E.2d 381, 384. Moreover, the meaning of the term has frequently been determined by the circumstances surrounding the execution of the will, such as the testator's knowledge of the adoption and his approval or disapproval thereof (*Ansonia Nat. Bank v. Kunkel*, 105 Conn. 744, 748, 136 A. 588; *Middletown Trust Co. v. Gaffey*, supra, 96 Conn. 61, 71, 112 A. 689; *Munie v. Gruenewald*, 289 Ill. 468, 472, 124 N.E. 605; *In re McEwan*, 128 N.J.Eq. 140, 147, 15 A.2d 340; *Trowbridge v. Trowbridge*, 127 Conn. 469, 474, 475, 17 A.2d 517; see notes, 70 A.L.R. 621, 144 A.L.R. 670), or the testator's knowledge of the inability of persons, whose "issue" are provided for in the will, to bear children. *Ansonia Nat. Bank v. Kunkel*, supra, 105 Conn. at page 753, 136 A. 588; *Beck*

v. Dickinson, 99 Ind.App. 463, 466, 192 N.E. 899; see *Bray v. Miles*, 23 Ind.App. 432, 54 N.E. 446. "Since the language of different wills is so varied and the circumstances surrounding the testators are so different, decisions in will construction cases are of less value as guides or authority than is the case in almost any other branch of the law. * * * each will must be construed in the light of its own particular phraseology and the facts and circumstances surrounding the testator at the time of its execution." *Thompson on Wills*, 3rd Ed., 324, 325.

The circumstances preceding the execution of the will in the present case indicate that the testator intended to use "lawful issue" in its ordinary meaning as offspring of parentage (3 Page on Wills 152; cases collected in *Dolbeare v. Dolbeare*, 124 Conn. 286, 199 A. 555, 117 A.L.R. 691) to exclude adopted children. At the trial there was introduced into evidence the testimony of Edna Dyer Pierce, the widow of the testator, who testified to an oral conversation that took place in the presence of the testator and to other circumstances that occurred before the making of the will. The widow testified that at a time before the execution of the will she had a conversation with the testator in the presence of a nephew relating to the plans of Harry A. Pierce to adopt Iola Ann, who at that time was approximately two years of age; that during the conversation the nephew had informed the testator of the contemplated adoption and the testator then said: "If God spares my life until tomorrow, and I can get down to my bank, I am going to disinherit Harry"; that Harry, being informed of the testator's state of mind, promised him that he would not adopt Iola Ann or Dolores Amelia; that the testator destroyed a will that he had executed for the very purpose of disinheriting Harry. The disinheriting will, which was torn and thrown into a waste basket, was retrieved by the widow and preserved; this document was introduced into evidence at the trial. Edna Dyer Pierce further testified that one of the reasons that the testator did not like these minor children was the fact that the husband of the mother of the children stated to the testator that he was not the

father of the second child, since he was in jail at the time the child was conceived and could not have been the father. This was the only evidence received at the trial relating to the construction of the language of the will.

[13,14] Section 105 of the Probate Code provides: "When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations." If the terms of the will are unambiguous and are susceptible of only one meaning, the intent of the testator must be gathered from the face of the instrument itself. *Estate of Watts*, supra, 179 Cal. 20, 23, 175 P. 415; *Estate of Soulie*, 72 Cal.App.2d 332, 335, 164 P.2d 565; *Estate of Owens*, 62 Cal.App.2d 772, 774, 145 P.2d 376; *Vincent v. Security-First Nat. Bank*, 67 Cal.App.2d 602, 610, 155 P.2d 63. This will, however, is not clear on its face. The testator used "lawful issue" to qualify or restrict the meaning of children or grandchildren. As a layman using the words "lawful issue" in a holographic will he may have intended to distinguish legitimate from illegitimate children, adopted from natural children, legitimate children of the blood of the testator from adopted or illegitimate children, or he may have intended to include children of his legatees that they regard as their lawful issue. In view of the uncertainty appearing on the face of the will, it was proper for the trial court to admit evidence of the circumstances preceding the execution of the instrument to determine what the testator meant by "children (*lawful issue*)" in the first provision quoted above, and by "grandchildren being the *lawful issue*" in the second provision quoted above.

[15-17] Respondent contends that the extrinsic evidence was inadmissible on the

ground that it was too remote from the date of the execution of the will. That contention, however, relates to the probative value to be given such evidence, not to its admissibility. It cannot be seriously contended that such evidence was not sufficiently relevant to the testator's attitude toward the adopted children. *Trowbridge v. Trowbridge*, supra, 127 Conn. 469, 471, 17 A.2d 517; *Munie v. Gruenewald*, supra, 298 Ill. 468, 472, 124 N.E. 605; see *Beck v. Dickinson*, supra, 99 Ind.App. 463, 192 N.E. 899. In any event, since the respondent interposed only a general objection to the admission of the testimony of the widow, the question of its admissibility on the specific ground of remoteness cannot now be considered on appeal. It is well settled that when a general objection to the admission of certain evidence is overruled by the trial court, the party against whom the ruling is made cannot raise for the first time on appeal a specific objection thereto, unless the evidence is not admissible for any purpose. *Crocker v. Carpenter*, 98 Cal. 418, 421, 33 P. 271; *Christiansen v. Hollings*, 44 Cal.App.2d 332, 340, 112 P.2d 723; *Gularte v. Martins*, 65 Cal.App.2d 817, 821, 151 P.2d 570.

[18] The circumstances under which the will was executed may relate to events occurring before its execution, if they have relevance concerning the intention of the testator at the time the will was executed. See *Thompson on Wills*, supra, at 488. Accordingly, in several California cases circumstances existing years before the execution of a will have been considered in the interpretation of wills to determine the testator's intentions as they existed at the time of the execution of the will. *Estate of Dominici*, 151 Cal. 181, 188, 90 P. 448; *Estate of Mitchell*, 160 Cal. 618, 623, 117 P. 774; *Estate of Hotaling*, 72 Cal.App.2d 848, 165 P.2d 681; *Estate of Johnson*, 107 Cal. App. 236, 239, 290 P. 314; *Estate of Wierzbicky*, 69 Cal.App.2d 690, 693, 159 P.2d 699.

Although section 105 of the Probate Code clearly permits the introduction of evidence of circumstances surrounding the execution of a will, when there is an uncertainty on the face of the will as to the application of any of its provisions, it specifically provides

that oral declarations of the testator cannot be considered to determine his intentions. This section has been construed, however, not to exclude oral declarations that consist of instructions to a scrivener. Estate of Dominici, supra, 151 Cal. 181, 90 P. 448; Estate of Little, 170 Cal. 52, 148 P. 194; Estate of Donnellan, 164 Cal. 14, 127 P. 166; Estate of Hotaling, supra, 72 Cal.App. 2d 848, 856, 165 P.2d 681. The testator's statements relating to the disinheritance of Harry A. Pierce were not instructions to a scrivener and therefore do not come within this exception. See Estate of Johnson, supra, 107 Cal.App. 236, 240, 290 P. 314; Estate of Maloney, 27 Cal.App.2d 332, 335, 80 P.2d 998.

[19-20] There is sufficient evidence of circumstances before the execution of the will, exclusive of the testator's declarations, however, to support the conclusion that the testator intended to exclude adopted children from taking under the will. The uncontradicted testimony shows that the testator was opposed to the adoption of these children and that his opposition was manifested by the execution of a will disinheriting the adoptive parent; that the testator destroyed the disinheriting will on the promise of Harry A. Pierce that he would not adopt these children. This appeal is upon an agreed statement of facts, and therefore Rule 52 of the Rules on Appeal is controlling: "If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified by the judge or the clerk, or stipulated to by the parties, in accordance with these rules, it shall be presumed in the absence of proceedings or augmentation that it includes all matters material to a determination of the points on appeal." Thus, this court must determine from this record alone whether there was any evidence to support the judgment of the trial court. See *Alkus v. Johnson-Pacific Co.*, 80 Cal. App.2d 1, 8, 181 P.2d 72, 76. Since the only evidence in the agreed statement shows that the testator did not intend that the adopted children should take under the will, there is no evidence to support the order of the trial court.

The order is reversed.

GIBSON, C. J., and SHENK, ED-MONDS and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

I am convinced that the order of the trial court holding that the testator intended the adopted children of the annuitants to be included in the term "children, lawful issue" should be affirmed.

The general rule is that the findings of a trial court should be liberally construed and any inconsistency therein so resolved as to uphold rather than defeat its judgment. *Woodbine v. Van Horn*, 29 Cal.2d 95, 109, 173 P.2d 17; *Menghetti v. Dillon*, 10 Cal.2d 470, 472, 75 P.2d 596; *Ensele v. Jolley*, 188 Cal. 297, 303, 204 P. 1085; *Murray v. Tulare Irrigation Co.*, 120 Cal. 311, 315, 49 P. 563, 52 P. 586; *Bell v. Scudder*, 78 Cal.App.2d 448, 457, 177 P.2d 796. In this case, by giving a liberal construction to the findings of the trial court, its order can, and should, be affirmed on the following grounds: (1) That the trial court realized the error it committed by first holding that there was an ambiguity in the will in the use of the phrase "lawful issue"; (2) that the trial court, in accord with the general rule, disregarded evidence erroneously admitted and cured its own error by finding against such evidence; (3) that the trial court refused to believe the evidence contrary to its findings.

The first and most basic question is whether there is present in the will here involved the condition precedent to the admission of extrinsic evidence: Ambiguity, or as the Code puts it, "uncertainty." Prob.Code, sec. 105. Without such uncertainty, extrinsic evidence of any kind is inadmissible for the purpose of determining the intent of the testator.

In this case, the trial court originally held that there was an ambiguity, and therefore admitted the evidence. But on further consideration, the court may very well have come to the conclusion that it had erred. If no "uncertainty" existed, the matter became one purely of law for the court to decide. The evidence could be disregarded. Here, the evidence was obviously disregarded. There is a logical ex-

planation for this disregard. No prejudice can result to any one if the court, after making an error in receiving evidence, realizes the error and cures it by giving the document before it the interpretation it should have received from the start.

Construing the language used in the will under California law as required by Probate Code section 100, it was entirely reasonable for the trial court to conclude that the testator had in fact *not* intended to exclude the adopted children of the various annuitants by the use of the term "children, lawful issue." This interpretation should be permitted to stand. It is not only reasonable but also in line with the general trend expressed in statutes and cases in this state under which the status of an adopted child is approximated as closely as possible to that of a natural child.

In this connection, it may be conceded that up to this time, the California cases and statutes involved only questions of succession and pretermission rather than the interpretation of documents. The trend in favor of adopted children is nevertheless clear and so is the rule:

"The rule is well settled that where the construction given to an instrument by a trial court is reasonable and appears to be consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation, even though it may seem equally tenable with that accorded by the trial court." Estate of Northcutt, 16 Cal.2d 683, 690, 107 P.2d 607, 611, and cases there cited.

Under this reasoning, the trial court was bound to disregard the extrinsic evidence and had to determine the intention of the testator on the basis of the words used in the will itself in accordance with section 105 of the Probate Code. The alleged disregard of the evidence was therefore entirely proper and did not constitute error.

The decision of the trial court receives further support from the following rule:

"* * * that where by the terms of the will it is not made clear nor certain that an intestacy—whether partial or total—was intended, an interpretation which will avoid intestacy will be adopted." Es-

tate of Northcutt, 16 Cal.2d 683, 689, 107 P.2d 607, 610, and many cases there cited.

In this case, there would unquestionably be an intestacy if respondents are excluded. There is not the slightest indication of an intent to create such an intestacy in the will. The trial court therefore correctly concluded that the respondents were intended to take under the will.

Next, if it is conceded for the sake of argument that the use of the term "lawful issue" in the will created an uncertainty within the meaning of section 105 of the Probate Code, the oral declarations of the testator are still inadmissible under that same section. The majority opinion recognizes that rule but accords it lip service only.

The evidence contained in the agreed statement of facts shows that respondents' counsel made immediate objection to the admission of declarations of the testator. The objection was general as well as specific and stated the rule laid down in section 105 of the Probate Code. The following excerpt from the agreed statement of facts shows that the trial court misunderstood counsel for appellants:

"Mr. Shelton: We are offering this testimony as to the facts and circumstances surrounding the man at the time when the will was executed and the facts thereto so as to make the court conversant with them.

"The Court: You are not seeking by this witness to introduce any statement of the testator with reference to this language?

"Mr. Shelton: Yes, directly bearing on that *in declarations* that he had no intentions * * *."

The trial court then overruled the objection, evidently thinking that the declarations of the testator would not be introduced. The question asked by the trial court showed that it was aware of the rule under which such declarations would not be admissible. Afterwards, when the inadmissibility of the evidence came to light, the trial court must have realized that it was subject to reversal if it rendered a decree based on inadmissible evidence. Fishbaugh v. Fishbaugh, 15 Cal.2d 445, 457,

101 P.2d 1084. Under those circumstances, it was the duty of the trial court to disregard the inadmissible portion of the evidence. On appeal, it is presumed that the trial court disregards inadmissible evidence which has crept into the record.

"In general it will be assumed on appeal, where the case is tried by the court without a jury, that the court considered only proper and competent evidence in making its findings and did not consider other evidence which has been admitted erroneously and it will be presumed that such evidence was disregarded." 5 C.J.S., Appeal And Error, § 1564, page 405. The same general rule is stated in almost identical words in 3 American Jurisprudence at page 505 and is supported by many cases. *Bisno v. Herzberg*, 75 Cal.App.2d 235, 241, 170 P.2d 973; *Cordi v. Garcia*, 56 Cal.App.2d 584, 588, 132 P.2d 887; *Farmers' & Merchants' Nat. Bank v. Stowell*, 6 Cal.App.2d 373, 378, 44 P.2d 392.

Looking at the record in the light of this presumption, it is evident that the admissible portion of the evidence, that is, that portion which the trial court was under a duty to consider, shows nothing but the facts that the testator once made and tore up a will and that he became angry on one occasion. And while it may be conceded that this might have been enough evidence to support the conclusion of the trial court, had it concluded that the intention of the testator was to *exclude* the adopted children of the annuitants, the fact remains that it found to the contrary. Such evidence as was left certainly did not compel the trial court to find one way or the other. A torn will and an outburst of rage are equivocal acts, capable of any number of interpretations. It is axiomatic that under such circumstances the result reached by the trial court should not be disturbed.

Finally, if it is assumed that the words used in the will not only created an "uncertainty" but that the extrinsic evidence contained in the agreed statement of facts was admissible (and neither of these points is conceded), the trial court was still free to disbelieve the uncontradicted evidence of the only witness, and evidently did dis-

believe it. In a recent case, when speaking of uncontradicted evidence, the majority of this Court said: "But, of course, the trial court was not required to believe their testimony. The trial court is the exclusive judge of the weight of the evidence and the credibility of the witnesses. It is its province to give to the evidence that weight to which, in its judgment, it is entitled, and to draw all reasonable inferences therefrom, and if, in its judgment, the evidence is entitled to no weight it may disregard such evidence altogether. 24 Cal.Jur. 886, § 135." *Campbell v. Birch*, 19 Cal.2d 778, 779, 122 P.2d 902, 908. The dissenting judges in this case concurred with the majority on the point mentioned. Page 803 of 19 Cal.2d, page 916 of 122 P.2d: "* * * first, that the trial court could have disbelieved defendants' evidence on the subject; and second, that an inference * * * arose * * * With the first I agree, but * * *." (See, also, *Tretheway v. Tretheway*, 16 Cal.2d 133, 104 P.2d 1033.)

There can be no question but that the trial court in this case disregarded or disbelieved the evidence produced at the trial as to the testator's intention with respect to the adopted children. This the trial court obviously had the right to do. *Estate of Bristol*, 1943, 23 Cal.2d 221, 143 P.2d 689; *Tretheway v. Tretheway*, 1940, 16 Cal.2d 133, 104 P.2d 1033.

In my opinion no ambiguity exists in the meaning of the words used. But if it is conceded that an uncertainty arose, whether some or all of the evidence was admissible or not, there is still a reasonable and logical explanation for the action taken by the trial court.

In a case of this nature, reflections of this kind are removed from the realm of conjecture by the presumption that the trial court acted in the proper discharge of its office and did not reach an arbitrary result. The cases cited *supra* show that this court has often recognized the necessity for liberal construction in order to sustain rather than reverse a trial court. The rule that the trial court is presumed to disregard inadmissible evidence in the record is in line with this general principle. In this

case, the majority opinion usurps the function of the trial court and reverses it where, under the settled rules above outlined, it could and should be affirmed.

SCHAUER, J., concurs.



32 Cal.2d 247

VICKERS v. STATE BAR OF CALIFORNIA.

L. A. 19218.

Supreme Court of California.

July 30, 1948.

1. Attorney and client ☞42

An attorney's presentation to court of statement of facts known to be false violates provision of Business and Professions Code prohibiting attorney from seeking to mislead judge by artifice or false statements since intent to secure determination based on false statement is presumed. Business and Professions Code, § 6068.

2. Attorney and client ☞42

An attorney's presentation to court of statement of fact which is known to be false and which tends to mislead court violates Business and Professions Code, whether or not attorney is successful in misleading court. Business and Professions Code, §§ 6068, 6106.

3. Divorce ☞156

An interlocutory decree of divorce does not dissolve the union, and parties continue to be husband and wife until entry of a final decree after lapse of one year. Civ.Code, §§ 61, subd. 1, 132.

4. Attorney and client ☞42

As respects discipline of attorney for misleading probate court in application for special letters of administration by representing that he was husband of decedent, attorney could not claim that he was technical husband of decedent under a voidable marriage at the time, where at all times material to the case he was husband of

first wife under terms of an interlocutory judgment of divorce and the purported marriage to decedent was void from beginning and subject to collateral attack at any time. Civ.Code, §§ 61, 132; Business and Professions Code, §§ 6068, 6106.

5. Attorney and client ☞58

Board of Governors of State Bar, in reaching a determination as to discipline to be recommended upon a charge against an attorney, properly considered record of attorney's prior misconduct.

6. Attorney and client ☞58

Attorney was suspended for three years for knowingly making false representation to probate court that he was husband of decedent and entitled to special letters of administration. Business and Professions Code, §§ 6068, 6106.

CARTER, J., dissenting.

Proceeding on the petition of Charles J. L. Vickers to review a disciplinary proceeding in which the Board of Governors of the State Bar of California recommended that petitioner be disbarred.

Petitioner suspended for three years.

Morris Lavine, of Los Angeles, for petitioner.

Fairfax Cosby and Jerold E. Weil, both of Los Angeles, for respondent.

PER CURIAM.

Upon the petition of Charles J. L. Vickers, this court issued a writ to review a disciplinary proceeding in which the Board of Governors of The State Bar recommended that he be disbarred.

The notice to show cause charged Vickers with three counts of professional misconduct. First, The State Bar asserted, he intentionally misled the court in connection with a petition for special letters of administration upon the estate of Olive Agnes Vickers, also known as Agnes Kirk. The second count alleged that after accepting a fee for legal services, he told a client that his action would soon come to trial when, in fact, no complaint had been filed. Finally, Vickers was charged with

the appropriation of a typewriter belonging to a client. Each of these charges was denied by the petitioner and the matter proceeded to a hearing before a local administrative committee.

As a witness in his own behalf, Vickers related that on September 2, 1942, in the Superior Court of Los Angeles County, his wife (nee Georgia Moore) obtained an interlocutory decree of divorce. Olive Kirk was an acquaintance at this time. On a visit to Ohio, she became ill and Vickers joined her there. Early in November they started for California by plane but on account of travel priorities only got as far as El Paso. They went to a hotel there and registered as man and wife.

On November 21st, about a week after their arrival, Vickers consulted William A. Cocke, an El Paso attorney specializing in Mexican divorces. There is considerable conflict in the testimony as to how Cocke's name was obtained. Vickers' testimony was that Olive made the appointment and persuaded him to go to see Cocke. At a meeting in Cocke's office on that day, certain legal aspects of a proposed proceeding were discussed and a number of papers were signed. Some of them concerned statistical data in regard to the marriage of Vickers and Georgia Moore; others, including a power of attorney, written in Spanish, Vickers signed without reading or inquiring about their contents.

The same day, Vickers and Cocke crossed the international boundary line to Juarez, Mexico, and in a public building there Vickers signed "some Spanish roll." Vickers testified at one time that he believed this signature was "for the divorce" but he later said that it was only for the purpose of establishing residence, which accords with Cocke's explanation of the document. Several persons were present at the time of signing the roll but no testimony was taken nor was anything translated for Vickers. He "got a divorce decree" at that time, he told the committee, but his later testimony shows that he was not referring to a judgment in writing. Vickers and Cocke then returned to El Paso and Vickers did not make any further appearance in the matter.

Two days later, in El Paso, upon an affidavit stating that he was a single man, Vickers obtained a license to marry Olive. They immediately went through a marriage ceremony before a local judge. The following day, a complaint for divorce by Vickers against Georgia was filed in the Civil Court of First Instance in Juarez.

After the marriage ceremony Vickers and Olive resumed their journey to Los Angeles by plane and lived in her apartment. During the next five months, they lived together as man and wife, and introduced each other as such. In May, 1943, because of Olive's ill health, they went to Texas. Deciding to stay there, Vickers secured part time employment at electrical work and in a cigar stand. Early in July, they received word that property located in Los Angeles, title to which stood in the name of Olive, was about to be sold. They returned to Los Angeles and Olive died there on July 29th.

A few days later, Vickers filed a petition for special letters of administration upon "In the Matter of the Estate of Olive Agnes Vickers, also known as Olive Agnes Kirk." In this petition Vickers alleged that he was the husband of the decedent. At the same time, he petitioned for letters of administration. The petition for special letters was granted immediately, but before the date set for the hearing of the application for letters of administration, a creditor of the decedent petitioned for revocation of the special letters which had been granted. In this petition, it was alleged that these letters had been granted to Vickers upon "the stated ground of necessity to enable him to pay decedent's funeral and interment expenses" but that he "made no move to have the body taken care of" and decedent's mother "was forced to pay the expenses of funeral services and interment." Upon a hearing, the special letters were revoked and the decedent's mother was appointed administratrix of the estate.

In his testimony before the committee, Vickers gave two reasons for making application for special letters of administration. First, he said, he was without funds, and burial expenses amounting to approxi-

mately \$352 could not be paid unless he obtained the money from the estate. His second reason was that because of the death of Olive, the escrow for the sale of her property could not be completed. The holder of a second trust deed then threatened to foreclose; and special letters were applied for in order to complete the escrow and save the equity in the property.

The State Bar charges that in making application for special letters of administration, Vickers intentionally misled the court as to the true facts by representing that he was the husband of the decedent. At that time, it is alleged, Vickers knew, or should have known, that such a statement was untrue. Other allegations are that the same statement was included in his petition for letters of administration and each of them was made "for the sole purpose of obtaining letters of administration of an estate in which you had no legal interest or right thereto as an heir at law or otherwise, nor any legal right to apply for such letters."

According to the probate judge who granted the petition for special letters of administration, Vickers stated to him that the decedent was his wife. The representations in regard to the nature of the property owned by the decedent, and its value, was substantially the same as those made in the petition. When he made the order, he had no knowledge of the prior marriage to Georgia nor of the divorce proceedings. At that time, the judge told the committee, "he appeared as any reasonable person would have appeared under the same circumstances, having recently experienced a death in his immediate family, * * * he seemed to be upset and disturbed mentally."

As justifying his representations to the probate court, Vickers told the committee that when Olive died he was without funds and had to borrow money for her burial expenses; the purpose of the proceeding was to obtain money to finance the funeral and purchase a grave. And following the issuance of special letters of administration to him, he told the attorney for the mother of the deceased that as he was going into the Army he could not act as administrator;

he was not interested in the estate beyond providing money for funeral expenses, and would be satisfied to allow the mother and her attorney to make a fair distribution of the property. The estate to be administered upon was in part his separate property, he claimed, but to avoid a deficiency judgment on record against him, he had Olive Kirk take title to the home, in which there was about an \$800 equity, in her maiden name. According to this testimony, Vickers received only \$16 from the estate.

Joseph Musgrove, the attorney for the mother, testifying for The State Bar, told the committee that he had obtained the revocation of Vickers' letters, and then had the mother appointed as administratrix. In discussing the matter with him, said Musgrove, the explanation made by Vickers for his conduct was that "she wanted to be married and to please her I did go through with the ceremony." But Vickers added, "I also had it annulled." Further, Musgrove quoted Vickers as saying, "for the purpose of administering the estate I think this ceremony that we went through in Texas will be sufficient to qualify me as her husband even though the marriage wasn't valid."

Manuel Ruiz, Jr., licensed to practice in California and also in Mexico, testified on behalf of The State Bar, that at the time in question, there was merely a one-day residential requirement for a divorce proceeding and after the suit was commenced, unless the action was contested, the plaintiff did not have to return; all necessary appearances could be made by counsel. However, he added, where the defendant did not contest or raise an issue, the shortest time within which a default could be entered under the circumstances related by Vickers was about 18 days from the date of filing the complaint. Moreover, entry of default, he said, was a prerequisite to the pronouncing of judgment and the issuance of a decree.

Upon this evidence the local committee found that the allegation of Vickers in the petitions for letters of administration concerning his marital relationship to Olive Agnes Vickers "was false and untrue and

was known by the respondent to be false and untrue and was made for the purpose of deceiving the judge of the Superior Court before whom * * * [those petitions] would be heard, and the judge before whom the petition for special letters of administration was heard was deceived by said allegation." The finding in regard to the charge that Vickers had made false representations to a client is in favor of the petitioner. As to the last count, the committee determined that a client of Vickers loaned him a typewriter, reasonably worth \$56, which he sold for \$30 without accounting for the proceeds, notwithstanding a demand from the client.

The committee's conclusions of law from these findings were that in making the representations to the court in the probate matter and in selling the typewriter without paying its reasonable value, Vickers committed acts of moral turpitude, and violated his oath and duties as an attorney at law; also, the committee concluded, he commingled his property with that of a client. As discipline, the committee recommended that on count one Vickers be disbarred; that count two be dismissed; and on count three, that he be suspended for a period of six months. Except for two inconsequential changes, the findings of the local administrative committee were adopted by the Board of Governors, which recommended that the petitioner be disbarred. In fixing the degree of discipline, the Board of Governors took into consideration the suspension of Vickers for two years on account of professional misconduct, ordered by this court on July 5, 1944 (Bar.Misc. 1808).

The petitioner contends that the evidence is insufficient to support the findings of the Board of Governors. In defense of his representations to the court in the probate matter, he argues that as he went through a marriage ceremony with Olive Kirk in Texas, he was her husband, and his status as such could be affected only by an annulment of the marriage; no annulment ever was had, hence, in law, he was the husband of Olive Kirk at the time of her death. Moreover, Vickers says, his action did not involve professional miscon-

duct as such, but related only to his private life. As to the other charge, he asserts that Guthrie, the client who left the typewriter with him, solicited and received considerable legal advice without paying for it, and is "a skilled and congenital cheating chisler." Under these circumstances, Vickers contends, the penalty recommended by the Board of Governors was much too severe. But in any event, he concludes, the board erred in taking into consideration his two year suspension from the practice of law for professional misconduct. In support of its action, The State Bar contends that there is no deficiency in the evidence as to either offense, that the punishment recommended is justified, and that in fixing discipline a prior suspension may be considered.

Section 6103 of the Business and Professions Code provides as to an attorney that "any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." By section 6068, subsection (d) of that code, it is stated that, "It is the duty of an attorney * * * to * * * never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." In the same code it is further provided that an attorney may be disbarred for "the commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not." Sec. 6106.

[1,2] Vickers' commission of the acts of professional misconduct charged in count one of the order to show cause depends first upon whether his representation to the probate court was in fact untrue, and secondly, whether he knew that his statement was false and he intended thereby to deceive the court. In his latter connection the recently stated rule is that "the presentation to a court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of the quoted provision (sec. 6068, subsec. d). * * * The conduct denounced by the Business and Professions Code is not the act of an attorney by which he suc-

cessfully misleads the court, but the presentation of a statement of fact, known by him to be false, which tends to do so." *Pickering v. State Bar*, 24 Cal.2d 141, 144, 145, 148 P.2d 1, 3.

After the matter was argued before this court, it was "referred to the Board of Governors of The State Bar with instructions to take further evidence with respect to the circumstances surrounding petitioner's divorce allegedly obtained in the State of Chihuahua, Mexico, from Georgia Vickers, and his good faith in subsequently representing to the probate court his marital relationship to Olive Agnes Vickers." In the later proceedings, Vickers stated to the committee that at the time of making application for special letters of administration, he believed he was the legal surviving husband of Olive. In explanation of his belief, Vickers said that Cocke "had me sign a register, and told me that was all that was sufficient. That you only had to have one day's lapse and you were entitled to your divorce."

This is in direct conflict with Cocke's version of the conversation. The attorney summarized his statements to Vickers as follows: "I told Mr. Vickers that service of summons on his wife in the absence of waiver was absolutely essential to legality * * * that approximately not less than twenty-one days would have to elapse from the date of service before the decree could issue * * * [and] four to six weeks, usually five weeks, would have to elapse from the date of registration before the decree could issue, even in the absence of contest * * * I advised him, of course, that the summons would have to be served after the action was filed but before any decree could issue." To be noted in this connection is Vickers' statement at the first hearing before the committee in regard to Cocke's explanation of the law. Vickers then testified: "He did say that in order to effect the validity of [the decree of divorce] * * * as far as the United States is concerned that they were going to serve notice upon [Georgia]. * * *"

In relating his explanation to Vickers concerning the Mexican law, Cocke said, "I did not tell Mr. Vickers that the whole proceeding 'was all over,' and he had secured

a divorce from Georgia Josephine Moore Vickers. I probably did tell him that his preliminary steps had all been taken and I would not need him further unless a contest arose."

This accords with the record, which shows that three days later, which was after the marriage ceremony with Olive, a complaint was filed in the Civil Court of First Instance at Juarez whereby Vickers commenced an action for divorce against Georgia. A week later, at Los Angeles, she was served with a copy of the summons and complaint, but no further proceedings have been had. As stated by Cocke, this was "because Mr. Vickers never put me in a financial position to make the final tax payment which was a condition precedent to securing the divorce decree. I heard nothing from Mr. Vickers, notwithstanding I wrote him several letters."

Following the presentation of evidence, the committee made supplemental findings of fact. It found that Vickers went to the office of the mayor of Juarez and affixed his signature to a certificate of registration, thereby becoming eligible to commence a proceeding for divorce. But that registration, as Vickers then well knew, had no other force or effect. Other findings are that at the time of Vickers' purported marriage to Olive, he "knew and was well aware that the same was of no legal force or effect * * *; and further, knew and was well aware that he was not divorced from Georgia. * * *"

Upon consideration of the evidence, the findings formerly made were affirmed and the issue of the good faith of Vickers' representation to the court was determined adversely to him. Vickers knew or should have known, the committee found, that the allegation of his petitions to the probate court concerning his relationship to Olive was false and untrue. That representation, the committee further found, was made with the object of intentionally misleading the court as to the true facts "and for the sole purpose of obtaining letters of administration of an estate in which * * * [he] had no legal interest or right whatsoever, nor any legal right to apply for such letters." From these facts, the committee concluded in the same form as its original

recommendation, that Vickers violated his oath and duties as an attorney at law within the meaning of the Business and Professions Code, and again recommended that he be disbarred from the practice of law.

When the supplemental proceeding reached the Board of Governors, Vickers made a motion for a hearing de novo. The motion was denied but he was allowed to present certain additional evidence. He testified to substantially the same facts as he had stated to the committee and asserted that he "honestly believed" he had done everything necessary to obtain a Mexican divorce. He also declared that at the time of his appearance in the probate court he not only "honestly believed" that Olive was his wife, but still has that belief. "I was absolutely acting in good faith in obtaining the Letters of Special Administration * * *. [T]here was no doubt in my mind; my only purpose was to see that she got a decent burial."

Other testimony of Vickers was that he did not secure the marriage license in El Paso in the belief that his previous marriage had been dissolved. "I knew I had a year to wait on the California action," he explained. But, according to his belief, he insisted, the Juarez action resulted in his being free to marry notwithstanding the fact that in California the decree of divorce was not final.

[3,4] The interlocutory decree of divorce obtained by Georgia could not have become final before September 2, 1943. This was over nine months after the marriage ceremony in El Paso and also after the time of filing the petitions for letters of administration. It is elementary that an interlocutory decree of divorce does not dissolve the union. The parties continue to be husband and wife until the entry of a final decree after the lapse of one year. Civ.Code, sec. 61, subsec. 1, and sec. 132. There is no substance whatever to the assertion of Vickers that by virtue of the Texas ceremony he was technically the "husband" of Olive under a voidable marriage. At all times shown by this record he was the husband of Georgia and by the terms of section 61 of the Civil Code, his purported marriage to

Olive not only was "illegal and void from the beginning" but subject to collateral attack at any time. In re Estate of Elliott, 165 Cal. 339, 132 P. 439.

Vickers has had a legal education and some experience in divorce litigation. His marital status at the time of the marriage ceremony with Olive and when she died primarily depended upon the status of his marriage to Georgia. He admits knowledge of all of the essential facts of the proceeding brought by Georgia, and considering all of the circumstances surrounding his acts with Olive in El Paso, the findings of fact and conclusions of law made by the administrative committee, and adopted with minor changes only by the Board of Governors, are fully justified by the evidence.

It is argued that, at the worst, Vickers was in the position of a putative or de facto spouse, and for that reason had a standing in court in matters relating to property. But his argument begs the question, for the principal issue in the present case is whether or not he acted in good faith in representing that he was the surviving husband of Olive. He relies upon *Schneider v. Schneider*, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386, and *Coats v. Coats*, 160 Cal. 671, 118 P. 441, 36 L.R.A., N.S., 844, but in these cases the parties who entered into the marriage acted in good faith and honest belief in their right to do so.

[5,6] Concerning the complaint of Vickers as to the severity of the discipline recommended, the representation to a court of a fact known by an attorney to be false is a serious matter, particularly when that fact relates to his own affairs and is the basis for an order by which he obtains financial advantage. Vickers has been under suspension as discipline imposed in two proceedings brought upon four different complaints against him, and the record of his prior misconduct was properly considered by the Board of Governors in reaching a determination as to the discipline to be recommended upon the present charge. *Herron v. State Bar*, 24 Cal.2d 53, 147 P.2d 543; *McGregor v. State Bar*, 24 Cal.2d 283, 148 P.2d 865; *Prime v. State Bar*, 18 Cal.2d 56, 112 P.2d

881. However, the recommendation by the Board of Governors in the present proceeding will be modified, and it is ordered that the petitioner be suspended from the practice of law for a period of three years commencing thirty days after the date of filing of this opinion.

CARTER, Justice (dissenting).

I dissent.

The sole basis for the judgment of suspension in this case is a claimed knowingly false representation by petitioner to the Probate Court that he was the husband of Olive Agnes Vickers, deceased, in a proceeding for special letters of administration on her estate. Not only is the result based upon the wholly *private* conduct of petitioner unconnected with his capacity as an attorney at law but the alleged misrepresentation was of a purely technical import and was clearly not intended to cause injury to anyone. Any other conclusion finds no substantial support in the evidence.

The judgment of suspension is based upon the finding that petitioner knowingly misrepresented his marital status to the court in his petition as above mentioned. That alleged falsity must turn upon the assumption that petitioner's marriage to Olive was invalid, which in turn depends upon the legality of the proceedings for a divorce in Mexico. It should be noted that while no divorce was ever granted by the Mexican court, proceedings therefor were commenced. Whether or not the proceedings there taken, together with all the other circumstances, were sufficient to make petitioner's claim that he was Olive's husband, in bad faith, is the question presented. It should first be observed in this connection that the legal question as to the legality of Mexican divorces is difficult and involved. Mexican divorces have been held valid. *Commonwealth v. Yarnell*, 313 Pa. 244, 169 A. 370. And also invalid. *Bethune v. Bethune*, 192 Ark. 811, 94 S.W.2d 1043, 105 A.L.R. 814; *Garman v. Garman*, 70 App.D.C. 4, 102 F.2d 272, 122 A.L.R. 1317; *Bergeron v. Bergeron*, 287 Mass. 524, 192 N.E. 86; *May v. May*, 251 App.Div. 63, 295 N.Y.S. 599; *In re Estate of McNutt*, 36 Cal.App.2d 542, 98 P.2d 253; *DuQuesnay*

v. Henderson, 24 Cal.App.2d 11, 74 P.2d 294; *Kegley v. Kegley*, 16 Cal.App.2d 216, 60 P.2d 482; *People v. Harlow*, 9 Cal.App.2d 643, 50 P.2d 1052; 105 A.L.R. 817. There may be an estoppel to question the validity of the foreign decree. *Bruguiere v. Bruguiere*, 172 Cal. 199, 155 P. 988, Ann. Cas.1917E, 122; *Kelsey v. Miller*, 203 Cal. 61, 263 P. 200. In an article on Mexican marriages and divorces by William B. Stern, Foreign Law Librarian of the Los Angeles County Law Library, appearing in the March-April, 1945, edition of *The State Bar Journal*, the following statement appears:

"It would be beyond the scope of this article to point out details in which the codes of the several states differ from the Old or the New Federal Civil Codes, or from both of these codes. But I would like to emphasize the need of consulting the codes and laws of each particular state whose law forms the basis of a controversial marriage or divorce. Such a search of the law should not only compromise the normative rules of the laws, but should also embrace statutory provisions by which dispensatory faculties are conferred on judicial and administrative authorities; many marriages and divorces which at first glance seem to be defective, actually derive their validity from dispensations and waivers."

So far as the record in this case discloses, no judicial tribunal has passed upon the validity of petitioner's marriage to Olive Agnes Vickers. The petition for revocation of the special letters of administration issued to petitioner alleged that petitioner was not married to Olive, but other grounds were advanced, and it does not appear upon which ground the order of revocation was granted. It is not claimed that the marriage was not legally consummated according to the law of Texas where it was solemnized. The sole claim of invalidity is predicated upon the assumption that petitioner's marriage to Lillian Vickers had not been dissolved at the time his marriage to Olive was consummated, giving consideration to the point to which the proceedings had developed and the effect thereof. This presented a legal question which could only be determined by a judicial tribunal in an

appropriate proceeding after obtaining jurisdiction over the parties and the subject matter.

It clearly appears from the record in this case that the charge against petitioner is based upon the conclusion reached by The State Bar that petitioner was guilty of unprofessional conduct involving moral turpitude because he made an alleged misrepresentation relative to his marital status. In my opinion it is not the function of The State Bar to pass upon the validity of the marital status of members of the bar, or predicate a charge of moral turpitude against a member of the bar upon representations made by him in good faith with respect to his marital status, especially in a case such as this where the record shows that the validity of petitioner's marriage to the deceased was dependent upon the validity of divorce proceedings which petitioner claims he instituted in Mexico where he says he was advised by legal counsel that such decree was valid and legal and resulted in the permanent dissolution of his former marriage. Even conceding that a judicial tribunal might determine such proceedings to be insufficient to sever the bonds of matrimony in an appropriate proceeding to test their validity, it would not necessarily follow that a member of the bar would be guilty of moral turpitude in making a representation in good faith that such proceedings were effective before they had been adjudged invalid by a judicial tribunal having jurisdiction to pass upon their validity. Many cases have been decided by the courts of last resort of several of our states and by the Supreme Court of the United States involving questions of this character and we find these courts divided on the question of whether or not divorce proceedings consummated in certain states were effective to dissolve the marriages which were the subject of such proceedings. The following citations reflect the wide divergence of judicial opinion which has existed and apparently still exists on this subject. *Sherrer v. Sherrer*, 68 S.Ct. 1087; *Coe v. Coe*, 68 S.Ct. 1094; *Estin v. Estin*, 68 S.Ct. 1213; *Kreiger v. Kreiger*, 68 S.Ct. 1221; *Esenwein v. Commonwealth of Pennsylvania ex rel. Esenwein*, 325 U.S. 279, 65 S.Ct. 1118, 89 L.Ed. 1608, 157 A.L.R.

1396; *Williams v. State of North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366; *Esenwein v. Commonwealth*, 325 U.S. 279, 65 S.Ct. 1118, 89 L.Ed. 1608, 157 A.L.R. 1396; *Williams v. State of North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273; *Haddock v. Haddock*, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867, 5 Ann.Cas. 1; *Andrews v. Andrews*, 188 U.S. 14, 5 to 3, 23 S.Ct. 237, 47 L.Ed. 366; *Atherton v. Atherton*, 181 U.S. 155, 21 S.Ct. 544, 45 L.Ed. 794; *Bell v. Bell*, 181 U.S. 175, 21 S.Ct. 551, 45 L.Ed. 804; *Olds v. Olds*, 219 Iowa 1395, 260 N.W. 1, 5 to 4, 261 N.W. 488; *Golden v. Golden*, 41 N.M. 356, 68 P.2d 928, 3 to 2; and 17 Am.Jur., *Divorce & Separation*, sec. 747.

In the concurring opinion of Mr. Justice Douglas in the *Esenwein* case [325 U.S. 279, 65 S.Ct. 1120] he made the very pertinent observation that "The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States."

In view of the great conflict of judicial opinion as to the jurisdictional requirements necessary to consummate a valid divorce proceeding it is not possible for me to see how a charge of unprofessional conduct can be predicated upon a representation made in good faith by a member of the bar relative to his marital status where such member of the bar launches proceedings to obtain a divorce in accordance with the law of a state or foreign country before consummating the marriage in question. In other words, in view of the conflict of judicial opinion on the difficult and complex problems involved in the determination of the validity of the marital status, it seems to me that it is expecting too much of a lowly member of the bar to be absolutely certain of his marital status under the circumstances here presented.

It is my understanding that under recent decisions of the United States Supreme Court, the courts of one state are not required to give full faith and credit to a divorce decree obtained in another state where jurisdictional requirements have not been met (*Williams v. State of North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed.

1577, 157 A.L.R. 1366; *Esenwein v. Commonwealth*, 325 U.S. 279, 65 S.Ct. 1118, 89 L.Ed. 1608, 157 A.L.R. 1396), and parties who remarry after obtaining such a decree may be adjudged guilty of bigamy. There are no doubt many cases of this character where no prosecution will ever be instituted because of inaction of the prosecuting officials or where both parties to the invalid divorce decree have remarried. Nevertheless, the crime of bigamy has been committed in such cases, and if a lawyer is involved, he is subject to disbarment because the crime of bigamy certainly involves moral turpitude. If the majority opinion in this case is permitted to stand, then The State Bar may successfully proceed with disbarment proceedings against every member of the bar of this state who has remarried after his former marriage was presumably dissolved by a decree of divorce which is subject to a jurisdictional infirmity without a prior determination of its invalidity by a judicial tribunal of competent jurisdiction. In other words, The State Bar will be permitted to perform the functions of both our Criminal and Civil Courts in addition to its function as an administrative agency. This was never contemplated by even the most ardent supporters of The State Bar Act.

The asserted disability relied upon in order to disqualify Vickers from entering into a marriage with the decedent was that he had not complied with the procedural requirements necessary in order to obtain a divorce in Mexico. To hold that Vickers knew the falsity of the allegation in his petition for special letters of administration that he was the husband of the deceased, and that he made the representation with the intent to deceive, is quite different from a determination as to what his actual marital status may have been after the Mexican divorce proceeding and the Texas marriage ceremony, and is unsupported by any evidence in the entire record. The majority opinion apparently upholds the finding referred to upon the slim basis of what Cocke, petitioner's attorney in the Mexican divorce proceedings, said he told petitioner. Plainly petitioner did not understand it in that fashion, otherwise it is not to be supposed that he would have married Olive there-

after and commit the crime of bigamy. On the contrary the presumption is, in accordance with his testimony, that he believed the marriage was severed, that he acted innocently and did not violate the law.

It is well settled in this state that when a marriage has been shown in evidence the law raises a strong presumption of its legality. In *re Pusey*, 173 Cal. 141, 159 P. 433; *Hunter v. Hunter*, 111 Cal. 261, 267, 43 P. 756, 31 L.R.A. 411, 52 Am.St.Rep. 180; In *re Estate of Newman*, 34 Cal.App. 2d 706, 710, 94 P.2d 356. There is also a presumption that a person is innocent of crime or wrong. See, Code Civ.Proc., sec. 1963(1); In *re Estate of Newman*, supra. (If Vickers did not obtain a divorce in Mexico his marriage to the decedent was bigamous.) It is obvious that these presumptions have not been dispelled in this case. Certainly, it was to Vickers' advantage to complete the Mexican divorce proceeding as there would have been no object in going to the trouble and expense of hiring a lawyer and instituting a proceeding if he had no intention of pursuing the matter to completion. The good faith of Vickers in the premises is shown by the fact that he lived with the deceased, outwardly manifesting himself as her husband during the entire remainder of her life. Although she had a mother and brother living, it was he who was endeavoring to make the arrangements for her funeral and burial and see that the expenses thereof were paid. It was for that latter purpose, primarily, that he petitioned for special letters of administration.

The testimony of Vickers cannot be made the basis of an inference that he knew he had not obtained a divorce in Mexico. An inference is a conclusion as to the existence of a material fact that may properly be drawn from the existence of certain primary facts. See, Code Civ. Proc., secs. 1832, 1958. Whether a particular inference can be drawn from certain evidence is a question of law and depends upon its reasonableness. See, Code Civ. Proc., sec. 1960. The majority opinion points to no primary facts testified to by Vickers from which it can reasonably be inferred that he knew the Chihuahua court had no jurisdiction to enter or did not enter

a divorce decree prior to the marriage ceremony in El Paso. On the other hand, quite to the contrary, Vickers' testimony reveals the following: His attorney told him that it took six months to get a divorce in the State of Baja California; thirty days in Sonora, and by virtue of special treaty with the State of Chihuahua, a divorce could be obtained there in one day. When in Juarez, Chihuahua, he appeared in court before a judge and signed an official "document roll." While returning to El Paso his attorney told him it "was all over" and that he had a divorce. He was told that it was not essential to the validity of the divorce in Chihuahua that the defendant be notified, because under the laws of Chihuahua the opposing party could not contest the grounds for divorce; that the fact of the filing of a complaint is taken to show dissatisfaction and incompatibility, and the divorce is automatically rendered. He was further informed that notice would be sent to the county of the residence of the defendant for personal service upon her, in accordance with the general practice carried on in order to satisfy the comity requirements of some of the adjoining states. Also, that this notice, when returned, would be filed in the divorce action nunc pro tunc. His testimony further reveals that he informed the court of the residence address where the defendant could be found and served.

Furthermore, under the facts of this case, Vickers' state of mind at the time he went through the marriage ceremony in El Paso has no bearing upon what he knew at the time he filed his petition for special letters in the estate of Olive Agnes Vickers. In other words, even if it were possible to infer from Vickers' testimony concerning the notice or waiver that was to be sent or obtained from his first wife, that he must have known that no divorce decree had been entered prior to the El Paso marriage ceremony, this furnishes no support for the charge in this proceeding that he knew that he was not the husband of the deceased eight months later when he filed his petition in the Probate Court. This for the reason that Vickers was also told that this waiver or notice would be entered nunc pro

tunc. The question is not whether this actually could or could not confer jurisdiction upon the court to render a divorce decree at or prior to the time of the marriage ceremony with the deceased (assuming such notice or waiver to be necessary), but whether such fact furnished a reasonable basis for Vickers to believe that it could. In view of the further fact that his wife could not contest the divorce suit, even if she wanted to, it appears to have been most reasonable for him to so believe.

The contention that Vickers knew Mexican legal procedure gains no support from the facts of his education and experience. At the time of the events here concerned he was 33 years of age. His legal experience was quite limited. He had been a member of The State Bar less than four years and had not practiced elsewhere. It need scarcely be said that the modes and methods of civil procedure in Mexico are not matters of common knowledge to the bar of this state. Respondent proved what it claimed to be the law of Chihuahua, Mexico, at the time in question by a member of the bar of that place, qualified as an expert upon divorce law. Moreover, Vickers did not represent himself in the Mexican proceeding, but engaged an attorney licensed to practice in Chihuahua, Mexico.

I further am unable to subscribe to the majority opinion for the reason that it characterizes the acts charged in count one of the order to show cause as "professional misconduct." Vickers did not appear before the Probate Court in his capacity as an attorney, but appeared in his personal capacity and so advised the court. He did not even prepare the petition, but another attorney, whose name appears thereon, did so for him. If by the citation of Business and Professions Code section 6106, the majority mean to imply that Vickers was guilty of "moral turpitude, dishonesty or corruption," then the opinion is further erroneous for the reason that there was no attempt at personal gain. Vickers obtained the appointment as special administrator for legitimate reasons within the purview of the Probate Code provisions for such appointment. He was in need of funds to provide a funeral and decent burial for the

one with whom he had been living, ostensibly, and in good faith as his wife. Immediate action was also necessitated in order to consummate a sale of real property that had belonged to the deceased and petitioner before such sale was rendered impossible by virtue of foreclosure proceedings then under way. A special administrator is an emergency officer, appointed where necessary, not to conduct administration or distribution of the estate, but solely to conserve the property. 11 B Cal.Jur. 864. He was required to post a \$2,000 surety bond as a condition precedent to being appointed special administrator, and it does not appear that any claim has ever been made against the surety on account of maladministration by Vickers nor has it been shown in this proceeding that any detriment was caused to the estate by his appointment.

It appears that the petition for special letters of administration was filed six days after the death of Olive Agnes Vickers, claimed by petitioner to be his wife, and at a time when he had but twenty-five cents to his name. One's qualifications to discharge whatever trust may be reposed in him by virtue of his profession or general occupation should not be judged too strictly by what he does at such a dismal hour and under stress of such circumstances. Under any view of the facts in this proceeding nothing is shown that is deserving of any further discipline than that which the petitioner is now undergoing.

In conclusion, I deem it appropriate to quote from the opinion of the District Court of Appeal in the case of *In re Kling*, 44 Cal.App. 267, at page 271, 186 P. 152, 153, where the court speaking through Mr. Justice Victor E. Shaw said: "The record, as we read it, fails to disclose any deception on the part of appellant, or that he acted through corrupt motives or otherwise violated the provisions of section 282, Code of Civil Procedure. The oath required by section 278, Code of Civil Procedure, of any attorney is that he will 'faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability.' *Moral turpitude cannot be predicated upon errors of judgment as to the law, or action had and taken in good faith by an*

attorney, openly and with notice to the adverse party under an honest assertion of legal right, where there is no deception practiced or unfair advantage sought."

In my opinion the proceeding against the petitioner should be dismissed.



32 Cal.2d 301

MORAN v. STATE BOARD OF MEDICAL EXAMINERS OF DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS OF CALIFORNIA et al.

L. A. 20514, 20515.

Supreme Court of California.

July 30, 1948.

Rehearing Denied Aug. 26, 1948.

1. Physicians and surgeons ⇨11(3)

The power of state board of medical examiners to reconsider decision suspending physician's license expired on delivery of decision to physician, where board ordered decision effective on such delivery. Government Code, §§ 11519, 11521.

2. Mandamus ⇨164(3)

Defendants failing to deny new factual matter in amendment to petition for writ of mandate would be deemed to have admitted such new matter. Code Civ.Proc. § 462.

3. Mandamus ⇨143(1)

The statute permitting petition for writ of mandamus to review agency's decision to be filed within five days after delivery to petitioner of board's record made pursuant to petitioner's "request to agency" must be liberally and not narrowly construed. Government Code, § 11523.

4. Mandamus ⇨143(1)

Physician's request to duly appointed shorthand reporter for state board of medical examiners for preparation of record of proceedings before board resulting in suspension of physician's license was "request to agency" within statute permitting petition for writ of mandamus to review decision of board to be filed within five days after delivery to physician of

board's record made pursuant to physician's "request to agency". Government Code, §§ 11500, 11518, 11519, 11521, 11523; Business and Professions Code, § 2109.

See Words and Phrases, Permanent Edition, for all other definitions of "Request To Agency".

5. Mandamus ⇨174

In mandamus proceeding to review decision of state board of medical examiners suspending physician's license, trial court was authorized by law to exercise its independent judgment on the evidence. Code Civ.Proc. § 1094.5.

6. Appeal and error ⇨930(1)

In reviewing evidence on appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged to uphold verdict if possible.

7. Appeal and error ⇨989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

8. Appeal and error ⇨996

When two or more inferences can reasonably be deduced from the facts, appellate court cannot substitute its deductions for those of trial court or jury.

9. Appeal and error ⇨931(1)

Appellate courts, if there be any reasonable doubt as to sufficiency of evidence to sustain a finding, should resolve that doubt in favor of the finding.

10. Mandamus ⇨187(9)

On appeal by state board of medical examiners from judgment annulling board's decision suspending physician's license, evidence was viewed in the light most favorable to physician.

11. Mandamus ⇨168(4)

Evidence warranted finding that physician's treatment of alleged drug addicts was emergency treatment and that condition of alleged addicts was complicated by presence

of incurable disease, so that suspension of physician's license by state board of medical examiners for prescribing narcotics to the alleged addicts was abuse of discretion. Business and Professions Code, §§ 2390, 2391; Health and Safety Code, § 11391.

12. Evidence ⇨14

It is common knowledge that some sufferers from severe cases of asthma and arthritis spend many years vainly seeking permanent relief and cure.

13. Mandamus ⇨151(2)

In mandamus proceeding to review decision of state board of medical examiners suspending physician's license, members of board were proper but not necessary parties.

14. Mandamus ⇨190

In mandamus proceeding to review decision of state board of medical examiners suspending physician's license, expense incurred by physician for preparation of record of proceedings before the board was taxable as costs, where physician was the prevailing party. Code Civ.Proc. § 1094.5.

TRAYNOR, EDMUNDS and SPENCE, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Henry M. Willis and Allen W. Ashburn, Judges.

Proceeding by James A. Moran against the State Board of Medical Examiners of the Department of Professional and Vocational Standards of the State of California and R. O. Bullis and others, members of the State Board of Medical Examiners, for a writ of mandate to compel the annulment of an order of suspension of license to practice as a physician and surgeon. From the judgment, the defendants appeal, and from the order taxing costs, the petitioner appeals.

Judgment affirmed and order affirmed as modified.

Prior opinion, 187 P.2d 878.

Joseph Scott and Cuthbert J. Scott, both of Los Angeles, for petitioner.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondents.

SCHAUER, Justice.

In February, 1944, respondent Board of Medical Examiners (hereinafter termed the Board) licensed petitioner James A. Moran (hereinafter called petitioner) to practice medicine and surgery in California. Thereafter petitioner developed a general practice of his profession at Carmel, in Monterey County. In May, 1946, a special agent of the Board filed a written accusation charging petitioner with three counts of unprofessional conduct in the prescription of certain narcotics and asking that the Board discipline petitioner. Following a hearing the Board, on August 16, 1946, filed its written decision and ordered that petitioner was guilty as charged, that his medical certificate be suspended for one year, that for five years immediately following the year of suspension petitioner be on probation and neither have in possession nor prescribe narcotics, and that the decision "shall be effective immediately upon delivery of a copy thereof" to petitioner.

On September 26, 1946, petitioner filed in the superior court in Los Angeles his petition for a writ of mandate asking that the court review the proceedings before the Board, set aside the decision and order of the Board, and order that petitioner's license to practice medicine in this state be restored; an alternative writ was issued the same day. The individual members of the Board, as well as the Board itself, are named as parties respondent in both the petition and the alternative writ. On October 16, 1946, the Board by way of return filed its demurrer and answer to the petition for the writ; and there was also filed in the superior court a transcript of the proceedings before the Board. That court, after a hearing but with no evidence other than the transcript of the Board proceedings, overruled the demurrer, made findings in favor of petitioner, and ordered that the decision of the Board be annulled, that petitioner's medical certificate be restored, and that petitioner recover his costs. The

Board has appealed from the judgment annulling its decision (L.A. 20514) and petitioner has appealed from the order of the court taxing his costs at only \$31.60 and disallowing an item of \$117 paid by him as the cost of the transcript of the proceedings before the Board (L.A. 20515). We have concluded that upon the record and the applicable law the judgment of the trial court must be affirmed and that petitioner is entitled to recover the item of costs which was disallowed.

As grounds requiring reversal of the trial court's judgment in petitioner's favor, the Board contends:

1. That the petition for mandamus was not filed within the time allowed by statute.

2. That the record of the proceedings before the Board supported its decision, and the trial court had no power to set aside such decision.

1. Time for Filing Mandamus Petition.

Section 11523 of the Government Code provides that judicial review of the Board's decision "may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. Except as otherwise provided in this section any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. * * * The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days¹ after a request therefor by him, upon the payment of the expense of preparation and certification thereof. * * * Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until five days after its delivery to him. * * *

Section 11518 of the same code states that the Board's decision "shall be in writing," and section 11519 provides that the "decision shall become effective 30 days after it is delivered or mailed to respondent [petitioner herein] unless: * * * the agency itself [here, the Board] orders

¹ Prior to the 1947 amendment to section 11523 the period was "20 days."

that the decision shall become effective sooner * * *." Section 11521 provides that the "power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent [petitioner herein], or on the date set by the agency itself as the effective date of the decision if such date occurs prior to the expiration of the 30-day period."

[1] In this case the Board ordered that its decision be effective upon delivery of the written decision to petitioner. Delivery took place on August 19, 1946, and consequently the Board's power to order a reconsideration expired on the same date, and the time allowed petitioner to file this mandamus proceeding expired 30 days later unless extended by other provisions of section 11523 of the Government Code. As noted hereinabove, the mandamus petition was filed September 26, 1946, or subsequent to the expiration of such thirty-day period. Petitioner urges, however, that within ten days of August 19, 1946, he "requested the agency to prepare * * * the record" of the proceedings before it, that he filed this petition for mandamus within five days after delivery of the record to him, and that therefore he acted within the time allowed by the provisions of section 11523, quoted hereinabove.

As originally filed on September 26, 1946, the petition for mandamus contained no reference to the facts which petitioner claims establish that the petition was filed in time. The Board demurred to the petition on the grounds, among others, that the court "has no jurisdiction of the subject of the purported cause of action set forth or referred to in said petition," that the petition failed to state facts sufficient to constitute a cause of action, and that the petition was not filed "within the time permitted by law, and, more specifically," within 30 days after the effective date of the Board's decision. With the demurrer the Board filed its answer expressly admitting "the allegations contained in Paragraphs I, III, IV, V and VI" of the petition and denying all other allegations thereof. Thereafter petitioner, with leave of court, filed an amendment to paragraphs VI and VII of his petition. As amended, para-

graph VI alleges, among other things, that the Board's decision "was made effective immediately upon delivery of a copy thereof to petitioner, and that said copy was received by petitioner on August 19, 1946; that on said August 19, 1946, petitioner requested respondent State Board of Medical Examiners, by requesting its duly appointed shorthand reporter, Ralph A. Sollars, to prepare a full and complete record of the proceedings held * * *; that on September 24, 1946, petitioner's attorney * * * received direct from said Ralph A. Sollars, via Railway Express, the record hereinbefore referred to and now on file with the above entitled court."

[2] The Board filed no answer to the amendment to the petition. Nevertheless, it now asserts that "none of petitioner's allegations upon this subject [request for the record of the Board's proceedings], denied in the return, were proved. In fact, there was no attempt to prove them." Apparently the Board is suggesting that the denials contained in its answer to the petition as originally filed should be deemed extended to relate also to new matter added by the amendment but that its express admission of the allegations of paragraph VI do not relate to that paragraph as amended. There is no merit in such suggestion. If the denials of the answer be deemed extended (and we are aware of no authority to support such an extension, in the absence, as here, of stipulation to that effect) to new matter pleaded in the amendment to the petition, then the Board is in the position of denying not only that petitioner requested a copy of the Board proceedings, but of denying also that a copy of its decision was ever delivered to or received by petitioner so as to set running the time allowed to petitioner to file this mandamus proceeding. "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true * * *." (Code of Civil Procedure, § 462.) We are of the view that the Board, by failing to deny the new factual matter contained in the amendment to the petition, must be deemed to have admitted it. (See 21 Cal.Jur. p. 155, § 106, and p. 188, § 131.)

[3] The Board urges that in any case a request made of the shorthand reporter to prepare the record of the proceedings before the Board is not a request of "the agency" within the provision of section 11523 and did not operate to extend the time within which petitioner might file his mandamus petition. In support of its position the Board points to section 1300 of Title 16 of the California Administrative Code, by which it has established the locations of its offices in Sacramento, Los Angeles, and San Francisco (see also Bus.&Prof.Code, § 2109); and to section 1303 of the same code, by which it delegates (pursuant to the authority of Govt. Code, § 11500) certain of its functions to its Secretary-Treasurer, "or in his absence from the office of the Board, to its Assistant Secretary." The Board argues that its failure in this latter section to expressly delegate the function of receiving a request for a record of disciplinary proceedings before it, establishes that petitioner's request to the shorthand reporter amounted to no request at all, within the intentment of section 11523 of the Government Code. But the very language used in the last mentioned section carries an implication that it must be liberally, rather than narrowly, construed. The language is that "The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency," etc. It seems obvious that such part of the proceedings as is reflected only by the reporter's notes can "be prepared by the agency" only as it acts through the reporter. In other words, the reporter is necessarily representative of the agency in preparation of at least a part of the record. There is no denial that in this case Sollars was the agency's "duly appointed shorthand reporter" nor is there any contention that any person other than the official reporter could have prepared the record. Furthermore, section 11500 of the Government Code does expressly provide that "wherever the word 'agency' alone is used *the power to act may be delegated by the agency* and wherever the words 'agency itself' are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's pow-

er to hear and decide." (Italics added.) We are of the view that if such quoted section has any significance at all in relation to the proposition for which the Board invokes it that it tends to support petitioner's position rather than that of the Board. Certainly the function of making the record in the first place; i. e., of taking the notes in shorthand, was delegated to the official reporter; yet section 1303 is as silent on the delegation of that duty as it is on the function of preparing the transcript or receiving the request for the transcription.

[4] The "Certificate of Reporter" attached to the record states that "the foregoing is a full, true and correct transcript of the shorthand notes taken by me in the above entitled matter, on the dates hereinbefore specified, and * * * is a full, true and correct statement of the proceedings had in the same matter as directed by the Board of Medical Examiners." In its answer to the petition for mandamus the Board alleges that the record as filed in the trial court is accurate, and adopts into its answer by reference, all of the contents of such record. It also relies upon the same record to support its arguments on other phases of this case, hereinafter discussed. It is to be noted that such record contains not only the oral proceedings before the Board, including photostatic copies of exhibits introduced, but also copies of the written accusation before the Board, of Notices of Hearing, of petitioner's Notice of Defense, and of petitions and notices concerning the taking of depositions; in other words, the entire file of the Board proceedings is seemingly included. Thus, the authenticity of the record is established; the attack is directed not at the authority of the reporter to have *prepared* the record for the agency but only at his authority to have *received the request* for the same on behalf of the agency. Under such circumstances, the holding of the trial court to the effect that petitioner's request to the reporter constituted substantial compliance with the statutory provisions and amounted to a request to the agency and that the act of the "duly appointed reporter" in furnishing the transcript was the act of the agency, must be sustained.

2. The Evidence Before the Board.

Petitioner urges and the trial court found that certain of the findings of the Board, upon which its decision rested, were not supported by the weight of the evidence received by the Board, and, therefore, abuse of the Board's discretion was established within the provisions of section 1094.5 of the Code of Civil Procedure. That section, enacted in 1945, treats of court review of administrative orders and decisions. It provides, among other things, that "(a) Where [as here] the writ [of mandamus] is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the * * * board * * * may be filed * * *. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

"(b) The inquiry in such a case shall extend to the questions whether * * * there was any prejudicial abuse of discretion. Abuse of discretion is established if * * * the findings are not supported by the evidence.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence."

[5-10] That the trial court in this case was "authorized by law to exercise its independent judgment on the evidence" is well established. (See *Dare v. Board of Medical Examiners* (1943), 21 Cal.2d 790, 795, 136 P.2d 304; *Sipper v. Urban* (1943), 22 Cal.2d 138, 141, 137 P.2d 425; *Hohreiter v. Garrison* (1947), 81 Cal.App.2d 384, 402, 184 P.2d 323.) As stated in the last cited case, 81 Cal.App.2d at page 402, 184

P.2d at page 334, "Thus the ultimate power of decision rests with the trial court." And, as declared in *Re Estate of Bristol* (1943), 23 Cal.2d 221, 223, 143 P.2d 689, 690, on appeal from the judgment of the trial court, "The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (*Crawford v. Southern Pacific Co.* (1935), 3 Cal.2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. * * * Appellate courts, therefore, if there is any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding." (See also *In re Estate of Teel* (1944), 25 Cal.2d 520, 526, 154 P.2d 384; *Viner v. Untrecht* (1945), 26 Cal.2d 261, 267, 158 P.2d 3; *Rice v. California Lutheran Hospital* (1945), 27 Cal.2d 296, 301, 163 P.2d 860; *De Young v. De Young* (1946), 27 Cal.2d 521, 526, 165 P.2d 457.) It follows that the question before us is whether the evidence, viewed in the light most favorable to petitioner, sustains the findings of the trial court to the effect that the charges against petitioner were not supported by the weight of the evidence.

As indicated hereinabove, the only evidence considered by the court was the record of the proceedings before the Board, which included a transcript of the oral hearing. The accusation filed with the Board charged that petitioner on certain dates in 1945 violated section 2391 of the Business and Professions Code in that at the respectively specified times, and other-

wise than in "emergency treatment * * * or required by the presence of incurable disease * * * or the infirmities attendant on age," he prescribed narcotics for three alleged drug addicts, whom we designate here as Catherine (drugs prescribed between October 15 and December 11, 1945); Allan (drugs prescribed between October 22 and November 23, 1945); and R. L. (drugs prescribed on September 28 and on November 10, 1945). Petitioner freely admits that he did prescribe certain derivatives of opium to the persons named, but he contends, and the court found, that the weight of the evidence shows that petitioner's treatment of each patient was "emergency treatment * * * and that their condition at all times was complicated by the presence of an incurable disease," and that consequently the treatment was lawful and both legally and medically proper. Such contention of the petitioner and the finding and conclusion of the court in his favor are abundantly supported by the evidence.

Section 2391 of the Business and Professions Code provides that "the prescribing, * * * furnishing, * * * or administering * * * any of the drugs or compounds mentioned in section 2390 [which includes opium and morphine] to a habitue or addict constitutes unprofessional conduct within the meaning of this chapter [the chapter on medicine]."

"If the drugs * * * are administered * * * by a licensed physician and surgeon of this State * * * this section shall not apply to any of the following cases:

"(a) Emergency treatment of a patient whose addiction is complicated by the presence of incurable disease * * *

"(b) Treatment of habitues or addicts in institutions approved by the board [of Medical Examiners] * * *."

And in section 11391 of the Health and Safety Code it is provided that: "No person shall treat an addict for addiction except in one of the following: (a) An institution approved by the Board. * * * [Four other types of institutions are here listed.] This section does not apply during emergency treatment or where the

patient's addiction is complicated by the presence of incurable disease * * *."

Petitioner testified that he is a graduate of Tulane University Medical School, served an internship, and thereafter served as a medical officer in the United States Navy during World War II; that he had engaged in private practice from September, 1944, to October, 1945; that the alleged addict Catherine first came to his office, at Carmel, on October 13, 1945; that she was "complaining of severe pain in the left side of her face, and headache, and abdominal pain, and she told me that she had previously had trifacial neuralgia, which had been successfully injected, so I attempted to do the same thing over but the first time it did not work very well, so then I gave her some narcotics to take care of the pain"; that he continued treating her until December, 1945, and "prescribed a considerable amount of narcotic" because "it was evidently needed to control her pain"; that after he secured her history he was "treating her for an incurable disease, to-wit, tic douloureux and the trifacial neuralgias. * * * This trifacial, after it exists for some time, is quite difficult to control"; that he wrote to doctors who had previously treated the patient; that one of such doctors replied, under the date of October 24, 1945, that in 1928 he "did a left infra orbital injection for tic in 1928, which she [the patient] says was successful for six years. She now asks that I give you this information in the hope you will make another injection for her. She was then and is still, as far as I know, an addict." Petitioner further testified that he thereupon attempted (during the latter part of October, 1945) to secure admission to Las Encinas hospital (which is approved by the Board for the treatment of narcotic addiction) for the patient; that Dr. C. W. Thompson, medical director of the hospital, stated that no vacancies were then available, but upon inquiry from petitioner, replied that he (Dr. Thompson) thought that petitioner "would be allowed to give narcotics to this patient * * * as a humanitarian measure pending the time when the patient could be admitted for treatment"; that early in November he again "made a

strenuous effort" to have the patient admitted to the same hospital but was again told that no vacancies existed; that he thereupon attempted to secure admission for the patient into a different private hospital, also approved by the Board for narcotic treatment, and also into the County Hospital; that when he finally "got everything completed she refused to enter the hospital"; that the only money the patient ever paid him was for "her telephone calls"; that he had a well established practice with a reasonable income at the time the patient consulted him. Petitioner stated further that on Catherine's first visit to his office he injected her face with novocaine and alcohol, and also prescribed morphine sulphate because sometimes such injections do not "stop the pain"; that he had had no previous "experience with narcotics [addicts]" during his private practice; that on the occasion of Catherine's first visit to his office he did not know or suspect that she was an addict, that on examining her he observed a "muscular tic" or a "tic douloureux" on the "whole left side of her face" with frequent spasms; that such a tic is associated with a trifacial neuralgia; that his office history of the patient had been inadvertently destroyed by an inexperienced office assistant. Also introduced into evidence was a letter received by petitioner from the patient during the period he was attempting to secure her admission to Las Encinas, in which she described her years of suffering, including a history of pain from "gall bladder, tri facial, and arthritis" and expressed her appreciation for petitioner's kindness in attempting to help her. Much of petitioner's testimony as to Catherine's condition and her statements and appearance of being in great pain, as to petitioner's efforts to secure her admission to a hospital, and that petitioner was treating her primarily for trifacial neuralgia, was confirmed by his mother, a registered nurse and experienced anesthetist who assisted petitioner in his office. The mother testified further that Catherine "haunted" petitioner's office seeking treatment; that he prescribed for her until he "could get her into an institution"; that the patient said "she couldn't get the money" for hospital-

ization, and when petitioner "came to the conclusion that she had tried long enough to get the money he told her he couldn't treat her any longer, that she would have to go to an institution, and if she couldn't get the money for a private institution * * * she would have to go to the county, and I called the County Hospital and asked them to receive her and they said they would." Prescription forms introduced into evidence indicate that on 18 different dates between October 15 and December 11, 1945, petitioner prescribed morphine sulphate for Catherine; thereafter petitioner discontinued treating the patient and on or about December 16, 1945, at the direction of another doctor she was "moved to a sanitarium" for treatment for withdrawal of narcotics.

Other prescriptions show that on nine dates between October 22 and November 19, 1945, petitioner prescribed morphine sulphate for the alleged addict, Allan. Petitioner testified that when he first examined Allan the latter "was in an acute asthmatic attack * * * choking * * * and I tried adrenalin and that didn't work. Then I started giving him Vitamin C and morphine and that seemed to hold him—control his symptoms"; that the only way petitioner "could control his symptoms was by the administration of Morphine Sulphate in large quantities"; that Allan was "to take these morphine sulphate tablets whenever he had an attack"; that Allan's history indicated "that he had had his asthmatic attacks for several years. * * * He told me he had an attack every twelve or twenty-four hours"; that "asthmatics normally have that terrific choking condition" and recurrence "so regularly" is "quite ordinary * * * depends entirely on changes of the weather and diet." Petitioner's mother confirmed that Allan first came in the office with an attack of asthma, "Practically choking and couldn't get his breath. * * * Every occasion he came in the office he was choking. * * * This was no simulation." Dr. Harold E. Fraser, "Medical Examiner of the Courts of San Francisco," testified that he examined Allan in January, 1946; Allan told him of suffering so severely from chronic asthma that morphine treatment

had been given; that he, the witness, believed Allan had asthma; that emergency treatment might require morphine; that morphine sulphate is recognized by some physicians as a proper prescription for chronic asthma.

Prescriptions indicate that on September 28, 1945, and again on November 10, 1945, petitioner prescribed pantopon, another opium derivative, for the alleged addict, R. L. Petitioner testified that he saw R. L. "about twice, maybe three times"; that petitioner administered narcotics "because of extreme pain and suffering in connection with a spinal arthritis" with which the patient was afflicted; that he (petitioner) did not consider R. L. an addict at the time but was "suspicious of him" and therefore inquired of the State Division of Narcotic Enforcement concerning the patient. Petitioner stated further that he believed he was treating all three of the alleged addicts "for a pathology rather than addiction." An inspector from the Division of Narcotic Enforcement confirmed the fact that petitioner had inquired concerning R. L., on September 18, 1945, and had been informed the following day that "there was nothing on file at the office of the Division" concerning the patient. The inspector testified further that on November 13, 1945, petitioner had made a written report to the Division concerning his prescription of narcotics for Allan in which petitioner stated Allan to be an addict, and on the same date made a similar report concerning Catherine; that from the reports "there was no indication that there was any dereliction on" petitioner's part; that in all his "dealings and conversations with" petitioner the inspector found petitioner "most cooperative."

The agent of the Board, who filed the accusation against petitioner, also testified that when he questioned petitioner concerning the three alleged addicts petitioner "made a full and complete disclosure" and "did not appear to try to hold anything back."

[11, 12] It is apparent that the evidence summarized above amply supports the trial court's finding that petitioner's treatment of the three alleged addicts "was

emergency treatment * * * and that their condition at all times was complicated by the presence of an incurable disease." Petitioner testified that in each case his treatment was for the purpose of relieving acute pain and suffering. From the long history of Catherine's afflictions and the opinion of petitioner the court was warranted in the view that her condition was "complicated by the presence of an incurable disease," and it is common knowledge that some sufferers from severe cases of asthma and arthritis, the diseases of Allan and R. L., spend many years vainly seeking permanent relief and cure. The Board points to evidence in the record which it urges establishes that petitioner was treating none of the three patients as an emergency measure or for a bona fide disease but solely for addiction. Such evidence at the most presents only a conflict with that discussed hereinabove. The trial court has resolved the conflict in petitioner's favor and under the rules already set forth its decision must stand.

[13] As mentioned hereinabove, both the Board and its individual members are named as respondents in the petition for mandamus, and the judgment rendered by the trial court is also directed to the Board and to the persons of whom it is composed, who are first named and then described as "Members of the State Board of Medical Examiners." The Board contends that the members were improperly joined as parties respondent in that the Board itself is the "only agency which may afford any relief or take any action in the matter." The Board urges also that its membership changes from time to time and that undue labor and confusion will result if substitution of parties must occasionally be made in a court action involving the Board. In support of its position on this point the Board cites *Boland v. Cecil* (1944), 65 Cal. App.2d Supp. 832, 840, 150 P.2d 819; *Reed v. Molony* (1940), 38 Cal.App.2d 405, 411, 101 P.2d 175; and *Sparks v. Prior* (1933), 131 Cal.App. 743, 744, 22 P.2d 233. The first two of these cases are concerned with determining whether certain named defendants were sued as individuals or in their respective official capacities, and the statement in the third case, a proceeding to re-

view an order of the Board of Dental Examiners suspending a dentist's license to practice, that only the Board itself was a proper party defendant, is not accompanied by a citation of authority. It is our view that although the members of a board such as the Board of Medical Examiners need not necessarily (in the absence of special facts requiring their presence) be included as parties, it is not improper to name them in their official capacity, as was done here. As stated at page 857 (§ 58) of 16 Cal.Jur., "Where the duty sought to be compelled is enjoined upon a board as such, the proceeding should be against the board, although the better practice seems to be to name the individual members in addition to the board. Moreover, there are exceptional cases in which the disobedience of the board is due to the action of certain individual members, where such members must be expressly made defendants, the reason therefor, appearing in the petition for the writ. Where the duty is enjoined upon particular officials as representatives of a body politic, the more general practice is to proceed against the officials, yet it is held that there is no good reason why their principal, the legal entity which is commonly the real party to be affected by the writ, may not be joined as a defendant in the proceeding; though seldom a necessary party, it may not generally be called an improper one." (See also *Golden Gate Bridge etc. Dist. v. Felt* (1931), 214 Cal. 308, 5 P.2d 585; *City and County of San Francisco v. Linares* (1940), 16 Cal.2d 441, 448, 106 P.2d 369; 35 Am.Jur. 80, § 328.) We hold that in the absence of legislative provision to the contrary the members of the Board are proper, but not necessary, parties to this proceeding.

The Board's motion to tax costs awarded to petitioner by the trial court was heard by a judge other than the one who rendered judgment in petitioner's favor; an order was entered taxing petitioner's costs at only \$31.60 and disallowing the sum of \$117 paid by petitioner to the reporter as the cost of the transcript of the proceedings before the Board; and as stated here-

inabove, petitioner has appealed from the order. As already quoted herein, section 1094.5 of the Code of Civil Procedure provides that in such a proceeding as this, "If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs."

[14] Petitioner is the prevailing party; as appears hereinabove the record filed by him of the Board proceedings is an authentic record, adopted by the Board as a part of its return to the alternative writ; it is not disputed that petitioner bore the cost of preparing all of such record or that the amount paid is reasonable; it follows that his expense is taxable as costs and that the order taxing costs must be modified by adding the sum of \$117.

In case No. L. A. 20514 the judgment from which the Board appeals is affirmed. In case No. L. A. 20515 the order taxing petitioner's costs at \$31.60 is modified by adding to such costs the sum of \$117 and as so modified is affirmed.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

TRAYNOR, Justice (dissenting).

The procedure governing judicial review of the adjudicatory decisions of statewide administrative agencies is prescribed by section 1094.5 of the Code of Civil Procedure, which follows "the procedural pattern laid down by recent court decisions."¹ Tenth Biennial Report of the Judicial Council of California, 26. This section provides:

"(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

¹ *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 136 P.2d 304; *Russell v. Miller*, 21 Cal.2d 817, 136 P.2d 318;

Sipper v. Urban, 22 Cal.2d 138, 137 P. 2d 425.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

Thus, the purpose of review under this section is the correction of abuse of discretion. "Where the fact finding power is involved, the review by mandate will correct an 'abuse of discretion on the facts.'" Tenth Biennial Report of the Judicial Council of California, 141. When the action of a local administrative agency is challenged, an abuse of discretion on the facts is established if the findings are not supported by substantial evidence. In the case of a statewide agency, with statutory powers only, the court may exercise an independent judgment on the facts, and an abuse of discretion is established if the court determines that the findings are not supported by the *weight* of the evidence. Thus, the controlling issue in a mandamus proceeding to review the action of a statewide agency exercising statutory powers only, when it is claimed that the findings are not supported by the evidence, is whether the findings are supported by the *weight* of the evidence. In some instances not yet clearly defined (*Dare v. Board of Medical Examiners*, supra, 21 Cal.2d 790, 799, 136 P.2d 304; *Russell v. Miller*, 21 Cal.2d 817, 136 P.2d 318; *Wyatt v. Cerf*, 64 Cal.App.2d 732, 149 P.2d 309; *Madruga v. Borden Co.*, 63 Cal.App.2d 116, 146 P.2d 273; *West Coast Etc. Co. v. Contractors Etc. Board*, 68 Cal.App.2d 1, 155 P.2d 863; *McDonough v. Garrison*, 68 Cal.App.2d 318, 156 P.2d 983; *West Coast Etc. Co. v. Contractors Etc. Board*, 72 Cal. App.2d 287, 164 P.2d 811) the court may accept evidence in addition to that presented before the agency. If it does, however, the basic issue in the case is still whether the *weight* of the evidence supports the agency's findings. Under section 1094.5 of the Code of Civil Procedure the superior

court must find that the *weight* of the evidence does or does not support the agency's findings. The question before the superior court is, not what findings it would have made had it been the administrative agency and the hearing had been held before it, but whether the agency abused its discretion by making findings that are not supported by the *weight* of the evidence. When an appellate court reviews the decision of the superior court it must determine whether the superior court correctly decided the issue before it, namely, whether the agency's findings are supported by the *weight* of the evidence. It cannot properly make that determination without reviewing the entire record to see where the *weight* of the evidence lies. If it considered the evidence only in part, it would not be determining where the weight of the evidence lies but, only whether there is or is not some evidence on either side.

The majority opinion, however, is based on the assumption that the superior court is not acting as a reviewing court but as a trial court deciding issues of fact in the first instance as if there had never been an administrative hearing and as if the record made before the agency had been made before the court. Even though an appellate court reviewing the identical record of the administrative hearing that was before the superior court for review, concludes that the weight of the evidence clearly supports or does not support the agency's findings, as the case may be, it is bound by the superior court's decision as if the case were originally tried there, if there is conflicting evidence in the record. What special insight or qualifications does that court have to make its review of the identical record binding on the appellate court? Thus, the weight of the evidence test governs the superior court in reviewing the administrative record but not the appellate court in reviewing the decision of the superior court. The appellate court must blind itself to the fact that the proceeding before the superior court was a review of the administrative record and treat that proceeding as a trial *de novo*. Although the superior court must find that the agency's findings were or were not supported by the weight of the evidence,

the appellate court is concerned, not with whether the superior court correctly decided that issue, but whether there is evidence to support the findings of the superior court, disregarding completely any question as to the weight of the evidence. The basic issue in the case, whether the agency's findings are supported by the weight of the evidence, is transformed into a new issue essentially analogous to the issue in the case of a nonsuit or directed verdict. The appellate court must consider only the evidence in favor of the agency's findings, when the superior court finds that they are supported by the weight of the evidence, or only the evidence against such findings, when the superior court finds that they are not supported by the weight of the evidence.

The majority opinion by treating the proceeding before the superior court, not as a review, but as a trial de novo, reverts, so far as appellate review is concerned, to the doctrine of *Laisne v. State Board of Optometry*, 19 Cal.2d 831, 123 P.2d 457, from which this court withdrew in *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 136 P.2d 304 and *Sipper v. Urban*, 22 Cal.2d 138, 137 P.2d 425, and virtually makes the superior court the final reviewing court of the decisions of statewide administrative agencies exercising only statutory powers, when an abuse of discretion on the facts is claimed.

In *Sipper v. Urban*, supra, 22 Cal.2d 138, 144, 137 P.2d 425, 427, Mr. Justice Schauer, who cast the controlling vote, declared:

"The complete trial de novo doctrine of the Laisne case has been abandoned. By the decision in the *Dare* case (*Dare v. Board of Medical Examiners*, supra) the majority of the court has receded from the extreme position taken in the *Laisne* case with respect to the right of a party to a complete trial de novo on mandamus review, and has thereby substantially rectified perhaps the most serious of the practical difficulties suggested in the dissenting opinion in the *Laisne* case as bound to be encountered in practice under the majority rule as then stated. The procedure as now declared gives the reviewing court the power and duty of exercising an independent judgment as to both facts and law,

but contemplates that the record of the administrative board shall come before the court endowed with a strong presumption in favor of its regularity and propriety in every respect and that the burden shall rest upon the petitioner to affirmatively, competently, and convincingly, support his challenge. In other words, rarely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts. This is in full accord with the presumption declared in subdivision 15 of section 1963 of the Code of Civil Procedure, 'That official duty has been regularly performed.' It is, of course, also inherent in the mandamus remedy that the right of the petitioner to the initial issuance of the writ is not absolute. His right to make the application is absolute but the application implicitly calls for the exercise of judicial discretion, and within the limits of that discretion (for definition of *judicial discretion*, see *Gossman v. Gossman*, 52 Cal.App.2d 184, 194, 195, 126 P.2d 178) the writ may be granted or withheld, as the facts averred in and circumstances appertaining to each particular case may require, in the interests of sound justice."

It is now apparent that the rules that the "record of the administrative board shall come before the court endowed with a strong presumption in favor of its regularity and propriety in every respect" and that "the burden shall rest upon the petitioner to affirmatively, competently, and convincingly, support his challenge" have only such force as the superior court wishes to give them. Appellate courts abandon all responsibility for their enforcement.

The condition in this state of judicial review of the adjudicatory decisions of statewide administrative agencies exercising only statutory powers may be briefly described. Appellate courts disclaim virtually all responsibility when it is claimed that the agency's findings are not supported by the evidence. The superior court determines whether or not the writ shall issue, whether or not additional evidence shall be taken or a complete trial de novo given, and whether or not the agency de-

cision shall be upheld or set aside. Whatever the superior court does must be upheld by the appellate courts if, viewing the proceeding not as a judicial review but as a proceeding like a nonsuit or directed verdict, there is some evidence or inferences therefrom in favor of the superior court's decision. Thus, on the one hand the superior court by refusing to issue the writ or by upholding the agency's findings, even though they are not supported by the weight of the evidence, may refuse to exercise the check on administrative agencies that the statute contemplates they should exercise. On the other hand, it has virtually unlimited freedom to destroy the effectiveness of such an agency. When it erroneously finds that the weight of the evidence does not support the agency's findings it substitutes its judgment for that of the agency and controls the discretion vested by the Legislature in the agency. See *Inglim v. Hoppin*, 156 Cal. 483, 105 P. 582; *Doble Steam Motors Corporation v. Daugherty*, 195 Cal. 158, 232 P. 140; *Bila v. Young*, 20 Cal.2d 865, 129 P.2d 364; *Moseian v. Parker*, 44 Cal.App.2d 544, 112 P.2d 705. Judicial review becomes more than a check on administrative action, it completely supplants that action and destroys "the values—expertness, specialization and the like—which, as we have seen, were sought in the establishment of administrative agencies." Report U. S. Attorney General's Committee on Administrative Procedure, 77.

It is my opinion that the superior court in this case has erroneously found that the weight of the evidence does not support the board's findings.

Section 2391 of the Business and Professions Code provides:

"Unless otherwise provided by this section, the prescribing, selling, furnishing, giving away or administering or offering to prescribe, sell, furnish, give away or administer any of the drugs or compounds mentioned in section 2390 to a habitue or addict constitutes unprofessional conduct within the meaning of this chapter.

"If the drugs or compounds are administered or applied by a licensed physician and surgeon of this State or by a registered

nurse acting under his instructions and supervision, this section shall not apply to any of the following cases:

"(a) Emergency treatment of a patient whose addiction is complicated by the presence of incurable disease, serious accident or injury, or the infirmities attendant upon age.

"(b) Treatment of habitues or addicts in institutions approved by the board where the patient is kept under restraint and control, or in city or county jails or State prisons."

In an interview with Joseph W. Williams, a special agent of the board, on April 16, 1946, petitioner stated: "Katherine S . . . came to me about the middle of October, 1945 and she wanted narcotics. She said she had a trifacial neuritis. I prescribed morphine in 1/2 grain tablets, 20 tablets at a time. She claimed she had been treated for the trifacial condition in Ohio. I wrote her doctor in Ohio a letter. She claimed to have considerable pain in the face and needed a half grain every four hours.

"I prescribed for her for about a week before I wrote her doctor for a history of her case. I knew she was a narcotic addict and tried to talk her into going and taking the cure. I examined the cranial nerves, but did not make any X-rays.

"I gave her two injections of alcohol for her trifacial condition. One was given about a week after I began prescribing narcotics for her. The second was given some time in November. Those were the only treatments I ever gave her. The only other medicine I ever gave her was morphine.

"I prescribed a tube of 1/2 grain morphine tablets for her every three or four days. I have no case history of her in the office. I think I made one, but I think my attorney has it. She was going to sue me and I sent her file to my attorney. I don't recall whether I took a case history on her or not, but the only examination I made was the one of the cranial nerves of the face.

"I finally talked her into going to take a cure for narcotic addiction and contacted Doctor Thompson of Las Encinas San-

atarium at Pasadena and made arrangements for her to go there and take the cure for addiction, but she never went. Late in December, 1945, she went to Alexander's Sanatorium, Belmont.

"I prescribed narcotics for her from about the 19th of October up to about the time she went to Alexander's Sanatorium. I knew she was an addict but she claimed to have pain in her face and I more or less took her word for her pain, as I did not make very much of an examination.

"She gave the name of this Doctor in Ohio who was supposed to have treated her. I wrote to him but don't recall receiving any reply.

"I also prescribed narcotics for Allan G . . . from about the middle of October to the end of December, 1945. I have no chart for G . . . as I did not make a chart for him. He had asthma and I prescribed a tube of $\frac{1}{4}$ grain morphine at a time for him. His prescriptions were every three or four days apart also. When he first came to me he told me how much morphine he was using, and I thought it was a sufficient quantity to make him an addict. He stated he had been using this for a long time.

"At that time he was a cook on a ranch in Carmel Valley. I knew he was an addict and tried to get him to take the cure but he wouldn't do anything to help himself. He didn't want to take it. Although he had an asthmatic condition he did not need that much morphine for his asthma. The only reason he had to have morphine was because he was an addict.

"I gave him some Vm C for asthma, in addition to the straight morphine I prescribed for him. I did not make a chart or keep a history on his case.

"H . . . was a cook at Pebble Beach School. I prescribed narcotics for him also for several months. He was supposed to have duodenal ulcers, but I did not make any X-rays of him. I did a gastric analysis and decided he was a narcotic addict.

"I prescribed a tube of pantopan, $\frac{1}{3}$ grain, at a time for him. I don't know how many prescriptions I wrote for him.

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I did not keep a record or history of his case, either. I was sure he was an addict when he first came to me, but I wrote prescriptions for him for narcotics.

"I also wrote prescriptions for Mrs. F. G. P. . . . She claimed to have spinal arthritis. The next time she came in with gall stones. I prescribed 20 dilaudid, $\frac{1}{16}$ grain. I never made any X-rays or kept any case history on her. She is supposed to be an addict."

The foregoing testimony was corroborated by another agent who was present at the interview.

The complete cross-examination of Mr. Williams follows:

"Q. Mr. Williams, the Doctor made a full and complete disclosure to you when you questioned him, did he not? A. I believe he did.

"Q. And he did not try to hold anything back? A. He did not appear to.

"Q. And when you speak of Mrs. Moran, that is the Doctor's mother, seated here in the room? A. Yes, the lady in back (indicating).

"Q. And at the time you made your notes, did you immediately reduce the conversation to writing or was there some lapse there? A. I wrote the original notes while sitting there at his desk.

"Q. Did you receive on this case a report from the Bureau of Narcotic Enforcement? A. Did I receive?

"Q. Yes. A. No, I did not.

"Mr. Anderson: That is all.

"Mr. Hutchinson: That is all. Thank you. Any question by any Board Member? (No response.) (Witness excused.)"

The record reveals the following chronology of petitioner's treatment and prescriptions for these addicts:

Katherine's Case.

October 13, 1945—Petitioner's first meeting with addict. Examination and injection of novocaine and alcohol.

October 15, 1945—Prescription, morphine sulphate, 20 doses.

October 22, 1945—Prescription, morphine sulphate, 20 doses.

Katherine requested that the drug be taken by "hypo" because the taste of morphine was objectionable to her.

October 25, 1945—Prescription, morphine sulphate, 20 doses.

October 26, 1945—Petitioner received a letter dated October 24, 1945, reading as follows: "I have just received a letter from a patient of your, Mrs. K . . . S . . ., formerly of Cincinnati, for whom I did a left infra orbital injection for tic in 1928, which she says was successful for six years. She now asks that I give you this information in the hope you will make another injection for her. She was then and is still, as far as I know, an addict."

October 28, 1945—Prescription, morphine sulphate, 20 doses.

October 29, 1945—Prescription, morphine sulphate, 20 doses.

Petitioner telephoned Las Encinas Sanitarium to have Katherine admitted as a narcotic patient.

October 31, 1945—Prescription, morphine sulphate, 20 doses.

November 2, 1945—Prescription, morphine sulphate, 20 doses.

Petitioner telephoned Las Encinas Sanitarium in a second attempt to have Katherine admitted as a narcotic patient.

November 10, 1945—Petitioner sought to have Katherine enter the Livermore Sanitarium for treatment as a narcotic addict.

November 12, 1945—Prescription, morphine sulphate, 20 doses.

Petitioner telephoned Las Encinas Sanitarium in another further attempt to have Katherine admitted as a narcotic patient. Katherine refused to enter county hospital.

November 13, 1945—First and only report to Narcotic Division on furnishing drugs to addict.

November 14, 1945—Prescription, morphine sulphate, 20 doses.

November 16, 1945—Prescription, morphine sulphate, 20 doses.

November 19, 1945—Prescription, morphine sulphate, 20 doses.

November 21, 1945—Two prescriptions, morphine sulphate, 40 doses.

November 23, 1945—Prescription, morphine sulphate, 20 doses.

November 24, 1945—Petitioner's last personal meeting with Katherine.

November 26, 1945—Prescription, morphine sulphate, 20 doses.

November 30, 1945—Prescription, morphine sulphate, 60 doses.

December 5, 1945—Prescription, morphine sulphate, 60 doses.

December 11, 1945—Prescription, morphine sulphate, 20 doses.

Allan's Case

October 22, 1945—Prescription, morphine sulphate, 20 doses.

October 31, 1945—Prescription, morphine sulphate, 20 doses.

November 4, 1945—Prescription, morphine sulphate, 20 doses.

November 10, 1945,—Prescription, morphine sulphate, 20 doses.

November 12, 1945—Prescription, morphine sulphate, 20 doses.

November 14, 1945—Prescription, morphine sulphate, 20 doses.

November 16, 1945—Prescription, morphine sulphate, 20 doses.

November 19, 1945—Prescription, morphine sulphate, 20 doses.

November 23, 1945—Prescription, morphine, 20 doses.

R. L.'s Case

September 28, 1945—Prescription, pantapone, 20 doses.

November 10, 1945—Prescription, pantapone, 20 doses.

The burden was upon petitioner to prove that the treatments were emergency treatments of patients whose addiction was complicated by the presence of incurable disease. Code Civ.Proc. § 1981; *People v. Moronati*, 70 Cal.App. 17, 21, 232 P. 991; *People v. Agnew*, 16 Cal.2d 655, 663, 107 P.2d 601; *People v. Osaki*, 209 Cal. 169, 191, 286 P. 1025; *Bebington v. California Western States Life Ins. Co.*, 30 Cal.2d 157, 158-160, 180 P.2d 673; see 21 Cal. Jur. 383, 384.

During the hearing petitioner presented no expert testimony or opinion that his

furnishing the narcotics was necessary or proper under the circumstances or in the light of the history and examination of any of the addicts. Clearly the deposition of Dr. Fraser and the letter from Dr. Thompson cannot serve to show emergency treatment of addicts whose addiction is complicated by the presence of incurable disease. Dr. Fraser, "Medical Examiner of the Courts of San Francisco," testified with respect to Allan's commitment proceeding for addiction. On cross-examination he was asked by petitioner's counsel "Doctor, morphine sulphate is recognized by some physicians as a proper prescription for a chronic asthmatic condition, isn't that so? A. Oh, yes, it is used." He did not testify, however, that it was necessary or proper in Allan's case. When asked on direct examination "Are you able to state, Doctor whether it would have been necessary in his treatment to have given him 20 one-half grains tablets for use during a week, for any condition that he then had?" he replied, "Well, that might be a moot question—that is almost an expert question to answer that. I think in the case of the treatment of asthma we don't like to use morphine in a chronic condition of that nature. However, I can see certain conditions where morphine had been used where it would be objectionable." He was then asked the question, "Morphine would not have any curative effect?—merely to alleviate the pain?" to which he replied, "No, merely to alleviate his distress."

Dr. Thompson, the Medical Director of Las Encinas Sanitarium, was not available for cross-examination and his letter was introduced by his counsel "in mitigation of punishment, if any" and it was received by the hearing officer "as hearsay, as any other unsworn statement." The letter reads as follows:

"To Whom it may concern:

"This is to evidence and certify that Doctor James A. Moran of Carmel, California, called by telephone during the latter part of October, 1945, regarding one Mrs. S. . . ., stating that Mrs. S. . . . was addicted to narcotics, and that he would like very much to have her admitted to Las Encinas for treatment.

"At that time we had no vacancies and could not confirm a reservation for this patient. Doctor Moran asked if I thought he would be allowed to give narcotics to this patient until such time as she could be admitted to Las Encinas for treatment, and I replied that I thought this might be done as a humanitarian measure pending the time when the patient could be admitted for treatment.

"Early in November, Doctor Moran phoned again, during my absence, and this time the conversation took place between Doctor Stephen Smith, Medical Director and Doctor Moran. Doctor Moran again stated the importance of treatment to Doctor Smith and again he was told that no vacancies existed and that we could do nothing about the matter for the present. Doctor Smith also recognized the importance of Doctor Moran's call and the urgency of supplying treatment to the patient, Mrs. S. . . ., but on account of lack of space, we were unable to admit Mrs. S. . . . for treatment.

"Respectfully, C. W. Thompson, M.D., Medical Director." (Italics added.)

There is nothing in this letter to indicate that Dr. Thompson or Dr. Smith believed that the heavy doses of morphine prescribed for Katherine were required as emergency treatment of an addict whose addiction was complicated by an incurable disease. The italicized statements in the letter, on which petitioner particularly relies, express the belief that pending Katherine's admission to the Sanitarium for treatment for addiction petitioner might prescribe narcotics as a humanitarian measure. There was no approval, however, of the amounts prescribed, and petitioner cannot reasonably contend that he was treating her for addiction. The Health and Safety Code provides: "A physician treating an addict for addiction shall not prescribe for or furnish an addict more than any one of the following amounts of narcotics during each of the first fifteen days of such treatment: (a) Eight grains of opium. (b) Four grains of morphine." (§ 11392.) "After fifteen days of treatment the physician shall not prescribe for or furnish to the addict more than any one of

the following amounts of narcotics during each day of such treatment: (a) Four grains of opium. (b) Two grains of morphine." (§ 11393.) "At the end of thirty days from the first treatment, the prescribing or furnishing of narcotics shall be discontinued." (§ 11394.) These restricted amounts are in sharp contrast with the heavy doses petitioner prescribed for Katherine. "The physician treating an addict for addiction shall within five days after the first treatment report by registered mail, over his signature, to the State Division, stating the name and address of the patient, and the name and quantities of narcotics prescribed. *The report shall state* the progress of the patient under the treatment. The physician shall in the same manner further report on the fifteenth day of the treatment and on the thirtieth day of the treatment, and thereafter shall make such further reports as are requested in writing by the State Division." (§ 11395.) There was no compliance with this provision.

There remains petitioner's testimony that in each case his treatment was for the purpose of relieving acute pain and suffering and that he believed he was treating the addicts "for a pathology rather than an addiction." The record shows that the narcotics were furnished by prescription, apparently for use by each addict in his own way at his own time. They were furnished over periods as long as fifty-eight days. None of the addicts was confined to bed. Each called regularly at petitioner's office for his own form of narcotics. There is no evidence of any physical examination of any of them after their first appearance at petitioner's office. It is not clear from the record to what extent, if any, petitioner saw them thereafter before furnishing them with prescriptions. The chronology set forth above shows that four prescriptions for 160 doses of morphine were furnished Katherine after petitioner last saw her on November 24, 1945. It is difficult to believe that it is emergency treatment to prescribe narcotics for an addict in such generous doses on so many occasions with-

out even seeing her. See *People v. Kinsley*, 118 Cal.App. 593, 595, 601, 5 P.2d 938.

The record shows that Katherine did not suffer from anything but narcotic addiction. Doctor Moultain saw Katherine at her sister's home on December 16, 1945, five days after petitioner's last prescription. He found no objective symptom of gall bladder ailment, of tic douloureux, or of other incurable disease, and concluded that her complaints "were purely for the purpose of getting morphine." She confessed to him that she was an addict and that "what she wanted was a dose of morphine." He caused her to be moved to the Alexander Sanitarium. Doctor Alden, the consulting psychiatrist at the Alexander Sanitarium, after examining the findings and history made by other members of the medical staff and the nurses' notes, and after conversing with Katherine, concluded that she was suffering from withdrawal of narcotics. He testified that there was no indication of any necessity for treatment for any other infirmity or disease. On January 12, 1946, Katherine was released from the Alexander Sanitarium as no longer requiring treatment.

In answering the contention that the board's findings should be set aside because of petitioner's testimony that his prescriptions were given to alleviate the pain of his patients suffering from incurable diseases, the District Court of Appeal, Second District, Division Two, which reversed the judgment of the superior court in this case, in an opinion by Presiding Justice Moore succinctly stated [187 P.2d 878, 883]:

"But there was other proof upon that issue, to wit, the circumstantial evidence from which incriminating inferences may be drawn: (1) The excessively large number of doses given to S and G knowing that they were addicts. Although he knew that Mrs. S should be hospitalized for her addiction and attempted to gain her admittance into Las Encinas, he continued to prescribe the generous dosage to her for six weeks after that institution had rejected her and notwithstanding her refusal to enter the county hospital. Such

prescriptions were clear violations of section 11391, supra [Health and Safety Code], from which an inference of guilt might be fairly deduced and an adverse finding made under section 2391, Business and Professions Code. (2) He prescribed 180 doses for Mr. G for his asthma knowing that G was an addict and that morphine had no curative qualities. See § 11393, supra. He told a special agent that the only reason G had to have morphine was his addiction; that he 'did not know how many prescriptions' he wrote for him. Nor did he keep a record or history of his case. 'I was sure he was an addict when he first came to me, but I wrote prescriptions for him for narcotics.' After having already prescribed 100 doses for G, on November 13 he reported him as an addict to the division of narcotic enforcement giving his name, age, address, and dose; one and a half grains of morphine sulphate daily. (3) A similar report was made on November 15 with reference to Mrs. S. after having already prescribed 180 doses for her subsequent to October 13. His failure to keep records and to make reports on both of these parties constituted violations of section 11395 and sufficed to justify the inferences of violations of that statute. (4) He prescribed twice for H, suspicious that he was an addict before dismissing him. (5) He delayed reporting his prescriptions to the division of narcotic enforcement 'for quite some time.' (6) As further light upon his intent, petitioner prescribed for a Mrs. P. * * *, not mentioned in either count of the accusation, after being apprised by the division of her addiction. She claimed to suffer from arthritis, gall stones and spinal arthritis. He gave her '20 dilaudid, one half grains.' (7) In order to have a supply for his office he wrote prescriptions for morphine for his mother who served as his nurse.

"The board was not only entitled, but was required, to consider such circum-

stances in determining whether petitioner acted in good faith and honestly believed that each of the addicts in question was suffering from incurable disease as well as from addiction. While the testimony of petitioner was direct and although he was the only person who could testify as to the thoughts he entertained, yet the circumstances particularized by him as well as those given by Doctors Moulton and Alden and by the special agents of the board, and his persistency in prescribing morphine for addicts when it could serve no purpose save that of gratifying appetites for the narcotic—these circumstances justify the inference of unprofessional conduct on the part of petitioner. And if in the minds of the members of the board such inferences outweighed the direct testimony of petitioner, the board was acting within its lawful discretion in suspending his license."

It is hardly necessary at this time to argue the importance of the functions of the Board of Medical Examiners or the necessity of curbing the traffic in narcotics. The board, a body of ten experienced physicians, interpreted the facts in the light of their professional training and experience, and determined that the condition of the addicts did not justify petitioner's supplying them with narcotics. The Legislature vested the board with power to make such determinations by virtue of its specialized experience, and this court has recognized that the "findings of the board come before the court with a strong presumption of their correctness." *Drummev v. State Board of Funeral Directors*, 13 Cal.2d 75, 85, 87 P.2d 848, 854; *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 798, 136 P.2d 304; *Sipper v. Urban*, 22 Cal.2d 138, 144, 137 P.2d 425.

EDMONDS and SPENCE, JJ., concur.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

GORDON v. AZTEC BREWING CO.

Civ. 15992.

District Court of Appeal, Second District,
Division 3, California.

July 14, 1948.

Rehearing Denied Aug. 9, 1948.

Hearing Granted Sept. 8, 1948.*

1. Pleading ⇨403(2)

Failure of a complaint to specifically allege an alter ego relationship between corporation against whom action is brought and another entity upon which reliance is placed by plaintiff may be cured by denials in the answer.

2. Pleading ⇨403(4)

In action against bottling corporation by purchaser for injuries sustained when bottle exploded, corporation's answer specifically denying it was in the business of selling or distributing the bottle in question at time of injury was sufficient to put in issue question of whether corporation was a party properly chargeable with liability, and the existence of an alter ego relationship could be reasonably considered involved in view of admission of existence of a partnership doing business under identical firm name.

3. Pleading ⇨427

Since pleadings are a means to an end, determination of an issue fairly and fully tried should not be denied effect merely because that issue was not squarely within framework of the pleadings.

4. Pleading ⇨427

In action by purchaser against corporation for injuries sustained when bottle exploded, where defendant denied it distributed the bottle in question, but maintained that partnership of same name had done so, and when plaintiff elected to continue action against corporation on alter ego theory defendant argued on the merits that alter ego doctrine was inapplicable, issue of alter ego relationship was presented though plaintiff had not squarely pleaded that theory. Code Civ.Proc. §§ 469, 470.

5. Corporations ⇨1

Separate corporate identity is not always available as a defense, and where

there is such a unity of interest and ownership that separateness of corporations has ceased and facts are such that an adherence to the fiction of separate existence of the corporation would under particular circumstances sanction a fraud or promote an injustice, separate identity will be disregarded, though actual fraud need not be shown, and it is sufficient if a refusal to recognize the alter ego relationship will bring about inequitable results.

6. Corporations ⇨1

Where all corporate assets were transferred to a limited partnership to reduce income tax liability, but firm name remained the same, members of partnership were identical with stockholders of the corporation and partnership carried on beer manufacturing business of corporation without interruption and used same plant, corporation was the alter ego of partnership insofar at least as regards liability for purchaser's injury sustained when beer bottle produced by limited partnership exploded.

7. Corporations ⇨1

In action by purchaser against bottling corporation for injuries sustained when bottle claimed by defendant to have been produced by a partnership of the same name exploded, where evidence concerning alter ego was plain and uncontradicted, and there was no evidence which would have supported a contrary finding, question of separate existence of the two allied entities was for the court rather than the jury.

8. Constitutional law ⇨315

Where purchaser's action against corporation, as alter ego of partnership, for injuries sustained when bottle distributed by partnership exploded was fully litigated, corporation had full knowledge of facts and it did not appear that partnership could have presented additional evidence affecting results of the trial, enforcement of judgment against corporation would not deprive it of property without due process of law.

9. Negligence ⇨121(3)

Res ipsa loquitur doctrine is properly applied where it is assumed as a matter

* Subsequent opinion 203 P.2d 522.

of common knowledge that a bottle of pressurized liquid does not ordinarily explode except through some one's negligence; but the mere occurrence of the explosion does not bring the doctrine into play.

10. Negligence ⇨121(2)

It is erroneous to apply the doctrine of *res ipsa loquitur* upon the assumption that a factual basis for it exists, where such factual basis must first be determined from conflicting evidence or inferences.

11. Evidence ⇨7, 20(1)

It is common knowledge that glass is a breakable substance and should be handled with care, that a glass bottle of liquid under pressure does not ordinarily explode unless the bottle is defective or under excessive pressure, and that it is known in the trade that there are certain methods used by manufacturers and bottlers for the testing of bottles.

12. Evidence ⇨20(1)

The nature of commonly used tests and their effectiveness in the discovery of defects, as well as the customary practices of manufacturers and bottlers in making use of them, are not matters of common knowledge but are properly the subject of expert testimony.

13. Negligence ⇨134(8)

In purchaser's action against bottler for injuries sustained when bottle exploded, evidence that bottles of defendant's beer frequently exploded during pasteurization, and occasionally afterwards during labeling, or while resting in storage, or during transportation was sufficient to establish that defendant was under duty to examine the bottles for defects before parting with possession of them.

14. Negligence ⇨50

Method used by glass manufacturers in testing bottles by suddenly thrusting them alternately into hot and cold water could be regarded by a jury as a reasonable and practical one for a bottler to use and an efficient one as well.

15. Negligence ⇨48, 134(8)

Whether a defect in bottles is discoverable in the exercise of ordinary care

is a fact to be inferred from expert testimony, and the bottler must be deemed to have had knowledge of all facts that would have been developed in the exercise of ordinary care.

16. Trial ⇨206

In purchaser's action against bottler for injuries sustained when bottle explodes, jury should be instructed that if it deems expert testimony reliable and sufficient to the effect that defects in bottles are discoverable in exercise of ordinary care, an inference of negligence arises if a bottle explodes while in the hands of the bottler.

17. Evidence ⇨570

Weight to be given expert testimony is within sound discretion of the fact-finding tribunal.

18. Negligence ⇨134(8)

In purchaser's action against bottler for injuries sustained when bottle exploded, ultimate conclusion as to whether bottler exercised ordinary care to discover defective or dangerous condition was to be reached by weighing evidence as to availability of reasonable and practicable tests and their effectiveness against evidence as to methods employed by the bottler.

19. Negligence ⇨136(24)

In purchaser's action against bottler for injuries sustained when bottle exploded, whether defendant used proper care to discover defective bottles was for the jury.

20. Negligence ⇨134(4)

In purchaser's action against bottler for injuries sustained when bottle exploded, where bottle had passed through several other hands after defendant parted with it before it exploded, plaintiff was required to produce evidence sufficient to prove directly or by reasonable inference that the bottle was in a defective or dangerous condition when it left defendant's hands, and testimony that bottle was carefully handled while in hands of other persons and not exposed to extraneous damaging forces, if believed by the jury, would meet the requirement.

21. Negligence ⇨121(3)

In purchaser's action against bottler for injuries sustained when bottle exploded, where bottle was carefully handled by plaintiff, explosion in itself justified an inference that when delivered to plaintiff, the bottle was either defective or under excessive internal pressure.

22. Negligence ⇨138(2)

In purchaser's action against bottler for injuries sustained when bottle exploded, instruction directing jury as a matter of law, *res ipsa loquitur* inference of negligence was applicable to defendant and limiting jury's duty to weighing the inference against any contrary evidence was prejudicially erroneous where bursting of bottle did not of itself raise an inference of negligence on the part of defendant.

23. Negligence ⇨138(2)

In purchaser's action against bottler for injuries sustained when bottle exploded, instruction directing jury that *res ipsa loquitur* inference of negligence was applicable to defendant and limiting jury to weighing this inference against any contrary evidence was prejudicially erroneous as improperly taking from jury issue of whether bottle was carefully handled or subjected to extraneous harmful forces after it left defendant's control.

24. Trial ⇨295(1)

In determining the propriety of instructions, court must consider them as a whole.

25. Trial ⇨296(1)

Reversible error in the form of erroneous instructions cannot be cured by giving other correct instructions where the effect is to create a clear conflict and it is impossible to determine which instructions governed the jury's determination.

26. Trial ⇨296(3)

In purchaser's action against bottler for injuries sustained when bottle exploded, erroneous instruction directing jury that as a matter of law *res ipsa loquitur* inference of negligence was applicable to defendant was not cured by later instructions but further impressed on jury where in effect the prerequisite fact of subse-

quent careful handling after the bottle left defendant's control was ruled as a matter of law against defendant.

27. Negligence ⇨121(2)

Res ipsa loquitur instruction is intended for use only where particular instrumentality was clearly in the exclusive control of defendant at time of injury so that no issue of subsequent careful handling is presented and where, as a matter of law, the accident involved would probably not have occurred without negligence.

28. Negligence ⇨138(2)

In purchaser's action against bottler for injuries sustained when bottle exploded, where bottle had passed through several hands after leaving defendant, jury should have been instructed that if they believed that bottle was carefully handled and not exposed to injury after leaving defendant's hands and if they believed there was a defective or dangerous condition which was discoverable by defendant in exercise of ordinary care, an inference should be drawn that defendant was negligent and that such negligence was the proximate cause of injury.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Jack Gordon against Aztec Brewing Company, a corporation, for damages for personal injuries sustained when a bottle allegedly sold by defendant exploded as a result of defendant's alleged negligence and alleged breach of warranty. From the judgment, defendant appeals.

Judgment reversed.

Eugene S. Ives and Schell & Delamer, all of Los Angeles, for appellant.

Mitchell & Cold and Samuel A. Rosenthal, all of Los Angeles, and Leonard G. Ratner, of Beverly Hills, for respondent.

SHINN, Acting Presiding Justice.

On the morning of August 23, 1944, plaintiff, who was the owner of a cocktail bar and cafe, was severely injured in his right eye when a bottle of ABC beer exploded in his hand while he was trans-

ferring it from the case in which it was delivered to a refrigerator in his establishment. Subsequently this action for damages was brought against the alleged manufacturer of the beer and the wholesale distributor thereof from whom plaintiff had acquired the beer. The complaint named as defendants Aztec Brewing Company, a corporation; Black and White, doing business as Axtec Brewing Company, also known as ABC Brewing Company; Aztec Brewing Company, a copartnership, also known as ABC Brewing Company; Associated Brewers Distributing Company; and a number of "Doe" defendants. Two causes of action were set forth, the first being based on negligence and the second on implied warranty. At the commencement of the trial, a motion for judgment on the pleadings in favor of the defendants was granted by the court in respect to the second cause of action, and that matter is not own before us.

The complaint was served upon Associated Brewers Distributing Company, the wholesale dealer, but during the trial this defendant was voluntarily dismissed from the case by plaintiff. It was also served upon one F. M. Brick, who was designated in the return of service as the assistant general manager and superintendent of Aztec Brewing Company, a corporation. At no time was service had upon any other named defendant, and no appearance was had on behalf of any of them. An answer was filed by Aztec Brewing Company, a corporation, which stated that it was "answering for itself alone and not for any of its co-defendants." This answer denied that at any time mentioned in the complaint the answering defendant bottled, sold, or distributed ABC beer; denied that plaintiff at any time purchased any ABC beer from the answering defendant; and denied the allegations of negligence and proximate cause. It admitted the existence of the partnership doing business under the name of Aztec Brewing Company.

The following instruction was given on the court's own motion: "It has been established in this case that Aztec Brewing Company, a corporation, is the 'alter ego or other self' of the Aztec Brewing Com-

pany, a co-partnership. Therefore, if one is liable, both are liable." The jury returned a verdict in favor of plaintiff and against Aztec Brewing Company a corporation, and Aztec Brewing Company, a limited partnership. The present appeal has been taken by Aztec Brewing Company, a corporation, from the judgment entered upon and in accordance with that verdict.

The following facts were established by undisputed evidence. At the time of the injury to plaintiff, ABC beer was produced solely by Aztec Brewing Company, a copartnership which was the successor to the corporation of the same name which filed an answer, as stated above. The said corporation was organized in 1932 with its place of business in San Diego. In March, 1944, primarily in order to reduce income tax liability, the structure of the company was changed to a limited copartnership, but the firm name remained the same, namely, Aztec Brewing Company. All of the corporate assets were at this time transferred to the partnership. The corporation ceased to manufacture, bottle, or sell beer after March 31, 1944, and remained in existence thereafter merely in order to collect certain claims due it. The members of the newly formed partnership were identical with the stockholders in the corporation, the president and vice-president of the latter becoming general partners, and all other shareholders becoming limited partners. The financial interests of all the partners were in exactly the same ratio as had been their interest in the corporation. The partnership carried on the beer manufacturing business of Aztec Brewing Company without any interruption; was issued licenses under that name; and used the same manufacturing plant, equipment, offices, trucks, labels, packing cases, letterheads, and invoices as the old firm. It retained in its employment substantially the same personnel. For a short period of time, the corporation continued to use the company offices for the purpose of completing its unfinished business. During this time, separate bank accounts were maintained for each entity, checks on these accounts being differentiated by use of the words, "corporation," or "a

partnership." Whereas the executive authority of the president of the corporation had been paramount, under the partnership organization it was joint and co-extensive with that of the other general partner.

On the basis of the foregoing evidence, the trial court ruled that the corporation was the alter ego of the partnership as a matter of law. Defendant's motion for a directed verdict and for a nonsuit were denied on this ground, and requested instructions submitting the alter ego issue to the jury were refused, the court giving instead the instruction quoted above.

Appellant challenges the correctness of these rulings of the court in four particulars. It is first contended that since alter ego was not pleaded, it was not an issue properly before the court. In support of this proposition, reliance is placed upon *Dos Pueblos Ranch & Imp. Co. v. Ellis*, 8 Cal.2d 617, 67 P.2d 340, *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673, and *Davis v. Perry*, 120 Cal.App. 670, 8 P.2d 514. None of these cases dealt with a situation similar to that in the present case. The *Dos Pueblos Ranch* case involved an appeal from a judgment for plaintiff entered on the pleadings, and held only that defendant's answer failed to allege facts sufficient to put alter ego in issue, that being the only defense upon which defendant relied. *Minifie v. Rowley* involved a ruling sustaining a demurrer to a complaint, and the court held that the complaint did allege sufficient facts to raise the issue of alter ego. In *Davis v. Perry*, the court states that when alter ego is relied upon as an equitable defense, it must be pleaded in order to render admissible evidence based thereon. Although undoubtedly a correct statement of the law as applied to the facts there before the court, it was unnecessary to the decision, for the court went on to hold that even had the alter ego relationship been proven, it would have been an inadequate defense. The three cases hold at most that under the circumstances there being considered, pleadings were necessary to put alter ego in issue. None of them can be deemed authority for the proposition that under different and more appropriate

circumstances specific allegations may not be dispensed with. See, for example, *Mirabito v. San Francisco Dairy Co.*, 1 Cal.2d 400, 35 P.2d 513, where alter ego does not appear to have been pleaded.

[1,2] Nevertheless, if we were to assume arguendo that plaintiff should have pleaded the alter ego relationship, we think the present case would fall within the principle enunciated in *Marr v. Postal Union Life Ins. Co.*, 40 Cal.App.2d 673, 680, 105 P.2d 649, which holds that the failure of a complaint to specifically allege an alter ego relationship upon which reliance is placed by plaintiff, may be cured by denials in the answer. In the case at bar, the corporation's answer specifically denied that it was in the business of bottling, selling, or distributing ABC beer at the time of the injury to plaintiff. This answer was clearly sufficient to put in issue the question whether the corporation was a party properly chargeable with any liability which might have resulted from plaintiff's injury; and the existence of an alter ego relationship could be reasonably considered to be involved in that determination in view of the admission of the existence of a partnership doing business under an identical firm name.

Furthermore, examination of the record discloses that from the very outset of the trial, defendant consistently maintained that the corporation known as Aztec Brewing Company had not produced the bottle of beer which injured plaintiff, but that the partnership of the same name had done so. When, early in the trial, counsel for defendant, who was called as a witness by plaintiff, testified to this effect, plaintiff, on the ground of surprise, requested and was granted a continuance for the purpose of taking the deposition of the president of the defendant corporation in order to determine whether or not the corporation was the alter ego of the partnership, and on the basis thereof, to decide whether the action against the corporation should be dismissed voluntarily. Most of the evidence summarized above showing the details of the relationship was contained in this deposition. Relying thereon, plaintiff elected to continue the

action against the corporation on the alter ego theory. Throughout the rest of the trial, defendant continued to argue on the merits that the alter ego doctrine was inapplicable, but produced no evidence to contradict that contained in the deposition of its president.

[3, 4] As was said in *Marr v. Postal Union Life Ins. Co.*, supra, 40 Cal.App.2d 673, 681, 105 P.2d 649, 654, "the foregoing immediately suggests that appellant's counsel was not surprised or misled by presentation of the alter ego theory at the trial, but on the contrary was fully prepared to meet such issue and defend against it. Not having actually misled appellant to its prejudice in presenting its defense, the variance, if any, between the allegations of the complaint and the proof cannot be considered as a material variance. Code Civ.Proc. secs. 469, 470." The departure from the pleadings in the present case was merely technical, and could not possibly be deemed to have resulted in a miscarriage of justice. Since pleadings are a means to an end, rather than an end in themselves, the determination of an issue fairly and fully tried should not be denied effect merely because that issue was not squarely within the framework of the pleadings. See *Swanson v. Hempstead*, 64 Cal.App.2d 681, 682, 683, 149 P.2d 404. Under the circumstances here presented, appellant cannot fairly deny that the question of the alter ego relationship was considered to be an issue in the case and was fully tried.

[5] Appellant further contends that the evidence was insufficient as a matter of law to establish the existence of an alter ego relationship in the present case. On the contrary, as we have seen, the undisputed evidence shows the existence of two ostensibly separate and distinct business entities which were actually the same economic unit, owned by the same persons in the same proportions. The partnership was admittedly created as a conduit through which the former corporate business could be conducted with diminished tax liability. The very fact that one entity conveyed its assets and relinquished control to the other without interruption in the conduct of

the business or any outward manifestation of change in the nature of the enterprise well illustrates the essential unity of interest between them. As said in *Mirabito v. San Francisco Dairy Co.*, 8 Cal.App.2d 54, 59, 47 P.2d 530, 532, "Separate corporate identity, however, is not always available as a defense. Where there is such a unity of interest and ownership that the separateness of the corporations has ceased and the facts are such that an adherence to the fiction of separate existence of the corporation would under the particular circumstances sanction a fraud or promote an injustice, separate identity will be disregarded." Under the rule quoted, it is well settled that actual fraud need not be shown. It is sufficient if a refusal to recognize the alter ego relationship "will bring about inequitable results." *Minifie v. Rowley*, supra, 187 Cal. 481, 488, 202 P. 673; *Wenban Estate, Inc. v. Hewlett*, 193 Cal. 675, 698, 227 P. 723.

[6] These principles are clearly applicable to the present facts. From the evidence considered as a whole, we think the only logical conclusion which could have been reached was that Aztec Brewing Company, a corporation, was the alter ego of Aztec Brewing Company, a limited partnership, insofar, at least as liability for plaintiff's injury is concerned. Cf. *Mirabito v. San Francisco Dairy Co.*, 1 Cal.2d 400, 406, 35 P.2d 513. A contrary decision would not only be highly inequitable, but would also confer an undeserved importance upon legal technicalities and, "upon the facts herein would be to deny respondent the fruits of fairly contested litigation, place a premium upon acts and conduct which have misled a litigant, and frustrate the very purpose of our jurisprudence." *Mirabito v. San Francisco Dairy Co.*, supra, 8 Cal.App.2d 54, 60, 47 P.2d 530, 533.

[7] The conclusion we have reached on this phase of the case disposes also of appellant's further contention that the issue of alter ego should have been submitted to the jury under proper instructions. Since, as we have seen, the evidence concerning alter ego was clear and uncontradicted, and there was no evidence

which would have supported a contrary finding, the question was one for the court rather than for the jury. *Isenberg v. California Empl. Stab. Comm.*, 30 Cal.2d 34, 40, 41, 180 P.2d 11; *Curcic v. Nelson Display Co.*, 19 Cal.App.2d 46, 64 P.2d 1153. Cf. *Wenban Estate, Inc. v. Hewlett*, supra, 193 Cal. 675, 695-697, 227 P. 723.

[8] The further contention that enforcement of the judgment against appellant corporation would deprive it of its property without due process of law is likewise without merit. The action was fully and fairly litigated. Defendant corporation had full knowledge of the facts, and there is nothing in the record to indicate that the partnership could have presented any additional evidence which would have affected the results of the trial in the slightest manner. As we have seen, the court clearly had jurisdiction over both business entities known as Aztec Brewing Company. Since the corporation is bound by the acts of its alter ego, any evidence which would support the judgment against the partnership likewise supports the judgment against the corporation to an equal extent. It follows that enforcement of the judgment against the latter would not be open to the alleged constitutional objection.

The second major issue presented by this appeal involves the correctness of the instructions which introduced the doctrine of *res ipsa loquitur*. As we shall presently see, the court instructed that the evidence established as a matter of law an inference of negligence on the part of appellant. By this instruction the court withdrew from the jury two essential questions of fact, namely, whether plaintiff had established by his evidence that the bottle was probably not rendered unsafe while it was in the hands of other persons after it left possession of the defendant, and whether the defective or dangerous condition of the bottle would probably have been discovered by defendant in the exercise of ordinary care. We shall proceed to demonstrate that this application of the doctrine was clearly erroneous and prejudicial.

[9] We think the problem of making correct application of the legal principles

involved in the exploding bottle cases is not as difficult as it has often been made to appear. There has been much disagreement in the cases over the application of the *res ipsa loquitur* doctrine. It has been properly applied where it has been assumed, as a matter of common knowledge, that a bottle of pressurized liquid does not ordinarily explode except through someone's negligence. But the proposition that the explosion of the bottle, in and of itself, raises an inference of negligence has not been declared in any California case and we adhere to the view that the mere occurrence of the explosion does not bring the doctrine into play.

[10] It has become customary in the trial of these cases to make use of expert testimony. That course was pursued in the present case and, as we shall see, the expert testimony, when considered with other evidence to which we shall refer, if given full credit by the jury, raised an inference of negligence on the part of defendant under general principles of negligence law. Where an inference of negligence arises because, and only because, the jury gives credit to the testimony of a number of witnesses testifying on different subjects, it is incorrect, as a matter of definition, and also redundant, to say that the inference arises under the *res ipsa loquitur* doctrine. Mere mistakes of nomenclature, however, are unimportant. The basis of our decision, as will be developed, is that it is erroneous to apply the doctrine upon the assumption that a factual basis for it exists, where such factual basis must first be determined from conflicting evidence or inferences.

[11] We take it that the following may be assumed as facts which are of common knowledge. (1) That glass is a breakable substance and should be handled with care. (2) That a glass bottle of liquid under pressure does not ordinarily explode unless the bottle is defective or under excessive pressure. (3) That it is known in the trade that there are certain methods used by manufacturers and bottlers for the testing of bottles.

[12] The nature of the commonly used tests and their effectiveness in the dis-

covery of defects, as well as the customary practices of manufacturers and bottlers in making use of them, are not matters of common knowledge, but are properly the subject of expert testimony. If such expert testimony is comprehensive, it will inevitably appear therefrom that defects are frequently discovered and that it is the customary practice of bottlers to make inspections or tests of bottles before they are sent out to the trade.

[13, 14] From the testimony of several of plaintiff's witnesses, it was revealed that bottles of ABC beer frequently exploded during pasteurization, and occasionally did so afterwards, during labelling, or while resting in storage, or during transportation. This evidence was sufficient, if indeed any proof was required, to establish that defendant was under a duty to examine its bottles carefully for defects before parting with possession of them. An expert on the manufacture of glass bottles, testifying for plaintiff, described several technical methods commonly used by glass manufacturers for disclosing various types of defects in bottles, and stated that if all of these tests were used all defects would be revealed. In the opinion of this expert, the explosion which injured plaintiff was caused by such a discoverable defect. He also described a test made by suddenly thrusting bottles alternately into hot and cold water, and testified that this was one of the best tests used. This method of testing, as described by the witness, could well have been regarded by the jury as a reasonable and practicable one for a bottler to use, and an efficient one as well.

[15, 16] Whether a defect was discoverable in the exercise of ordinary care is a fact to be inferred from expert testimony. The bottler must be deemed to have had knowledge of all facts that would have been developed in the exercise of ordinary care. The expert evidence to which we have referred above, would have justified the conclusion that defective bottles are discoverable in the exercise of ordinary care. It would follow as a corollary thereto that if a bottle explodes while in the hands of a bottler an inference of

negligence arises. Therefore, if such testimony is deemed reliable and sufficient by the jury, an inference of negligence of the bottler must be drawn, and the jury should be instructed to this effect.

[17] However, the jury was not bound to give full credit to the expert testimony. The weight to be given to such testimony is within the sound discretion of the fact finding tribunal. This rule is well established. *Maryland Casualty Co. v. Industrial Acc. Comm.*, 64 Cal.App.2d 162, 166, 148 P.2d 95; see cases collected in 10 Cal. Jur. 972. The considerations which enter into the determination whether the testimony of an expert witness should be deemed reliable and sufficient have been stated much too often to require repetition here.

[18] The ultimate conclusion, upon this branch of the case, whether the bottler did or did not exercise ordinary care to discover a defective or dangerous condition was to be reached by weighing the evidence as to the availability of reasonable and practicable tests, and their effectiveness, against the evidence as to the methods employed by the bottler.

[19] It appeared that defendant made no tests or inspections of its bottles, whether new or used, except that which was furnished by a pasteurization process, in which filled and capped bottles were slowly subjected to heat, to reveal defective ones. While the evidence as a whole, with respect to the matter of the use of care, was sufficient to justify a finding that defendant was negligent, we cannot say that it proved negligence as a matter of law.

[20] Another issue of fact arose from evidence that after defendant parted with the bottle it passed through several other hands before it exploded. Under these circumstances proof that defendant had failed to exercise ordinary care while the bottle was in its possession would not alone justify a conclusion that defendant's negligence was the cause of the explosion, since the defective or dangerous condition of the bottle might have developed after it left defendant's possession. It was therefore necessary for plaintiff to produce evi-

dence sufficient to prove, directly or by reasonable inference, that the bottle was in a defective or dangerous condition when it left the hands of defendant. Testimony that the bottle was carefully handled while in the hands of such other persons and was not exposed to extraneous damaging forces, if believed by the jury, would have met this requirement. *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 458, 150 P.2d 436.

Plaintiff attempted to meet this requirement of proof as part of his case. The beer presently involved was bottled and cased at Aztec Brewing Company's San Diego plant. The cases were then placed by Aztec's employees on conveyors which carried them into trucks operated by La Salle Trucking Company. They were transported by these trucks to the Los Angeles warehouse of Associated Brewers Distributing Company, where La Salle's drivers unloaded them onto conveyors which carried them into the warehouse. Subsequently, on receipt of plaintiff's order for fifteen cases of ABC beer, the requisite number of cases were loaded by Associated employees onto an Associated delivery truck during the night of August 21, 1944. An Associated driver delivered them to plaintiff the next day. During August, 1944, due to a shortage of beer, cases never remained in the Associated warehouse for more than three days. Shipments to Associated by La Salle of ABC beer were made on August 9th, 11th, 12th, 14th, 17th, and 21st. The cases delivered to plaintiff were not included in the shipment of the 21st, for it arrived in Los Angeles too late to be loaded for delivery on the 22nd. The plaintiff's fifteen cases evidently came from the shipment of the 17th. The driver who made this shipment testified that no accident occurred to his truck and trailer while making this delivery. Mr. La Salle, of the La Salle Trucking Company, testified that none of his trucks was involved in any accident while delivering ABC beer during the month of August, 1944.

The manager of the Associated warehouse testified that during the period when the beer delivered to plaintiff was in his

warehouse, he was not aware of any accident which might have affected the bottles in any way. He testified further that in loading and stacking cases of beer, it frequently happened that a bottle would break, depending on how the case was handled. Before delivery to customers of Associated, however, broken bottles would always be detected by a loader from the diminished weight of the case and from the rattle of broken glass, and intact bottles would be substituted therefor. The fifteen cases of ABC beer, as delivered to plaintiff, therefore contained only bottles which were unbroken, but the evidence did not disclose whether or not any breakage, with a subsequent substitution of bottles, had occurred in any of these cases.

The Associated driver who made the delivery to plaintiff on August 22 stated that he did not become involved in any accident en route, that he did not bump or otherwise roughly handle the cases, and that he handled them carefully in making the delivery to plaintiff's storage room. He stated that not only was there nothing to indicate that there was anything wrong with any of these cases or their contents, but that in fact "they were in excellent condition." The plaintiff himself also testified that he used due care in handling the bottles of beer in question, and described in detail his actual movements in transferring the cases from the storage room to the bar room on the night before the explosion. There are several particulars in which the proof was somewhat inconclusive. There was no affirmative testimony that the beer was carefully handled by La Salle Trucking Company, but merely testimony of lack of accidents to the trucks. Similarly, there was nothing to indicate that these cases were not subjected to rough handling at the Associated warehouse, unless such an inference could be drawn from the unequivocal statement of the delivery truck driver that the cases delivered to plaintiff were in excellent condition. Since additional evidence may be produced on a retrial we shall merely assume, for present purposes, that the evidence presented was sufficient to justify the jury in finding that it met plaintiff's burden of proof above stated.

At the request of plaintiff, the court gave the following instruction: "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part."

[21, 22] The first sentence of the questioned instruction can be interpreted only as a direction to the jury that, as a matter of law, under the facts as established by the evidence, the *res ipsa loquitur* inference of negligence was applicable to the defendant; and the succeeding two sentences limited the duty of the jury to weighing this inference against any contrary evidence. This instruction would have been proper only if the mere bursting of the bottle raised an inference that someone had been negligent, and also if it had been proved by clear and uncontradicted evidence that the bottle had been carefully handled by all persons who had possession of it, and that it was not exposed to injury, after it left the hands of the bottler. The bursting of the bottle did not raise an inference of negligence. However, in view of the uncontradicted testimony that the beer bottle was carefully handled by plaintiff, the explosion in itself justified an inference that, when delivered to plaintiff, the bottle was either defective or under excessive internal pressure, for, as said in the Escola case, "sound and properly prepared bottles of carbonated liquids do not ordinarily explode when carefully handled." 24 Cal.2d 453, 459, 150 P.2d 436, 439. As we have seen, the expert testimony was to be weighed with the evidence of the methods employed by defendant in

determining whether the inference arose that defendant had been negligent. The instruction took this issue from the jury and was prejudicially erroneous.

[23] Moreover, whether this dangerous condition of the bottle developed while it was in possession of the defendant, rather than one of the intermediate parties who handled it, presented a question of fact as to the manner in which it was handled by these latter persons. We cannot say that the jury could not have reasonably found that the evidence was insufficient to prove that the bottle was carefully handled, and was not subjected to extraneous harmful forces after it left defendant's control. By taking this additional issue of fact from the jury, the foregoing instruction was again prejudicial to defendant.

[24-26] Plaintiff, however, refers to the established rule that in determining the propriety of instructions, they must be considered as a whole (*Crooks v. White*, 107 Cal.App. 304, 312, 290 P. 497), and maintains that this additional error in the quoted instruction was cured by other instructions which followed it. The record shows that the court stated to the jury that the inference of negligence referred to in the quoted instruction was applicable only under certain special circumstances, one of which was that the instrumentality causing the injury "was in the possession and under the exclusive control of the defendant at the time the cause of the injury was set in motion." The court then gave the following instructions: "A defendant is deemed to have control of an instrumentality where it had control at the time of the alleged negligent act although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. The defendant is not charged with the duty of showing that something happened to the bottle after it left its control and management. In order to be entitled to the benefit of the doctrine of *res ipsa loquitur*, the plaintiff must show that every person who moved or touched the bottle after it left the control of the defendant, did so with due care, and that during said time

the bottle was not accessible to extraneous harmful forces." It is to be noted that nowhere in these later instructions did the court direct the jury that it must find the indicated facts to be true before the supposed inference of negligence might be applied to defendant. Plaintiff's contention that these later instructions did submit the issue of careful handling to the jury is an insufficient answer, for so construed, they would be in direct conflict with the previous instruction which, as we have seen, took that issue from the jury. It is well settled that reversible error in the form of erroneous instructions cannot be cured by giving other correct instructions, where the effect is to create a clear conflict, and it is impossible to determine which instructions governed the jury's determination. *Wright v. Sniffen*, 80 Cal.App.2d 358, 363, 181 P.2d 675; *Ross v. Baldwin*, 44 Cal.App.2d 433, 436, 112 P.2d 666; *Akers v. Cowan*, 26 Cal.App.2d 694, 699, 80 P.2d 143. The two sets of instructions may be reconciled, but only on the theory that the court was informing the jury that, as a matter of law, the prerequisite fact of subsequent careful handling after the bottle left defendant's control, had been conclusively established. Under this view, the additional error in the original instruction was clearly not cured by the later instructions, but was actually emphasized and further impressed upon the minds of the jury.

Opposing counsel evidently both appreciated fully the necessity for submitting the issue of subsequent careful handling of the bottle to the jury. Defendant requested, but was refused, the following instruction: "You are instructed that the plaintiff in this case does not have the benefit of the doctrine of *res ipsa loquitur*, that is, 'the thing speaks for itself', unless the preponderance of the evidence affirmatively shows that after the bottle which plaintiff claims to have exploded left the control of the defendant it was not acces-

sible to extraneous harmful forces, and that it was carefully handled by plaintiff or any third person who may have moved or touched it." Plaintiff likewise requested, and was refused, an instruction of substantially similar effect. We are not prepared to say, however, that even if the requested instructions had also been given, the presently considered error in the general instruction would have been cured, for a substantial conflict would have still remained.

[27] The *res ipsa loquitur* instruction which was erroneously given is intended for use only where the particular instrumentality was clearly in the exclusive control of the defendant at the time of the injury, so that no issue of subsequent careful handling is presented; and, where as a matter of law, the accident involved would probably not have occurred without negligence. *Radisich v. Franco-Italian Packing Co.*, 68 Cal.App.2d 825, 840, 158 P.2d 435, and *Dieterle v. Yellow Cab Co.*, 53 Cal.App.2d 691, 696, 128 P.2d 132, relied upon by appellant, were such cases. In the present case these issues were not only clearly questions of fact, but were necessarily the controlling elements in the decision.

[28] Under the evidence, as we have summarized it, the jury should have been instructed substantially to the effect that if they believed from the evidence that the bottle was carefully handled and not exposed to injury after leaving the hands of appellant, and if they believed that there was a defective or dangerous condition of the bottle which was discoverable by appellant in the exercise of ordinary care, an inference should be drawn that appellant was negligent, and that such negligence was the proximate cause of the injury.

The judgment is reversed.

WOOD, J., and McCOMB, J., Assigned, concur.

87 Cal.App.2d 191

SWANSON et al. v. TEARNEY et al.
Civ. 3902.

District Court of Appeal, Fourth District,
California.
Aug. 9, 1948.

I. Appeal and error ☞910

On appeal by plaintiffs from judgment for defendants in action for alleged breach of contract employing plaintiffs to manage defendants' store, all presumptions were in favor of a judgment rendered for defendants in a prior action brought by them against plaintiffs for an injunction, declaratory relief, and possession of store and damages, where there was no evidence before the District Court of Appeal introduced in the prior action.

2. Judgment ☞713(2)

Where store owners, who had employed others to manage store for one year with option to renew contract of employment, gave managers notice that contract was terminated and demanded possession, but managers refused to surrender possession, and owners brought action against managers, seeking an injunction, declaratory relief, and possession and damages, and controversy was heard and submitted on a broad stipulation that court should find and determine all mutual liabilities of parties arising out of transaction, and judgment was rendered for owners, managers were estopped in subsequent action against owners from asserting claim for damages for alleged breach of contract of employment, since such claim should have been raised and determined in first action.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Leonard Swanson and Dorothy Swanson against James F. Tearney and Mildred N. Tearney for breach of contract of employment. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment affirmed.

Ruel Liggett and Roy M. Cleator, both of San Diego, for appellants.

Robert B. Burch, Jr., Robert W. Conyers and Davies, Burch & Conyers, all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for an alleged breach of a contract of employment.

On October 1, 1945, the Swansons took possession of a store and living quarters owned by the Tearneys, under an agreement that they would manage the store for the owners "for one year with the option of a longer term," and that the net profits were to be divided equally between them each month. On October 18, 1946, the Swansons notified the Tearneys that they were exercising their option with the intention to extend the agreement to October 1, 1947, "as a proper exercise of their option." On October 22, 1946, the Tearneys gave written notice to the Swansons that all their rights under the contract were "hereby terminated," and demanding possession.

On November 6, 1946, the Tearneys filed an action against the Swansons entitled "Complaint for Injunctive Relief" and containing three counts, one for an injunction, one for declaratory relief, and one for possession and damages. An accounting was also prayed for, with judgment for any amount found due. A restraining order was issued on November 6, 1946, and in obedience thereto the defendants vacated the premises on November 7, 1946.

The answer filed by the Swansons denied that they were wrongfully in possession or management of the property, admitted that a notice of termination had been served but denied that they were acting as employees of the plaintiffs, and as an affirmative defense alleged that under the agreement they were operating the business as a joint venture, that they had exercised their option for a longer term, and that the agreement was still in full force and effect. It was then alleged that the agreement attached to the complaint was not a true copy of the original agreement.

The action was first tried and submitted on November 14, 1946. Thereafter, the plaintiffs filed an amendment to their complaint alleging violations of the contract

on the part of the defendants. A further hearing was then had on January 22, 1947.

Findings were then filed in which it was recited that when the matter came up on November 14, 1946, upon an application for a restraining order, it was stipulated that the merits of the case should also be heard and determined and the court proceeded to the trial of the case; that oral and documentary evidence was received, and the case argued and submitted; that thereafter, both parties requested "that an accounting be had and that the court find and determine their mutual liabilities one to the other"; that the plaintiffs then filed an amendment to their complaint and the defendants petitioned for a hearing on an accounting; and that a further hearing was then had on January 22, 1947. It was then found that the plaintiffs are the owners of this business; that they employed the defendants as managers under this agreement; that on October 18, 1946, the defendants served notice of their desire to continue as such managers; that on October 23, 1946, the plaintiffs notified the defendants that their employment and right of occupancy were terminated and requiring them to move; that the plaintiffs did not terminate or attempt to terminate that employment prior to October 23, 1946; that since that date the defendants have had possession of the books and records of said business to which the plaintiffs were entitled; that subsequent to that termination the defendants have refused to surrender possession after demand made; that it is not true that this business was a joint venture of the plaintiffs and defendants; and "that after balancing the mutual accounts of these parties" the defendants owed certain amounts to the plaintiffs, but are entitled to certain credits, leaving a net amount due from defendants to the plaintiffs in the sum of \$1045.82, "all of which is now wholly due, owing and payable." As conclusions of law, it was found that up to October 23, 1946, the defendants were employees of the plaintiffs; that the defendants were not wrongfully in possession prior to that time; that the employment of the defendants and their equitable rights were terminated on October 23, 1946; that since such termination the plaintiffs have been entitled to possession

of the property "as a matter of right"; that upon the accounting made the plaintiffs are entitled to \$1045.82; and that the plaintiffs are entitled to a permanent injunction against the defendants. Judgment was entered on February 25, 1947, in favor of the plaintiffs for \$1045.82, and awarding them possession of the business without any interference from the defendants.

On March 24, 1947, the Swansons brought this action alleging their employment by the Tearneys; its purported termination by them; that this termination of their employment was without legal right and was a breach of the employment agreement; and that as a result they have been damaged in certain amounts. An answer was filed denying, generally, the allegations of the complaint. Later an amendment was filed setting up as affirmative defenses that the judgment in the prior action is a bar to the cause of action here sued upon; that all of the issues here involved were available to the plaintiffs in the former action in which judgment had been entered adjudicating all rights growing out of the transaction upon which this suit is based; that in the former action the Swansons had omitted to set up as a counterclaim the matter here relied on though the same was then available to them, having arisen out of the same transaction; and that if the matter had there been raised it would have tended to defeat or diminish the claims of the plaintiffs in that action.

The findings in this action recite that when the action came on for trial a motion for judgment in favor of the plaintiffs was made and argued; that before any decision thereon was made the defendants offered in evidence the entire judgment record in the prior action, and that this record was received. It was then found that judgment in the prior action was rendered in favor of these defendants and had become final; that the pleadings, findings of fact and conclusions of law, and judgment in the prior action are attached to and made a part of these findings; that the same cause of action here relied on was adjudicated in the prior action; that the plaintiffs in the present action omitted to set up in the prior action as a counterclaim

the cause of action now relied on, although it was then available to them, arose out of the transaction there sued on, and had it been there pleaded would have tended to defeat or diminish the claims of the plaintiffs in that action; and that the plaintiffs in this action failed and omitted to set up or plead, in the former action, any counterclaim or cross-complaint either for damages or otherwise. As conclusions of law, it was found that the cause of action here sued on has been adjudicated in the former action, and that the plaintiffs herein are estopped from asserting the cause of action here relied on. Judgment was entered accordingly and the plaintiffs have appealed on a clerk's transcript which thus includes most of the judgment roll in the prior action.

The appellants contend that the prior action was merely one for declaratory relief; that section 1062, Code Civ.Proc., expressly provides that a judgment in such a case shall not preclude a party from obtaining additional relief based upon the same facts; that all that was determined in the prior action was that this employment contract had been terminated; that the court was not there concerned with whether or not this termination was wrongful or whether it constituted a breach of the employment contract; that whether their discharge was rightful or wrongful was not an issue which could have been determined in that case; that the real issue in that case was whether or not the employers had the power to discharge the appellants, and not as to whether or not they had exercised that power; and that the appellants had the right to defend the prior action on the ground that they had not been discharged, and to await a decision on that defense before seeking damage for a wrongful discharge.

Declaratory relief was an incidental matter in the prior action. Notice of termination of the employment had been served, and the main purpose of the action was to establish both the employers' right to terminate and the fact of termination. Declaratory relief was included, as one cause of action, for the very purpose of raising the issue as to whether the employment had been rightfully terminated.

[1] This was quite different from the ordinary action for declaratory relief, brought merely for the future guidance of the parties, and the main issues related to past actions and their finality. Whether or not the employment was rightfully terminated was not only within the issues presented, but the judgment was based upon the implied finding that it had been so terminated. Otherwise, the judgment entered could not have been rendered. If the employment was rightfully terminated there would be no right of action for damages for terminating it. There is no evidence before us, and all presumptions are in favor of the judgment. It does appear that the original contract did not provide for any definite extension, and a short extension was given. This may have been the reason for the court's implied finding that the employers had rightfully terminated the employment.

In any event, the issue raised in the present action is one which could and should have been raised in the prior action. These appellants had the opportunity in that action to contend, as they probably did, that the termination of the contract was wrongful and to seek to be reinstated in their employment, or to recover damages for any wrongful breach of the contract. This could have been done in the alternative, without waiving the right to claim reinstatement, if the facts warranted such relief. The issue here sought to be raised was directly connected with the main issue tried in the prior action and should have been there raised. Moreover, these appellants consented to go on with the second hearing in the other action, having joined in a request to the court that a complete accounting be had between the parties and "that the court find and determine their mutual liabilities one to the other."

[2] The appellants' present claim for damages arose out of the same transaction as that involved in the prior action, it was an issue which could and should have been there raised, the controversy was there heard and submitted on a broad stipulation that the court should find and determine all the mutual liabilities of the parties arising out of the transaction, and the court's con-

clusion in the present action that the appellants are estopped from now asserting this claim is fully supported by the record before us.

The judgment is affirmed.

GRIFFIN, J., concurs.



SINZ v. OWENS.

Civ. 7484.

District Court of Appeal, Third District,
California.

Aug. 3, 1948.

Hearing Granted Sept. 30, 1948.*

1. Appeal and error ⇨930(1)

Reviewing court must view flatly contradictory evidence in the light most favorable to the verdict.

2. Courts ⇨92

Portion of opinion in no way necessary to a determination of issues in case was "dictum".

See Words and Phrases, Permanent Edition, for all other definitions of "Dictum".

3. Physicians and surgeons ⇨14(4)

A physician in a rural community may not, by self-imposed isolation, blind himself to the progress of his profession and, by so doing, evade obligations and duties of his chosen field and thus establish for himself a defense in a malpractice action.

4. Evidence ⇨538

In malpractice action against physician in rural community, plaintiff's medical witness who was familiar with medical standards in neighboring towns which evidence showed were almost identical in regard to kind of medical services available in town where defendant practiced, was properly permitted to testify as to standard of care that should have been maintained by defendant, over objection that where issue is standard of care in a rural

community, a medical witness may testify only if he has knowledge of standard of due care in a particular rural community where alleged malpractice was committed.

5. Physicians and surgeons ⇨18(10)

In malpractice action against physician in rural community, instruction that if a physician undertakes service in a special medical branch, and if at that time and in the same locality there are members of the medical profession who specialize in such special branch, physician has the duty to possess that degree of learning and skill ordinarily possessed by specialists in same locality, was not error, where plaintiff's leg fractures which defendant treated were very rare and very complicated fractures, and two orthopedic specialists were available 12 to 14 miles away.

6. Physicians and surgeons ⇨15

Generally, as a part of the requirements which the law exacts of general practitioners of medicine and surgery, or other schools of healing, if, in exercise of care and skill demanded by those requirements, such a practitioner discovers, or should know or discover, that patient's ailment is beyond the practitioner's knowledge or technical skill, or ability or capacity to treat with a likelihood of reasonable success, he is under a duty to disclose the situation to his patient, or advise him of the necessity of other or different treatment.

7. Evidence ⇨359(4)

In malpractice action, jury was properly permitted to examine X-rays of plaintiff's injuries, where X-rays were identified, explained, and interpreted at great length by defendant physician and by expert witnesses of both parties.

8. New trial ⇨76(1)

A new trial may not be granted on ground of excessive damages merely because verdict seems large, but only when it appears to have been given under influence of passion or prejudice. Code Civ. Proc. § 657, subd. 5.

9. New trial ⇨128(6)

If evidence before trial court is conflicting, and there is substantial evidence

* Subsequent opinion 205 P.2d 3.

to sustain award, no right to grant a new trial on ground of excessiveness of the verdict exists where insufficiency of evidence is not also specified as a ground of the order. Code Civ.Proc. § 657.

10. New trial ☞76(4)

Where there was evidence in malpractice action by 62 year old rancher that he was totally disabled because of allegedly improper treatment of leg fractures, trial court had no right to grant defendant physician a new trial on ground that verdict of \$17,500 was excessive, in absence of actual showing that verdict was given under influence of passion or prejudice. Code Civ. Proc. § 657, subd. 5.

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Action by Rudy Sinz against Raymond L. Owens, M. D., to recover damages for alleged malpractice. From a judgment in favor of the plaintiff, the defendant appeals, and from an order granting defendant a new trial on issue of damages alone after plaintiff failed to consent to a reduction of the verdict, the plaintiff cross-appeals.

Order granting new trial reversed, and case remanded with instructions to enter judgment in accordance with jury's verdict.

Gilbert L. Jones and Daniel S. Lane, both of Stockton, for defendant-appellant and respondent.

Miller & Kroloff and Forrest M. Greenberg, all of Stockton, for plaintiff, respondent and appellant.

PEEK, Justice.

Both of the parties hereto have appealed—the defendant from a judgment in favor of plaintiff, and the plaintiff from the order of the trial court granting a new trial on the issue of damages alone after he had failed to consent to a reduction of the verdict of the jury from \$17,500.00 to \$10,000.00.

The record discloses that as a result of an accident plaintiff, who was then about sixty-two years of age, suffered a double comminuted fracture of the lower left leg,

one of the fractures being compounded. He was taken to the Buchanan Hospital in Lodi and upon his request defendant was called to attend him. The leg was placed in a plaster cast by the defendant after X-ray pictures were taken showing the bones to be in alignment. Following the application of the cast further X-rays were taken, which showed that although the leg was in satisfactory position there had been a slight change in the alignment. During the progress of plaintiff's hospitalization further X-rays were made showing the alignment to be progressively changing so that at the time of trial the upper fracture had an angulation of approximately thirty degrees and the lower fracture of approximately five degrees in the opposite direction; that is the leg bowed both to the rear and to the side. The leg is now shortened one and one-quarter inches; there is atrophy of the muscles of the leg and arthritis. He states that because of the extreme pain caused by this condition he cannot place his weight upon the leg and therefore must use a cane. According to the testimony of plaintiff's expert witness this condition also has resulted in his total disability as a rancher. The defendant himself testified that the deformity thus produced was permanent and that at the outset of the treatment he had anticipated permanent disability of the degree and in accordance with the results obtained. However, a witness for defendant testified that the disability was about twenty-five per cent. Defendant further testified that he decided against the use of any traction on the leg because of possible complications, and none was ever used.

Appeal of Defendant and Appellant Owens.

As grounds for reversal of the judgment the defendant contends (1) that because plaintiff's expert witness was not qualified there was prejudicial error in the admission of his testimony as to the standard of care; (2) that the court erred in instructing the jury on the applicable standard of care, and (3) that further error was committed in refusing to instruct the jury as requested by defendant in regard to the X-rays which were introduced in evidence, and in permitting the jury to examine them. Except as indirectly included in his

first contention no question is raised by defendant as to the sufficiency of the evidence to sustain the verdict of the jury nor was this question relied upon by the trial court in its order granting defendant's motion for a new trial.

Concerning defendant's first contention it is argued that the plaintiff's expert witness, Dr. Morrison, was not qualified to testify to the standard of care of a general medical practitioner in the city of Lodi in that he knew no doctors in that city and knew nothing of the facilities available there, his knowledge of professional standards being limited to the area surrounding the neighboring communities of Oakdale, Modesto and Turlock, located in Stanislaus county, and Escalon located in San Joaquin county. The qualifying examination of the witness does show that with one exception he knew no doctors in Lodi, although he knew of the facilities of the hospital there, and that he had practiced in the communities previously named and at present maintains his office in Oakdale, about forty miles distant from Lodi.

Defendant's argument admits that under the rule as enunciated in the more recent cases of *Warnock v. Kraft*, 30 Cal.App.2d 1, 85 P.2d 505 [Pasadena and Los Angeles]; *Lewis v. Johnson*, 12 Cal.2d 558, 86 P.2d 99 [Long Beach and Los Angeles] and *Sales v. Bacigalupi*, 47 Cal.App.2d 82, 117 P.2d 399 [Oakland and San Francisco], a doctor practicing in a city contiguous to a metropolitan area may testify to the standard of care in a city likewise contiguous to the same area. But he contends that where the issue is the standard of care in a rural community a doctor may testify only if he has knowledge of the standard of due care in the particular rural community or locality where the alleged negligent act was committed and relies most wholly upon two cases, *McNamara v. Emmons*, 36 Cal.App.2d 199, 97 P.2d 503, and *Bickford v. Lawson*, 27 Cal.App.2d 416, 81 P.2d 216.

[1,2] At the outset, and if it be necessary, both cases may be distinguished from the present. In the first case the appeal was by the plaintiff from an adverse verdict of the jury and was predicated on the

alleged error in the giving of certain instructions. Necessarily the reviewing court was compelled to view what is termed "flatly contradictory" evidence, as we must in this case, in the light most favorable to the verdict. Secondly the two expert witnesses produced by plaintiff therein were residents of San Bernardino and were found to be incompetent to testify to the standard of care in Ontario, the reason given being that there was no testimony as to the similarity between the practice in the two cities. And lastly, it appears that even if such was not the case the portion of the opinion quoted and relied upon by defendant herein is dictum since it in no way was necessary to a determination of the issues in the cited case.

In the *Bickford* case the alleged difficulties of plaintiff appear to have arisen originally through her failure to follow the suggestions of her doctor to go to a hospital where X-ray equipment was available for the proper diagnosis of a fractured leg, there being, strange as it may seem, no X-ray equipment available in the Glenn County Hospital. On review this court agreed with the conclusion of the trial court that the expert called by plaintiff was not competent to testify and quite properly his testimony was stricken "for the reason that he admitted he did not know what the practice of other physicians was in reducing and treating such fractures in that or any other locality." 27 Cal.App.2d at page 424, 81 P.2d at page 220.

In the present case plaintiff's expert witness, Dr. Morrison, testified that the standard practice with regard to fractures is uniform throughout the state; that the defendant did not follow standard practice; that he failed to use any form of traction which was indicated by the progressive angulation of the leg as shown by the X-rays, and that he removed the cast prematurely.

[3] In this day of rapid transportation and communication there appears to be no reason why enlightened medicine with much of its improved practices and facilities should not be available to all, thus necessarily relaxing to a certain extent and subject to the circumstances surrounding

the particular case, the historical rigidity of the standard of care rule. This is borne out by the testimony of the physicians herein which shows that at least in so far as the practitioners within the geographical area involved are concerned they would be the last to state that such is not the case. Here the defendant testified he maintains an extensive medical library to which he constantly is adding technical books, that he takes and reads all of the medical journals which include articles on various special subjects such as orthopedics; that he attends all of the county and state meetings of his profession, participating in all of the lectures that are there given and that on at least one occasion and possibly two he took a week intensive course on orthopedics at the University of California. In other words nothing appears from his testimony or from the record as a whole which would or did hamper the defendant either by training or available facilities in his diagnosis and treatment of the plaintiff. See *Viita v. Dolan*, 132 Minn. 128, 155 N.W. 1077, L.R.A.1916D, 644, Ann. Cas.1917E, 678. Even if the contrary were true and he had stated that he read no current medical periodical or text, participated in no way in the mutually beneficial educational activities of his profession nor took advantage of any of the many available post graduate or refresher courses, would he or any other practitioner have the temerity to state that by reason of such self-imposed isolation he might thereby blind himself to the progress of his profession and by so doing evade the obligations and duties of his chosen field? Surely such is not the case. In its origin when, because of various and readily apparent reasons uniform dissemination of professional knowledge was impossible, the standard of care rule may well have been supported by valid and substantial reason. However, under present day conditions the reason for the rigid application of the rule as now advocated by defendant under the facts herein disclosed becomes a mere excuse unfounded (See *McBride v. Saylin*, 6 Cal.2d 134, 135, 56 P.2d 941), which if carried to its ultimate might well preclude an injured party from ever maintaining a cause of action.

[4] If what we have said heretofore is at all well founded, the only remaining basis of defendant's contention that the testimony of Dr. Morrison should have been excluded, is an arbitrary geographical line separating Lodi, Oakdale, Stockton, Turlock, Modesto and Escalon, neighboring towns which the evidence shows are almost identical in regard to the kind of medical services available. In a case quite similar to the present our Supreme Court condemned a like contention, stating that to exclude expert testimony on such a ground "would be a misuse of the rules of evidence and an unjustifiable emphasis on empty technicalities". *Lewis v. Johnson*, 12 Cal.2d 558, 86 P.2d 99, 101. The court stated further that "common knowledge, as well as the testimony of the doctors on both sides, tells us that the method used in treating this particular kind of fracture was one in use *throughout the world*." (Italics added.)

In the present case the same situation obtains. All of the medical witnesses testified as to the standard practices generally in such cases although disagreeing upon the application of the various methods to the particular case. It further was established by defendant's own witnesses that the standard of care in Lodi was as good as elsewhere in the state, and the average physician in Lodi as proficient as the average physician in Stockton. And lastly, Dr. Morrison did not encompass the world, he merely testified that the treatment of fractures was uniform "*throughout the state*". (Italics added.)

[5] Defendant's second contention relates to the giving of the following instruction, which was taken verbatim from California Jury Instructions, Civil, (BAJI) where it appears as #214:

"By undertaking professional service to a patient a physician and surgeon impliedly represents that he possesses, and it is his duty to possess, that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing practicing in the same locality.

"If he undertakes such a service in a special branch of medical, surgical or other healing science, and if at that time and in

the same locality there are members of his profession who specialize in, and limit their practice to, that particular branch of the healing profession, it is his duty to possess that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing who engage in that special practice in the same locality.

"It is his further duty to use the care ordinarily exercised in like cases by reputable members of his profession practicing in the same locality; to use reasonable diligence and his best judgment in the exercise of his skill and the application of his learning, in an effort to accomplish the purpose for which he is employed. A violation of any of those duties is a form of negligence which we call malpractice.

"If you should find that the defendant failed in any of the duties I have mentioned, and that such failure was a proximate cause to the injury of the plaintiff, then your verdict must be in plaintiff's favor."

The defendant's attack upon the instruction is directed primarily at the second paragraph thereof which he characterizes as a "failure to differentiate between the recognized or unquestioned duty of a general practitioner to refer a case to a specialist when the ordinarily skilled practitioner would have done so and the duty imposed by the instruction, which requires every practitioner to be a specialist."

He further argues that the record is barren of any evidence indicating that the ordinary physician in Lodi would not have treated plaintiff, but would have referred him to a specialist.

It appears from an examination of the attacked instruction that it does not, as contended by defendant, impose upon the general practitioner an affirmative duty of care equal to that of a specialist. The instruction merely states that if the general physician undertakes a specialized service and if in his locality there are those who specialize or whose practice is limited to that particular branch of the healing professions then it is his duty "to possess that degree of learning and skill ordinarily possessed by" those who specialize in such practice in that locality. The instruction

does not attempt to cover all cases but limits the application thereof to those localities where there are specialists available in that particular branch of medicine.

It cannot be denied that the evidence without contradiction establishes the fact that the fracture suffered by plaintiff was exceptionally severe. It was a compounded comminuted fracture of the tibia and fibula bones of the leg, which was described by defendant's counsel as a "very rare sort of a situation", by the defendant physician as a "very complicated fracture in the leg" and "one of the most difficult fractures that we can treat of the lower leg", and as the orthopedic specialist called by defendant stated, "double fractures like that are quite unusual". In other words the record conclusively shows that here a general practitioner confronted with a "very rare * * * situation", and in no emergency, undertook to treat a very "complicated", "difficult" and "unusual" compounded comminuted fracture. These uncontradicted facts would seem to bring the case squarely within the statement of the rule appearing in Restatement, Law of Torts, Vol. 2, at page 805, where the text, by way of illustration, assumes a factual situation in which a general practitioner attempts a brain operation, and states: "* * * In such a case, a general practitioner would be negligent if he undertook the operation, except in an emergency when no more highly skilled surgeon was available or unless he disclosed the need of special ability and his lack of it to his patient and his patient insisted upon his performing the operation."

The illustration used by the trial judge in his memorandum opinion is similar to that found in the Restatement of Torts, *supra*, and likewise appears to be particularly *apropos*. There he observed that "instead of treating a complicated fracture a general practitioner undertakes to perform a delicate operation on the eye and as a result the patient is blinded, would anyone contend that his only duty was to use the ordinary care and prudence that the other general practitioners used in the same community when there were men who specialize in that field and whose services and skill the patient should have received? The general practitioner, and not the patient, is in a

better position to know when the services of a specialist are called for."

It is true no orthopedic specialists were available in Lodi. But in Stockton, a distance of twelve to fourteen miles, there were two available, one of whom testified for the defendant, and who, defendant testified, had been called in by him for assistance in orthopedic cases on several occasions. And as we may take knowledge of distance between Lodi and Sacramento we might go a step further, although outside of the record, and observe that in a much larger city approximately only thirty miles distant, there are several specialists in this field.

[6] This is a day of specialists. A condition unquestionably brought about by the rapid and highly technical advancements in the entire field of medicine, advancements so complex and involved as to make it impossible for one to keep abreast of them all. Therefore under conditions and circumstances such as are disclosed herein it necessarily would seem to follow that the general rule must be that, "as a part of the requirements which the law exacts of general practitioners of medicine and surgery, or other schools of healing, if, in the exercise of the care and skill demanded by those requirements, such a practitioner discovers, or should know or discover, that the patient's ailment is beyond his knowledge or technical skill, or ability or capacity to treat with a likelihood of reasonable success, he is under a duty to disclose the situation to his patient, or advise him of the necessity of other or different treatment." 132 A.L.R. 392.

[7] Lastly defendant contends that he was materially prejudiced by the alleged error of the trial court in allowing the jury to examine the X-rays of plaintiff's injuries, in that the effect of allowing such an examination without a qualifying instruction necessarily emphasized the angulation of plaintiff's leg and caused the jury to pass over the real issue of the standard of care used by defendant. Such contention is wholly without merit. The X-rays were identified, explained and interpreted at length by the defendant doctor and by the expert witnesses of both parties and there-

fore were properly admitted in evidence, and being properly admitted in evidence we know of no rule under the circumstances whereby a jury may be prohibited from viewing such evidence, nor do the two cases cited by counsel (*Hollis v. Ahlquist*, 142 Wash. 33, 251 P. 871; *Vale v. Campbell*, 123 Ore. 632, 263 P. 400; 77 A.L.R. 946) hold to the contrary.

Appeal of Respondent and Cross-Appellant Sinz.

The cross-appeal of plaintiff relates solely to the order of the trial court denying defendant's motion for a new trial on the condition that within the time specified therein plaintiff file a written stipulation remitting all damages in excess of \$10,000.00 and agree to a reduction of the verdict to that amount, but if such agreement was not filed as specified a new trial would be granted on the question of damages alone.

[8, 9] The question so presented is identical with that raised in the recent case of *Casaretto v. DeLucchi*, 76 Cal.App.2d 800, 174 P.2d 328, 336. There a like qualified order as entered did not specify either insufficiency of the evidence or any other ground as a basis therefor and hence that specific ground was disregarded. Sec. 657, C.C.P. Therefore as in each case the sole reason for the order patently was the amount of the damages the only statutory basis would be subsection 5 of said section, which provides that a new trial may be granted on the ground of "excessive damages, appearing to have been given under the influence of passion or prejudice". Hence the conclusion of the court on the identical question so raised in the *Casaretto* case is as pertinent here as it was there:

"A new trial may not be granted on this ground merely because the verdict seems large, but only when it appears to have been given under the influence of passion or prejudice. The trial court may interfere with the verdict on this ground only where the verdict is so disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice. Thus if the evidence before the trial court is conflicting, and there is substantial evidence to sustain the award, no right to grant a new trial on the ground of exces-

siveness of the verdict exists where insufficiency of the evidence is not also specified as a ground of the order. These principles are all well settled." (Citing authorities.)

[10] For the foregoing reasons the order granting the new trial is reversed as is the judgment entered pursuant thereto, and the case is remanded with instructions to the trial court to enter judgment in accordance with the verdict of the jury.

ADAMS, P. J., and THOMPSON, J.,
concur.



**UMBSSEN v. CROCKER FIRST NAT.
BANK OF SAN FRANCISCO et al.**
Civ. 13657.

District Court of Appeal, First District,
Division 2, California.

Aug. 2, 1948.

Hearing Granted Sept. 30, 1948.*

1. Property ⚡

Presumption that ownership of property, once established continues, is a special application to ownership of property of the statutory rule that a thing once proved to exist continues as long as is usual with things of that nature. Code Civ.Proc. § 1963, subd. 32.

2. Property ⚡

The presumption of the continuance of ownership of property is strongest in case of realty, and is weaker and varies in strength with regard to different classes of personalty, until it reaches the vanishing point. Code Civ.Proc. § 1963, subd. 32.

3. Appeal and error ⚡

Even though all facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts, there still remains a question of fact to be determined by the jury, and the jury's verdict cannot be set aside on appeal on

ground that it is not sustained by the evidence.

4. Escheat ⚡

In action by one who succeeded in corporation's assets against bank to recover fund which was earmarked by bank about 40 years before when bank certified a check which was drawn by a corporation in favor of an unknown payee, and which had never been presented to bank for payment, wherein the state intervened seeking the fund as abandoned property, evidence sustained findings for state and against plaintiff. Code Civ.Proc. §§ 1274.1 et seq., 1274.5, 1963, subd. 20.

5. Statutes ⚡

Statutes are to be reasonably construed to effect their purpose.

6. Escheat ⚡

Where owner of abandoned property is in fact unknown, a statement of that fact satisfies requirement of the Abandoned Property Act that name of owner and his last known address be given in report there-in provided to be made to the comptroller. Code Civ.Proc. § 1274.4.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by Helen D. Umbesen against the Crocker First National Bank of San Francisco, State of California, to recover a fund earmarked by bank more than 40 years before on the bank's certification of a check drawn by a corporation whose assets plaintiff had succeeded to, wherein the State intervened denying plaintiff's ownership and seeking payment to it of the amount in the fund as abandoned property. From a judgment in favor of the state, the plaintiff appeals.

Judgment affirmed.

Heller, Ehrman, White & McAuliffe, Lawrence C. Baker, and Richard E. Guggenhime, all of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and E. G. Benard and Wm. J. Power, Deputy Attys. Gen., for plaintiff in Intervention and respondent.

* Subsequent opinion 203 P.2d 752.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for respondent.

DOOLING, Justice.

The facts of this case, while unusual, are simple and without dispute. G. H. Umbesen & Co. was a California corporation engaged in the real estate business. In November, 1905, this corporation drew a check for \$6600 against its commercial account in the respondent bank and the check was on the same date certified by the bank. The name of the payee is unknown nor was it established at whose request the check was certified. The check was never presented for payment, its whereabouts are unknown and the fund of \$6600 earmarked by the bank upon its certification remained unclaimed until the commencement of this action. The plaintiff and appellant has succeeded to all the assets of the corporation including the interest, if any, of the corporation in this \$6600 fund.

On February 27, 1946, the respondent bank, pursuant to the Abandoned Property Act (Code Civ.Proc. sec. 1274.1 et seq.), reported the existence of this unclaimed fund to the State Controller, who thereafter published the fact of this unclaimed account as provided by Code Civ.Proc. sec. 1274.5. Appellant thereupon commenced this action claiming ownership of the fund and the State intervened denying plaintiff's ownership and seeking the payment to it of the amount in said fund as abandoned property. Upon the facts above stated the court gave judgment against the plaintiff and in favor of the State.

On this appeal appellant rests her claim for reversal chiefly upon the ground that ownership of the fund and check having been established in 1905 in her predecessor in title, G. H. Umbesen & Co., a disputable presumption that such ownership continued arose and that there is no substantial evidence in the record to rebut this presumption.

[1,2] The presumption that ownership once established continues is a special application to the ownership of property of the more general rule codified in Code Civ.Proc. sec. 1963, subd. 32: "That a thing once proved to exist continues as long as

is usual with things of that nature." 10 Cal.Jur. Evidence, sec. 77, p. 768; II Wigmore on Evidence, 3d Ed., sec. 382, p. 323; 31 C.J.S., Evidence, § 124, page 743. The qualification "as long as is usual with things of that nature" is an important part of the rule. Scott v. Wood, 81 Cal. 398, 404, 405, 22 P. 871; Connolly v. Industrial Accident Commission, 173 Cal. 405, 409, 410, 160 P. 239. Thus the presumption of the continuance of the ownership of property is strongest in the case of real property, and is weaker and varies in strength with regard to different classes of personal property (Ralahan v. Ralahan, 98 Conn. 176, 119 A. 349; Brune v. Fraidin, 4 Cir., 149 F.2d 325; Bethel v. Linn, 63 Mich. 464, 30 N.W. 84; In re Elias, D.C., 240 F. 448; Sargent v. Waterbury, 83 Or. 159, 161 P. 443, 163 P. 416, 418) until it reaches the vanishing point (High v. Bank of Commerce, 103 Cal. 525, 37 P. 508). In the last cited case our supreme court said (103 Cal. at page 527, 37 P. at page 508) that "the presumption that 'a thing once proven to exist continues as long as is usual with things of that nature' is shown by human experience to be not applicable to a balance in one's favor in a bank."

Several factors combine to weaken the presumption of continued ownership by the corporation of its certified check and with it the fund earmarked for its payment. A check is drawn for the very purpose of transferring it to the payee. Its certification is an additional indication of the fact that the maker intends to transfer it, or perhaps has already done so since the certification may be at the request of a holder in due course. A corporation engaged in the real estate business may reasonably be supposed to have had a bookkeeper and an adequate accounting system so that it would seem most likely that if the certified check had not been delivered to the payee it would have been returned to the bank by the corporation in the ordinary course of business and cancelled.

[3] The trial court was entitled to weigh all of the evidence and draw any inference therefrom that the facts would reasonably support. "* * * even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of

two inferences may fairly and reasonably be deduced from those facts, there still remains in the case a question of fact to be determined by the jury * * * and * * * the verdict of the jury * * * cannot be set aside by this court on the ground that it is not sustained by the evidence." *Mah See v. North American Accident Ins. Co.*, 190 Cal. 421, 426, 231 P. 42, 26 A.L.R. 123; *Hamilton v. Pacific Electric R. Co.*, 12 Cal.2d 598, 602, 603, 86 P.2d 829; *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 506-508, 106 P.2d 886; *Medico Dental etc. Co. v. Horton & Converse*, 21 Cal.2d 411, 436, 437, 132 P.2d 457.

[4] Appellant cites cases in which the presumption of continued ownership has been applied to negotiable instruments. In all of them the presumption was applied in favor of payees or holders. If there is any presumption that the maker of a negotiable instrument continues to be its owner it is patently a very weak one since negotiable instruments are not commonly held by their makers for any great length of time. The presumption that the usual course of business has been followed (Code Civ.Proc. sec. 1963, subd. 20) must at the very least be weighed against the presumption of continued ownership in such a case. On all the facts we cannot say that the trial court abused its discretion in finding against appellant.

We note the disputable presumption stated in Civil Code, sec. 3097 that "where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved." Appellant claims that this presumption is only applicable where the instrument is shown to be in the hands of a third person. The presumption is more broadly stated but, in view of our conclusion that the evidence supports the finding of the trial court without the aid of this presumption, we need not decide that question.

[5, 6] Appellant argues that in any event the judgment in favor of the State cannot be supported if the owner of the fund is unknown since Code Civ.Proc. sec. 1274.4 requires the name of the owner and his last

known address to be given in the report therein provided to be made to the Controller. Statutes are to be reasonably construed to effect their purpose and it would seem that if the owner of the property is in fact unknown a statement of that fact should satisfy the requirements of the statute; but at any rate since appellant has been adjudged to have no interest in the fund she is not injured by the judgment giving its custody to the State.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



87 Cal.App.2d 172

FAIRCHILD v. FAIRCHILD.

Civ. 16407.

District Court of Appeal, Second District,
Division 2, California.

Aug. 6, 1948.

1. Divorce ⇄254

Provision in interlocutory divorce decree directing real property of parties occupied by them as their home be held in joint tenancy subject to right of wife and minor child to occupy property, that property should be subject to partition by further order of the court in event no agreement between parties proved possible, constituted an express reservation by court conferring upon it continuing jurisdiction over ultimate disposition of the property.

2. Divorce ⇄254

The elimination of wife's continued right to occupy real property which had been part of the community pursuant to provision in interlocutory divorce decree directing the property be held in joint tenancy subject to right of wife and minor child to occupy it until she should desire to and should find it convenient to vacate it, did not alter any substantive right awarded by decision, but served to make way for eventual sale of property and disposition

of proceeds as contemplated by court and the parties.

3. Divorce ⇨254

Provision in interlocutory divorce decree directing real property belonging to community to be held in joint tenancy subject to right of wife and minor child to occupy property until wife should desire to and should find it convenient to vacate it, at which time property should be sold, intended to confer a mere temporary privilege upon wife, and not to vest her with a property right to continue permanently to reside rent free in the premises.

4. Divorce ⇨245(1), 309

The jurisdiction of trial court in divorce action to modify an award for support of wife and child continues even without a reservation of the power to modify. Civ.Code, § 139.

Appeal from Superior Court, Los Angeles County; Paul Nourse, Judge.

Action by Gerald Engle Fairchild against Luella Elmira Fairchild for divorce, wherein the defendant filed a cross-complaint. From minute entry of court's decision and documentary order modifying interlocutory judgment of divorce which had been previously entered, Luella Elmira Clark, formerly Luella Elmira Fairchild, appeals.

Affirmed.

Roland Maxwell and Paul H. Marston, both of Pasadena, for appellant.

John Ruskin Lane, of Pasadena, and Elber H. Tilson, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The two appeals herein are effectually from the same order: one from the minute entry of the court's decision; the other from the documentary order modifying the interlocutory judgment of divorce which had been previously entered. Pursuant to a stipulation made then in open court the movable properties and money of the parties were apportioned by the decree. That document provided: "It is further ordered * * * that the following described real

property * * * shall hereby be held in joint tenancy by the parties hereto *subject to the right of cross-complainant and the minor child of the parties hereto * * * to occupy said home until cross-complainant shall desire to and shall find it convenient to vacate the same at which time the said property shall be sold at a price agreed upon by the parties hereto or in the event no such agreement proves possible, the said property shall be subject to partition by further order of the court herein; the proceeds of the sale to*" be equally shared by the parties.

Upon respondent's application the court modified the interlocutory decree by striking from the above quoted passage the italicized words. The sole question presented on this appeal is whether the order of modification affects the property rights of the parties as at first adjudicated.

[1] While it is conceded that the home was community property, it is earnestly contended that the unmodified interlocutory decree fixed the property rights of the parties, and that since the court did not reserve jurisdiction to alter its decision with respect to such realty it was without jurisdiction to make the order of modification. But such contention flies in the face of the very words of the unmodified decree: "in the event no such agreement proves possible, said property shall be subject to partition by further order of the court herein." Such express reservation by the court conferred upon it continuing jurisdiction over the ultimate disposition of the home. *Hogarty v. Hogarty*, 188 Cal. 625, 628, 206 P. 79.

[2] The deletion of the italicized passage changed the rights of the parties only if it altered some substantive right awarded by the decision. But after striking the italicized portion the decree reads thus: "The real property * * * shall hereby be held in joint tenancy by the parties thereto." Thus the respective estates of the parties in the former community property remain unchanged by the modification, and the elimination of appellant's continued right to occupy the premises makes way for the eventual sale of the property and disposition of the pro-

ceeds as contemplated by the court. This is in accordance with the intent of the parties as well as of the court at the time of the trial as indicated by the very words of the decree before the alteration. Nor is the modification in derogation of the arrangement with respect to the payment of the encumbrances, taxes and insurance. Prior to striking the italicized portion the judgment provided that such expenses should be shared equally by the parties, and under the decree as altered the parties continue to hold as joint tenants and therefore are to share equally all expenses.

[3,4] Appellant's final contention is that the modification divests her of her property right to occupy the home. Following the entry of the final judgment both parties remarried. Appellant continued to reside in the joint tenancy home with her minor daughter and new husband. The argument that the change in the decree divests her of the right of permanent occupancy is founded upon a gratuitous assumption. In effect it is to maintain that regardless of any subsequent change of condition appellant might forever enjoy the domicile to the exclusion of respondent. But the court clearly contemplated a sale thereof and a disposition of the proceeds. The right of occupancy was a mere temporary privilege granted for the "convenience" of appellant and her daughter until she "shall desire to and shall find it convenient to vacate the same at which time the said property shall be sold." Similar provisions are common to divorce decrees, and in view of the known housing shortage in 1946 the instant proviso was eminently fair. But such a provision cannot be tortured into a vested property right which would defeat the entire purpose of the agreement of the parties and the judgment of the court. Indeed, it may be said that if the instrument is ambiguous a fair construction

thereof compels the conclusion reached by the trial judge in ordering the modification: "I construe this decree in the light of the circumstances that are shown by it, that the possession of the property was by way of alimony, support, and therefore the court has continuing jurisdiction over it." Such a construction is natural and reasonable in view of the pleadings, minute orders and all matters contained in the record. The virtual effect of the judgment was to award additional support for appellant and her child. The jurisdiction of the trial court to modify such an award continues even without a reservation of the power to modify. Civil Code, sec. 139; *Hough v. Hough*, 26 Cal.2d 605, 612 160 P.2d 15; *Wylie v. Wylie*, 26 Cal.App.2d 167, 170, 79 P.2d 152. Any other construction of the instant decree would permit appellant and her new husband to continue permanently to reside rent-free in premises jointly owned by her and respondent, contrary to equity and fair dealing.

The cases cited by appellant are not in point. In *Schell v. Schell*, 74 Cal.App.2d 785, 169 P.2d 654, no divorce was granted, but since it had been ordered that the wife be permitted to live in the premises "rent free" it was held on appeal that the husband could not maintain an action for an accounting of the rents and profits therefrom. *Baxter v. Baxter*, 3 Cal.App.2d 676, 40 P.2d 536, holds that property rights once determined may not be changed. But to grant the mere right of occupancy of a home jointly owned in lieu of payments of alimony is a far cry from so awarding property as to vest its title in the party benefited. In the instant case the court specifically reserved power to alter its award.

The orders are affirmed.

McCOMB and WILSON, JJ., concur.

87 Cal.App.2d 75

GREEN et al. v. UARTE et al.

ROGERS et al. v. UARTE et al.

Civ. 7493.

District Court of Appeal, Third District,
California.

Aug. 2, 1948.

Hearing Denied Sept. 30, 1948.

I. Appeal and error ⇨989

Where plaintiffs had called defendant truck driver as an adverse witness, on plaintiffs' appeal from a judgment of nonsuit as to driver and his employer, plaintiffs had a right to rely on that portion of testimony of driver favorable to them and to disregard unfavorable portion thereof. Code Civ.Proc. § 2055.

2. Automobiles ⇨244(10)

In death action, testimony of defendant truck driver when called by plaintiffs as an adverse witness that truck was on wrong side of highway when it collided with automobile in which decedents were riding made a prima facie case in favor of plaintiffs. Code Civ.Proc. § 2055.

3. Automobiles ⇨242(1)

Driving on the wrong side of the highway is prima facie evidence of negligence and calls for an explanation on driver's part, and burden is upon driver to excuse or justify his position upon the highway.

4. Automobiles ⇨245(50)

In death action arising out of automobile collision with defendants' truck, where plaintiffs made out a prima facie case and no contributory negligence on part of decedents was shown and they were presumed to have taken proper care of their own concerns, whether accident was proximately caused by negligence of defendant truck driver was for jury.

5. Evidence ⇨591

Testimony of adverse party called as witness is not, when weighed against a presumption, evidence of party calling witness. Code Civ.Proc. § 2055.

6. Evidence ⇨89, 591

Testimony of adverse party called as witness does not dispel presumption con-

trary thereto in favor of party calling adverse witness. Code Civ.Proc. § 2055.

7. Trial ⇨140(2)

Weight of testimony of adverse party called as witness is for jury and not for court on motion for nonsuit or directed verdict. Code Civ.Proc. § 2055.

8. Automobiles ⇨244(10)

Testimony of defendant truck driver, who was called by plaintiffs in death action as an adverse witness, as to how his equipment happened to be on wrong side of highway and in decedents' lane of travel at time of collision did not establish his freedom from negligence where he admitted that he was traveling at maximum rate of speed allowed for his equipment and road was wet and slippery, which would justify a conclusion that he was not driving his vehicle in a reasonable and prudent manner having due regard for conditions existing. Vehicle Code, §§ 510, 515; Code Civ.Proc. § 2055.

9. Automobiles ⇨245(13)

In death action arising out of collision between decedents' automobile and truck which was on wrong side of highway, nonsuit as to truck driver and his employer on basis of driver's explanation, when called as an adverse witness, that third defendant's automobile, preceding decedents' automobile, swerved across highway striking truck and causing truck to go out of control was error where there was evidence to justify conclusion that driver was not operating truck in a reasonable and prudent manner having due regard for the existing conditions and that other auto crossed over in an effort to avoid collision because truck was already over center line, and because, in any event, jury was not compelled to accept driver's version of how accident happened. Code Civ.Proc. § 2055; Vehicle Code, §§ 510, 515.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Separate actions for wrongful death by Betty Jack Green and others and by Mary Rogers and others, against John Uarte, Golden State Company, Ltd., and Don Ar-

thur McCoy to recover respectively for deaths of Roger Davis Green and Richard Francis Rogers in an automobile accident. From judgments of nonsuit as to corporate defendant and defendant McCoy, plaintiffs appeal.

Reversed.

C. Ray Robinson, of Merced, and Burton D. Wood, of San Diego, for appellants.

Chester O. Hansen, John Said and Stammer & McKnight, all of Fresno, for respondents.

ADAMS, Presiding Justice.

In an automobile accident occurring on Highway 99 a short distance north of Madera on July 24, 1946, Roger Davis Green and Richard Francis Rogers were killed. These actions were thereafter instituted by the respective widows and children of said decedents, seeking the recovery of damages from John Uarte, the driver of a Ford sedan, and Golden State Company, Ltd., the owner of certain trucking equipment, and its employee Don Arthur McCoy, the driver of same, which vehicles were involved in a collision with a station wagon in which decedents were riding, it being alleged that the accident was the result of negligence and unlawful conduct on the part of Uarte and McCoy in the operation of their respective vehicles.

The cases were consolidated for trial before a jury, and at the conclusion of the evidence adduced on behalf of plaintiffs motions for a non-suit were made by all of the defendants. They were granted as to Golden State Company, Ltd., and McCoy, but denied as to Uarte, and these appeals, which have been consolidated, were then taken from the judgments of non-suit in favor of said defendants. The sole question is whether, in view of the evidence presented by plaintiffs, the trial court erred in granting such non-suits.

It is conceded that the accident occurred about 11:30 p. m. on a rainy night when the pavement was wet and slippery; that the Company's equipment, which was proceeding north, consisted of a tractor and two large trailers partially loaded, said equipment being 8 feet wide, having an overall

length of 57 feet, and weighing approximately 43,000 pounds; that Uarte, who was driving a Ford sedan, and decedents, who were riding in a station wagon, were proceeding southward on the highway, Uarte's car being ahead of the station wagon; and that at the place where the collision occurred about two miles north of Madera, the highway was level, was paved to a width of 20 feet, had a six foot shoulder on each side, and was marked by a white line in the center.

[1] The only witness who testified as to the occurrence of the accident was defendant McCoy, who was called by plaintiffs under Section 2055 of the Code of Civil Procedure. Under well established rules, plaintiffs on this appeal have a right to rely upon such portions of his testimony as are favorable to them, and to disregard the unfavorable portions thereof. *Anthony v. Hobbie*, 25 Cal.2d 814, 817, 818, 155 P.2d 826; *Weck v. Los Angeles County Flood Control Dist.*, 80 Cal.App.2d 182, 191, 192, 181 P.2d 935.

His testimony is that he had been traveling at the rate of forty miles per hour except when going through towns or on grades, that it had been raining during the night and was raining when he left Madera, but that he could not remember whether it was raining at the exact time of the accident; that the rain was the first of the season, the highway was wet, and there was a certain amount of oil, dirt and debris upon it which rendered it very slippery, which he knew; that he was traveling at forty miles per hour just preceding the collision; that he saw the headlights of Uarte's sedan and the decedents' station wagon when they were about 750 feet distant, and that they were approaching on their right side of the highway; that his equipment collided with the station wagon on the left side of the highway; that he could not stop his equipment as readily on the wet pavement as he would have been able to do had it been dry; that he could not remember whether his windshield wiper was working at the time of his encounter with decedents' car, or whether he applied his brakes, or whether he turned his truck immediately before the collision.

In an attempt to explain and justify the fact that his equipment was on the wrong side of the highway when it collided with decedents' station wagon he testified that the Uarte car, when it reached a point about fifty feet in front of him and while his equipment was still on its own right side of the road, suddenly came over into the right lane and hit the right front wheel of the tractor portion of his equipment; and that as a result of this impact his lights went out, his steering mechanism started "spinning", and he lost control of his vehicle, whereupon it went over onto the left side of the road, thus colliding with decedents' station wagon. Photographs taken at the scene show that the equipment finally came to rest with its foremost portion on the left shoulder headed south, and the hind truck lengthwise squarely across the left lane of the road. He also testified that it appeared to him that decedents' sedan "clipped" Uarte's car or that one or the other of them "blew a tire, or something"; but he admitted he saw nothing of the kind and had no evidence that a tire was blown out; and while on this appeal respondents in their brief assert that the Uarte car was "clipped" by decedents' car and "catapulted to the wrong side of the road," and urge that for this reason the non-suit was properly granted, we note that the trial court ruled out McCoy's testimony in this connection, as being only the opinion of the witness, and stated that whether there was any such clipping or what happened would be a matter for determination by the jury.

[2-4] McCoy's testimony thus made a prima facie case in favor of plaintiffs. In *Musgrove v. Zobrist*, 83 Cal.App.2d 101, 103, 187 P.2d 782 (hearing in Supreme Court denied) the court said that driving on the wrong side of the highway is prima facie evidence of negligence, and calls for an explanation on the driver's part, and the burden is upon the driver to excuse or justify his position upon the highway, citing *Jolley v. Clemens*, 28 Cal.App.2d 55, 68, 82 P.2d 51, and *Parker v. Auschwitz*, 7 Cal.App.2d 693, 696, 47 P.2d 341. Also see *Temple v. De Mirjian*, 51 Cal.App.2d 559, 125 P.2d 544. No contributory negligence on the part of decedents was shown,

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and they are presumed to have taken proper care of their own concerns. Therefore whether the accident was proximately caused by negligence on the part of McCoy should have been submitted to the jury for its determination. In *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 558, 559, 299 P. 529, 536, the court said:

"The effect of evidence given by an adverse party under section 2055 was commented on by this court in the recent case of *Marchetti v. Southern Pac. Co.*, 204 Cal. 679, [686], 269 P. 529, 532. In that case we said: 'While the two trainmen, who were called for cross-examination under section 2055 of the Code of Civil Procedure, testified that they gave the required signals, both by ringing the bell and sounding the whistle the plaintiffs, especially upon a motion for a non-suit, would not be concluded by their evidence; it being the duty of the court upon a motion for a nonsuit to accept the evidence most favorable to the plaintiffs.'

* * * * *

[5-7] "Our conclusion, therefore, is that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not, when weighing it against a presumption, to be considered, nor is it really, evidence of the party calling such witness, and that the evidence thus produced does not dispel a presumption contrary thereto, but in favor of the party calling such adverse witness. This testimony is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or, if the case is before a jury, by the jury. When the action is before a jury, however, the duty of weighing this evidence is with the jury and not with the court upon a motion for a nonsuit or directed verdict."

Also see *Anthony v. Hobbie*, supra, in which case, though the evidence showed that defendant's car was traveling in its own proper traffic lane when it struck and killed the decedent who was in that lane, the court held that the presumption in favor of decedent was evidence to be weighed against the testimony of defend-

ant, and raised an issue of fact which necessitated reversal of a judgment for a directed verdict in favor of defendant and submission of the case to a jury.

In *Wood v. Samaritan Institution*, 26 Cal.2d 847, 849, 161 P.2d 556, in reversing a judgment entered after a directed verdict for defendant, the court said that in determining an appeal from such a judgment it was its duty to consider only the evidence most favorable to plaintiff, together with every inference which could be drawn therefrom reasonably, and every presumption that could fairly be deemed to arise in support of plaintiff; and that since under the circumstances of the case it could not be said that as matter of law plaintiff's evidence failed to establish the negligence with which defendant was charged, the issue should have been resolved as one of fact for the jury. Also see *Kirk v. Los Angeles Ry. Corporation*, 26 Cal.2d 833, 161 P.2d 673, 164 A.L.R. 1; *Simon v. City and County of San Francisco*, 79 Cal.App. 2d 590, 597, 180 P.2d 393.

[8,9] Obviously the trial court could not say in this case that McCoy's testimony as to how his equipment happened to be on the wrong side of the road and in decedents' lane of travel established freedom from negligence on his part as matter of law. He was traveling at a rate of forty miles per hour, the maximum rate of speed allowed for his equipment (Veh.Code, Sec. 515), and the road was wet and slippery, which fact would justify a conclusion that he was not driving his vehicle in a reasonable and prudent manner having due regard for the conditions existing. (Veh.Code, Sec. 510.) He saw the Uarte car and decedents' station wagon when they were some 750 feet away from him, and whether, as he said, the Uarte car "zooped" in front of him, struck his right front wheel and caused him to lose control of his vehicles so that they crossed over into decedents' lane of travel without fault on his part were questions of fact to be determined by the jury.

Also there is testimony from which it might have been inferred that McCoy's vehicles were at least partially in the left

lane before they were struck by the Uarte sedan, and that Uarte turned across the highway for that reason. A traffic officer who investigated the accident soon after it happened stated that he found "gouge" marks on the pavement approximately four feet east of the center line; and since the truck equipment was struck on the right front wheel and the photographs introduced in evidence show that that portion of the truck was dropped to the ground, it would not be unreasonable to infer, in view of the width of the truck, that it was at least partially over in the left lane before it was struck by Uarte. Also the jury would not have been compelled to accept McCoy's version of how the accident happened. *Temple v. De Mirjian*, supra.

The judgments appealed from are reversed.

THOMPSON, and PEEK, JJ., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



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BACIGALUPI v. BAGSHAW et al.

Civ. 13619.

District Court of Appeal, First District,
Division 2, California.

Aug. 2, 1948.

1. Highways ⇐120(4)

Evidence of damage to plaintiff's property from flood waters, occurring when culvert constructed by county became plugged during storm, did not compel verdict for plaintiff against county and road supervisor in view of evidence that storm was of unparalleled magnitude. Gen.Laws, Act 5619; Government Code, § 1953.

2. Highways ⇐120(1)

Where highway drainage system created by county to protect two county roads resulted in converging storm waters at a

point above a public road which was not a county road, county had authority and duty to provide an adequate culvert at that point even though road was not a county highway. Streets and Highways Code, §§ 961, 962, 964, 965(d).

**3. Appeal and error ⇐1064(1)
Highways ⇐120(4)**

In action against county for damage to property from flood waters occurring during storm when culvert constructed by county as part of highway drainage system, but under a road which was not a county road, became plugged, instruction that county was not authorized to remedy dangerous condition upon any public road unless road was part of county road system was erroneous and prejudicial.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Peter Bacigalupi against T. Fred Bagshaw and the County of Marin, to recover for damage sustained from the discharge of water onto the plaintiff's property because of defective drainage works installed by the county. Judgment for the defendants, and the plaintiff appeals.

Judgment reversed.

Freitas, Keating & Duffy, of San Rafael, for appellant.

Bronson, Bronson, & McKinnon, of San Francisco, for respondent.

DOOLING, Justice.

Plaintiff and appellant owns a home in Tiburon. This action was brought by him against the County of Marin and respondent Bagshaw as the member of the board of supervisors of that county having supervision of and responsibility for road work and surface water drainage improvements in the supervisorial district wherein Tiburon is located upon the claim that appellant's property was damaged by flood or storm waters diverted onto his property by certain drainage works installed by the respondent county. The first cause of action against both defendants was based, as to the county on the Public Liability Act of 1923,

Stats.1923, p. 675; Deering's Gen.Laws, Act 5619, and as to Bagshaw on sec. 1953 Government Code. The second cause of action was against the county alone on the theory of damage to private property for public use. Cal.Const. Art. I, sec. 14.

The evidence shows that on December 22, 1945, surface waters were discharged onto appellant's property resulting in substantial damage. This property fronts on the south side of Mar East Road. Tiburon in this area slopes rather precipitately from north to south. Above Mar East Road is a road known as Tiburon Boulevard and connecting Mar East Road with Tiburon Boulevard from the west is a road known as Mar Centro Drive. The land slopes steeply from Tiburon Boulevard to Mar East Road and Mar Centro Drive also slopes toward Mar East Road. The portion of Mar East Road easterly of its intersection with Mar Centro Drive is a public road but not a part of the county highway system. Tiburon Boulevard and Mar Centro Drive are both county roads. Immediately to the west of appellant's property, but not impinging upon it, is a canyon or swale which in the absence of any artificial works would be a natural watercourse during rainy weather. The county has constructed a number of flumes and ditches in the vicinity which will be more particularly described hereafter. On the night of December 22, 1945 there was a heavy rainfall and mud and water ran onto appellant's property and into his house causing the damage complained of. Investigation proved that a culvert across a short extension of roadway between Mar East Road and Mar Centro Drive, designated at the trial as culvert No. 2, had become stopped up and the water which would otherwise have run through it down the canyon or swale to the west of appellant's property was running over the road and onto appellant's land.

[1] We cannot agree with appellant that the evidence was such as to compel a verdict in his favor. While he proved notice from himself to Bagshaw and the county of a claimed defective and dangerous drainage system, respondent Bagshaw testi-

fied that the county had funds to reconstruct culvert No. 2 and the witness Clow, Deputy County Road Commissioner, testified that culvert No. 2 was probably not adequate for a big storm such as occurred on December 22, 1945; there was some testimony that the storm of December 22, 1945 was of unparalleled magnitude so that the jury might have found that the drainage system including culvert No. 2 was adequate for any rainfall that might be reasonably anticipated.

[2] However there is error in the record which compels a reversal. One of the defenses urged against the plaintiff before the jury was grounded on the contention that because culvert No. 2 ran under a road which had not been made a county highway the county had no legal right or authority to expend county funds upon its improvement or repair and therefore the defendants could not suffer liability on the theory that it was improperly or negligently constructed or maintained. Respondent Bagshaw and county employees who were called as witnesses for the defendants pointed up this theory by testifying to their opinion that they had no authority to do any work on culvert No. 2 because it was not under a county road.

This theory of the defendants finds no justification in the law. The evidence is without conflict that culvert No. 1 (throughout we use the numbers given the several culverts on the trial) was constructed to carry water beneath Tiburon Boulevard, admittedly a part of the county road system. This water is spilled into the natural water course above referred to in which the county constructed a ditch to carry it directly to culvert No. 2. Along the upper side of Mar Centro Drive the county constructed a ditch to prevent the flooding of that road. Mar Centro Drive is a part of the county road system. The water in this ditch is also conducted to the intake of culvert No. 2. To the east of culvert No. 1 on Tiburon Boulevard is another culvert constructed by the county which conducts water collected above Tiburon Boulevard beneath that road and spills it down the hillside toward culverts 4 and 5, constructed by the county under Mar East Road to the

east of appellant's land. The county constructed a ditch along the upper side of Mar East Road between culverts 4 and 2 which diverts additional water to the intake of culvert No. 2. The evidence shows without contradiction that the county constructed and installed culvert No. 2 as well. The whole constitutes an integrated system of drainage designed to protect Tiburon Boulevard and Mar Centro Drive, both of which are admittedly county roads. The construction of such a system falls well within the county's statutory powers. Streets and Highways Code secs. 961, 962, 964. We need only quote from section 964: "Whenever the board finds that any county highway has been damaged or is in danger of being damaged by storm waters or floods, the board shall adopt all measures necessary to repair or prevent such damage."

The county could not lawfully, to protect those two county highways, divert storm waters from Tiburon Boulevard and Mar Centro Drive to the location of culvert No. 2 and there leave such waters to spread out over the adjoining private property. It was its duty having collected such waters at that point to provide an adequate method of carrying them away. This it attempted to do by the construction of culvert No. 2.

The county is not limited to the area embraced within county roads in constructing flumes, ditches and other works for the protection of such roads from storm and flood waters. It is given the power of condemnation to acquire land or easements for that purpose by Streets and Highways Code sec. 965, subd. d. Since culvert No. 2 was within the area of a public, although not a county, road over which the public already had an easement for highway purposes the county probably needed no additional easement for culvert No. 2. In any event the evidence sufficiently shows that, if necessary, it had acquired such easement by prescriptive use. A flume, ditch or culvert maintained even on private property by a county as a part of a flood or storm water control system is said to be a public work within the purview of the Public Liability Act. *Young v. County of Ventura*, 39 Cal.App.2d 732, 738, 104 P.2d 102.

We are satisfied that having elected to converge storm waters at the point where culvert No. 2 is located as a protection to the two roads which are admittedly county roads the county had not only the authority, but the duty as well, to construct and provide an adequate conduit for such waters at that location.

[3] It follows that the trial court committed error in giving the following instruction:

"You are instructed that neither the County of Marin nor any of its officers, agents or employees were nor are authorized to remedy the dangerous or defective conditions upon any public road within said county unless that road is first taken into the County Road System in the manner provided by law.

"The acts of any officer, agent or employee of said County in altering, repairing, improving or doing any other work upon a public highway not previously taken into the County Highway System would be an unauthorized expenditure of county funds, in excess of the authority of said officers, agents and employees, and would not create any liability on the part of said County."

We need not decide in this case whether as applied to the maintenance or improvement as a means of travel of a public road, not taken into the county road system, this instruction correctly states the law or not. A reading of the transcript demonstrates that the instruction was not directed to that question. There was no claim that any failure to properly construct or maintain Mar East Road or its extension as a highway contributed to appellant's damage. The claim of damage was directed to the alleged improper maintenance or construction of culvert No. 2 as an integrated part of the drainage system established in that area by the county. Repeatedly the defense witnesses testified to their opinion that the county had no authority to repair or improve culvert No. 2 because it was not constructed across a county road. The instruction could only have been understood by the jury as applying to culvert No. 2. Applied to culvert No. 2 it was erroneous and necessarily prejudicial. Even if the jury found,

as they were entitled to do under the evidence, that culvert No. 2 was inadequate and negligently maintained, the instruction complained of would compel them to bring in a verdict for the defendants.

For this error the judgment is reversed.

NOURSE, P.J., and GOODELL, J., concur.



IMPERIAL-YUMA PRODUCTION CREDIT ASS'N v. SHIELDS et ux.

Civ. 3689.

District Court of Appeal, Fourth District, California.

Aug. 9, 1948.

Rehearing Granted Aug. 28, 1948.*

1. Trial ☞178

The power of court to direct a verdict is the same as the power to grant a nonsuit, and either may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence all value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support verdict for plaintiff.

2. Trial ☞169

In action on note wherein payor cross-claimed alleging a sum due for failure of payee to give credit on the note for sale of wheat and alleging damage for failure of payee to have pasturing done at proper time preventing payor from producing grain crop, where there was no evidence substantiating cross-complaint, payee was entitled to and court properly gave a directed verdict thereon.

3. Trial ☞178

A direction to render a verdict in favor of a party is the decision of the court upon a question of law. Code Civ. Proc. § 616.

* Subsequent opinion 193 P.2d 951.

4. Trial ⇐179

Court would have the power to enter judgment in a case at law where directions to return a verdict were not followed.

5. Appeal and error ⇐1099(3)

Question of right of a plaintiff to bring an action on a renewal note, where determined on a former appeal, could not again be raised on a second appeal following a new trial.

6. Trial ⇐179

Where court on plaintiff's motion for an instructed verdict directed that defendants recover nothing on their cross-complaint and jury refused to obey the instructions and were then dismissed, court could properly thereafter grant plaintiff's motion for judgment as prayed for without presenting the question to another jury. Code Civ.Proc. § 616.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Imperial-Yuma Production Credit Association, a corporation, formerly El Centro Production Credit Association, a corporation, against E. S. Shields, and wife, on note wherein defendants filed a cross-complaint. From the judgment, defendants and cross-plaintiffs appeal.

Judgment affirmed.

Leslie L. Burr, of El Centro, for appellants.

George R. Kirk, of El Centro, for respondent.

GRIFFIN, Justice.

This case was before this court before. The appeal was based on an order granting a new trial. Imperial-Yuma Production Credit Ass'n v. Shields, 74 Cal.App.2d 932, 169 P.2d 671. The nature of the proceedings, pleadings and factual background are the same as there related. The original action was based on a promissory note for \$6281.12, signed by defendants, upon which there was an unpaid balance in the sum of \$3422.48. Its due execution was admitted in the answer. Defendants denied that there was anything due thereon and filed

a cross-complaint alleging that \$2310.88 was due them because plaintiff had failed to give them credit on the note for the sale of 1010 sacks of wheat. Secondly, that in 1941, defendants planted a crop of barley and that it was the understanding that at the proper time the acreage in barley was to be pastured and the return from the pasturage was to be paid to plaintiff; that plaintiff failed to have the pasturing done at the proper time and the crop, consisting of 120 acres, was destroyed and that if permitted to be pastured at the proper time that acreage would have produced a grain crop valued at \$3500 and therefore defendants suffered this amount of damage less a credit of \$298.88 already allowed for such pasturage.

The case was tried before a jury on April 22, 1947. At the conclusion of the evidence the trial judge, apparently believing that the defendants had failed to substantiate their alleged claim under their answer and cross-complaint, granted a motion on behalf of plaintiff for an instructed verdict in the amount sought in plaintiff's complaint and directed that defendants recover nothing upon their cross-complaint. A verdict, in this form, was presented to it. The jury retired for deliberation and on returning refused to obey the court's instruction. Counsel for plaintiff moved that the jury be dismissed and also moved for a judgment for plaintiff as prayed for and asked the court to enter such a judgment. Counsel for defendants then moved for a mistrial and asked that the jury be discharged. Later, the court denied defendants' motion and granted that of plaintiff and on the same day a written judgment in favor of plaintiff was presented to the court and signed. A motion for a new trial and to vacate the judgment was denied. This appeal followed.

The defendants argue that it was error to grant plaintiff and cross-defendant's motion for entry of judgment by the court and to later enter such a judgment; that the denial of the motion of defendants, upon the refusal of the jury to return a directed verdict for the plaintiff was error; and that the judgment of the court is void as being in violation of section 616 of the Code of Civil Procedure; and that it was

error to deny defendants and cross complainants' motion for a new trial and to deny the motion to vacate the judgment.

[1] We are guided first by the general rule with reference to the authority of a trial court to direct a verdict. It is the established law of this state that the power of a court to direct a verdict is the same as the power of the court to grant a nonsuit. Quoting from *Estate of Flood*, 217 Cal. 763, 21 P.2d 579, 580, it is said:

"A nonsuit or a directed verdict may be granted 'only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence*, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'"

A similar statement of the rule is set forth in *Gish v. Los Angeles R. Corporation*, 13 Cal.2d 570, 90 P.2d 792, and it is there said that a court is not justified in taking a case away from the jury and itself rendering the decision unless it can be said that, as a matter of law, no other conclusion is reasonably deductible from the evidence. See, also, *Powers v. Cherry*, 42 Cal. App.2d 489, 109 P.2d 361.

We must therefore first analyze the evidence presented, in the light of this rule, to determine whether or not there was sufficient substantial evidence presented in support of the defendants' answer and cross-complaint upon which the jury could have found in their favor.

Plaintiff offered in evidence the promissory note as well as its books of account showing all credits given defendants. A crop and chattel mortgage on certain described farming implements was executed by defendants as security for the payment of the original note. Assignments of *proceeds* of sale of mortgaged crops for 1940, 1941, and 1942 were obtained from defendants and also the Warner Seed Company where defendants sold their crops. A similar assignment was signed respecting *proceeds* from rentals of certain lands for forage for 1940-1941. Letters in evidence show that defendants wrote plain-

tiff in September, 1940, acknowledging an indebtedness and expressing a great desire to pay it off. The Warner Seed Company's records were received in evidence. They disclose an account for all grains it claims it received from defendants and of the payments made to plaintiff which were the *proceeds* under the assignment.

This action was instituted in 1944. The farm implements and machinery given as security under the chattel mortgage are all worn out and have no particular value.

Plaintiff's agent testified that Mr. Shields admitted owing the balance due but claimed "Times were pretty tough". Defendant Mr. Shields testified that he was farming about 600 acres under crop mortgage to plaintiff and that he was farming 320 acres not under the mortgage; that the Pasqual Land and Cattle Company pastured, by agreement, his acreage planted to barley but that it was not "pastured off" at the proper time. For this pasturage plaintiff gave credit under the assignment to defendants on their note in the sum of \$290, less a water bill of \$51.80, and gave the cattle company a receipt for same.

It is defendants' argument, as we interpret it, that plaintiff company became liable for the reason that a loss occurred because the cattle company pastured defendants' acreage at an improper time.

There is no competent or substantial evidence substantiating this claimed damage nor is there any evidence attaching liability to the plaintiff for this claimed act. In fact, all of the evidence points to the conclusion that defendants made all arrangements with the cattle company for the pasturing of the acreage.

Considerable testimony was received in respect to the amount of grain delivered to the Warner Seed Company by defendants. Defendants intimate that they delivered more than the records of the Warner Seed Company reflect by their books. They fall far short of proving this fact. They point to no evidence substantiating this claim. Even assuming there was some discrepancy between their accounts, the record shows that as far as the plaintiff was concerned, it credited defendants' account with the amounts actually received from the Warner

Seed Company under the assignment of the proceeds. If there was a shortage as between defendants and the Warner Seed Company it is not reflected in the record. At least, plaintiff's liability for any claimed shortage does not appear.

[2] It therefore appears that there was no evidence substantiating defendants' cross-complaint as to plaintiff's liability for damages or that defendants were entitled to any credits other than those established by the uncontradicted evidence. Proof of these credits and the balance due on the note are the same as the allegations in the complaint. Therefore, there was no factual question for the jury to decide. Defendants failed to prove a cause of action on their cross-complaint. Plaintiff was entitled to and the court gave a directed verdict thereon. No other verdict could have been legally supported by the evidence.

We now turn to the next question presented, i. e., that the trial court lacked authority to enter the judgment complained of and was bound to again present the question to another jury under sec. 616 of the Code of Civil Procedure, citing *Vitamin Milling Corporation v. Superior Court*, 1 Cal.2d 116, 33 P.2d 1016; and *Casner v. Daily News Company, Ltd.*, 16 Cal.2d 410, 106 P.2d 201, 202.

In the *Vitamin Milling Corporation* case a motion for an instructed verdict was granted but the court never instructed the jury to return such a verdict. It was there held that sec. 616 of the Code of Civil Procedure did apply. In the instant case the trial court did so instruct the jury and it refused to comply with the instruction.

Likewise, in the *Casner* case, no order directing a verdict was made and no such instruction was submitted to the jury for its consideration. It is there said:

"* * * there is no showing or intimation that the jury in this case would have refused to return a verdict for the petitioner, if it had been instructed so to do."

In the former trial of the instant case a jury did render a verdict in favor of defendants on their cross-complaint and the trial court granted a new trial. On a new trial a second jury refused to follow the

instructions of the court and apparently intended to base a verdict in favor of defendants without substantial evidence to support it. Has the trial court no power to put an end to such litigation where the question raised becomes one of law only and not a question of fact?

[3] *Estate of Sharon*, 179 Cal. 447, 460, 177 P. 283, definitely holds that a direction to render a verdict in favor of a party is the decision of the court upon a question of law. It was said by Mr. Justice Edmonds in his dissenting opinion in the *Casner* case, 16 Cal.2d at page 417, 106 P.2d at page 204, that

"* * * The absence of a written verdict in such a case is at most a defect of form; and where the absence is a result of contumacious refusal by the jury, it is not a defect at all, since the court has full power to give the necessary judgment. Subsequent decisions have followed this reasoning and have applied the rule without any question * * *

"The District Courts of Appeal, in a number of recent decisions, have spoken unequivocally to the same effect, namely, that the court may enter judgment where a directed verdict is proper, irrespective of whether the jury actually returned the verdict." (Citing cases.)

It now appears that a new section of the Code of Civil Procedure, sec. 630 (effective 91 days after June 20, 1947), was added, specifically declaring the right of the trial court to order judgment entered on a directed verdict where, for any reason, the motion for a directed verdict was not granted and the jury was discharged without having rendered a verdict. The judgment in the instant case, however, was entered prior to the effective date of the new section.

[4] In *Reay v. Reay*, 97 Cal.App. 264, 271, 275 P. 533, 536, it was said:

"As the court was empowered to direct any one member of the jury to sign and return a verdict in compliance with the instruction, so also was the court empowered to enter judgment on that cause of action for defendants irrespective of whether or not the jury returned any verdict or if the jury refused to return a ver-

dict in compliance with the instruction.

* * *

"* * * the court would have the power to enter judgment in a case at law where directions to return a verdict were not followed." See, also, *Umstead v. Scofield Engineering Const. Co.*, 203 Cal. 224, 263 P. 799.

[5] The question of the right of plaintiff to bring this action on a renewal note, which question is attempted to be raised again on this appeal, was determined in the former appeal.

[6] We firmly believe that the trial judge was fully justified in entering the judgment appealed from under the circumstances here related.

Judgment affirmed.

BARNARD, P. J., concurs.



86 Cal.App.2d 803

BURKHEAD v. BRIGGS.

Civ. 16037.

District Court of Appeal, Second District,
Division 3, California.

July 19, 1948.

Hearing Denied Sept. 13, 1948.

1. Judgment ⇨877

In quiet title action, evidence sustained finding that within 40 days of date judgment in suit by decedent charging conspiracy to defraud decedent of his interest in realty became final, decedent had been paid money in accordance with decree requiring decedent to convey realty according to contract of sale if a reconveyance of other land to decedent were recorded and if decedent was paid a specified amount of money, and decedent's lien was extinguished upon reconveyance and payment pursuant to a decree.

196 P.2d—5½

2. Judgment ⇨585(5)

In quiet title action, where facts upon which plaintiff predicated his claim as successor in interest of third person arose after court decision that plaintiff held as mortgagee of third person was rendered, plaintiff was not estopped to show that he was successor in interest of third person.

3. Judgment ⇨715(3)

A judgment requiring conveyance of realty according to contract of sale if a reconveyance of other land were recorded and specified sum of money paid to plaintiff's predecessor in title was not res judicata of issues in action to quiet title involving issues whether the conditions were met.

4. Limitation of actions ⇨197(1)

Evidence sustained finding as to length and time of plaintiff's military service, which was not computable in period in which quiet title action was required to be brought. Soldiers' and Sailors' Civil Relief Act of 1940, § 205, 50 U.S.C.A. Appendix, § 525.

5. Army and navy ⇨24

Where quiet title action was commenced November 23, 1945, plaintiff's predecessor in interest was in possession on August 4, 1937, and plaintiff served in armed forces from April 17, 1942 until August 27, 1945, action was not barred by five year statute of limitations. Code Civ. Proc. § 318; Soldiers' and Sailors' Civil Relief Act of 1940, § 205, 50 U.S.C.A. Appendix, § 525.

6. Quieting title ⇨44(2)

In quiet title action based upon a prior decree requiring decedent to convey to plaintiff's predecessor in title if plaintiff's predecessor should reconvey other realty to decedent and pay decedent a specified sum, grant deed to plaintiff from plaintiff's predecessor in title was admissible in evidence to show the title conveyed to plaintiff by his predecessor.

7. Limitation of actions ⇨196(1)

In quiet title action where five year statute of limitations was set up as a defense, documents tending to show plaintiff's

seisin within five year period prior to commencement of action were admissible in evidence. Code Civ.Proc. §§ 318, 336, subd. 1.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Quiet title action by B. W. Burkhead against Arthur E. Briggs, as administrator of the estate of Cornelius Kallmeyer, deceased. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

Charles E. McGinnis, and Arthur E. Briggs, both of Los Angeles, for appellant.

Hanna & Morton and B. W. Burkhead, all of Los Angeles, for respondent.

McCOMB, Justice (Assigned).

From a judgment in favor of plaintiff, after trial before the court without a jury, in an action to quiet title to a parcel of real property, defendant appeals.

Chronology

(1) In 1927 Cornelius Kallmeyer was the owner of a tract of land containing 10 acres designated as lots A, B, C and D. This property was subject to an indebtedness of \$5,000, represented by Mr. Kallmeyer's promissory note payable to Mr. Hunt on April 1, 1931, which note was secured by a trust deed on the foregoing property. This note in due course became the property of the Warren estate.

(2) On June 3, 1927, Mr. Kallmeyer agreed to sell 5 acres, being lots B, C and D, to Mr. Watson for \$10,000. The consideration for the contract was the payment of \$5,000 in cash and an agreement by Mr. Watson to pay the above note secured by a trust deed.

(3) On February 4, 1928, Mr. Watson contracted to sell two of his five acres, the easterly one-half of lot B and all of lots C and D to Mr. and Mrs. Leffler for \$6,500, of which sum \$1,500 was paid in cash and it was agreed that the balance was to be paid February 3, 1941. The Lefflers did not pay the balance to Mr. Watson and he did not pay the note secured by the trust deed mentioned in paragraph 1, supra.

(4) On August 12, 1933, after foreclosing on the note mentioned above, the Warren estate purchased the entire tract at a trustee's sale.

(5) In January of 1934, Mr. Alvin H. Poore purchased the ten acre tract from the Warren estate for \$6,500, paying \$1,000 in cash; the balance being represented by a note and trust deed executed by Mr. Poore covering the ten acre tract.

(6) On February 17, 1937, Mr. John T. Watson commenced action No. 412182 against Mr. and Mrs. Poore to establish a resulting trust in his favor in the ten acres.

(7) On September 3, 1937, Mr. Watson mortgaged the ten acres to Mr. Burkhead (plaintiff in the present action) by an instrument in the form of a grant deed as security for attorney's fees.

(8) The trial of *Watson v. Poore* resulted in a decree being entered that Mr. Poore held title to the ten acres in trust for Mr. Watson. (*Watson v. Poore*, 18 Cal.2d 302, 115 P.2d 478.)

(9) On August 4, 1937, Mr. Kallmeyer filed action No. 418815 charging a conspiracy between Mr. Poore and Mr. Watson to defraud him of his interest in the aforementioned property, and had a receiver appointed to take possession of eight of the ten acres.

(10) The trial of *Kallmeyer v. Poore*, No. 418815, resulted in a judgment (a) quieting title in lot A in Mr. Kallmeyer, (b) decreeing with regard to the westerly one-half of lot B (the property involved in the action now before the court), that if within forty days from the date the judgment became final (the judgment became final on July 20, 1942, and the fortieth day thereafter fell on August 29, 1942), Mr. Watson, his successors or assigns, or any other person should record, or cause to be recorded, a reconveyance of lot A under the Poore deed of trust, and should pay Mr. Kallmeyer \$847.53, then and in such event Mr. Kallmeyer should convey to Mr. Watson, his successors or assigns, the westerly one-half of lot B according to the terms or conditions of the contract of sale dated June 3, 1927, but (c) providing that in the event lot A is not reconveyed under the Poore deed of trust, or the sum of

\$847.53 is not paid, Mr. Kallmeyer should "have a judgment of decree quieting title to the" remaining portion of lot B, and Mr. Kallmeyer should have judgment against Mr. Watson and Mr. and Mrs. Poore for the sum of \$347.53, and finally (d) giving a money judgment in favor of Mr. Kallmeyer against Mr. and Mrs. Poore in the sum of \$5,895.00.

(11) On February 23, 1939, Mr. Watson, by grant deed, conveyed lots A, B, C and D to plaintiff herein (Mr. B. W. Burkhead).

(12) An appeal from the judgment in Kallmeyer v. Poore resulted in an affirmance on May 19, 1942. (Kallmeyer v. Poore, 52 Cal.App.2d 142, 125 P.2d 924.)

(13) Prior to the expiration of forty days from the date the judgment in Kallmeyer v. Poore became final, plaintiff herein caused a full conveyance of lot A to be recorded so as to release it from all liens by reason of the Poore deed of trust.

(14) The receiver appointed in August, 1937, in the case of Kallmeyer v. Poore was discharged in the month of November, 1940, leaving on deposit with the clerk of the court \$954.37, of which \$170.93 was attributable to collections from the westerly one-half of lot B. On December 4, 1940, this sum of \$170.93 was delivered to Mr. Kallmeyer. The order by which he received this sum authorized him to collect the rent from the portion of lot B involved in this action, but ordered him to pay the \$170.93 on delinquent taxes on lot B and to apply any additional rent collected to the taxes on lot B, and after the taxes were paid in full to apply the rent collected for costs on the judgment until the costs were paid in full.

(15) January 31, 1941, Mr. Kallmeyer obtained an order of court that the sum of \$109.50, owing by Stever and Turner Lumber Company, tenants then in possession of the westerly one-half of lot B, be paid to Mr. Kallmeyer and this was done about February 1, 1941. Plaintiff's evidence showed that the 1940 tax of \$100.77 plus a penalty of \$4.03 on lot B was paid on April 18, 1941. On April 17, 1942, plaintiff was inducted into the armed forces of the United

States, and thereafter served continuously until August 27, 1945, when he was honorably discharged.

(16) Mr. Kallmeyer died on or about January 8, 1945, and letters of administration were issued to Arthur E. Briggs on or about February 2, 1945, in the estate of Cornelius Kallmeyer, deceased.

Questions presented for determination

First: *Was there substantial evidence to sustain a finding that within 40 days from the date the judgment in Kallmeyer v. Poore became final Mr. Kallmeyer had been paid the sum of \$847.53?*

[1] This question must be answered in the affirmative. During the period between December 11, 1939 and August 29, 1942 (the fortieth day after the judgment became final), Mr. Kallmeyer had collected rents from lot B in the amount of \$945.43. On August 20, 1942, Mr. and Mrs. Poore paid Mr. Kallmeyer \$8,807.96, in satisfaction of the judgment against them which sum included an item of \$347.53, which to that extent was a payment on the \$847.33 which Mr. Watson, his successors or assigns, or any other person, was to pay to Mr. Kallmeyer. Thus the total receipts by Mr. Kallmeyer as rents and payment on the judgment as of August, 1942, amounted to the sum of \$1,292.96. Mr. Kallmeyer was entitled to credit against said receipts for taxes paid in the amount of \$275.73. This left a net amount received by Mr. Kallmeyer in the sum of \$1,017.23 as of August 29, 1942. Thus it is evident that Mr. Kallmeyer had been paid the \$847.53 decreed to him by the judgment in Kallmeyer v. Poore, supra, and the foregoing evidence supports a finding to that effect.

The judgment in Kallmeyer v. Poore (52 Cal.App.2d 142, 125 P.2d 924), created an equitable lien in favor of Mr. Kallmeyer to protect the reconveyance of lot A and the amount of \$847.53 due him. Therefore the rents collected by the receiver and by Mr. Kallmeyer should be appropriated to the payment of the judgment debt, and when Mr. Kallmeyer received a clear title to lot A and payment to him of \$847.53 his lien became extinguished.

Second: *Is the plaintiff estopped to set up his claim as a successor in interest to Mr. Watson?*

[2] This question must be answered in the negative. Defendant contends that because there is a finding of fact in *Kallmeyer v. Poore* that plaintiff held as a mortgagee of Mr. Watson, he is estopped to show that he is the successor or assignee of Mr. Watson. The case of *Kallmeyer v. Poore* was decided on February 9, 1939, at which time plaintiff was the mortgagee of Mr. Watson. However, on February 23, 1939, Mr. Watson gave plaintiff a grant deed to the property here in question. The grant deed was recorded March 16, 1939. It is therefore evident that the facts upon which plaintiff herein predicates his claim arose after the decision in *Kallmeyer v. Poore*, supra, and hence plaintiff is not estopped to show that he is the successor in interest of Mr. Watson. (See *Yager v. Yager*, 7 Cal.2d 213, 217 et seq., 60 P.2d 422, 106 A.L.R. 664.

Third: *Was the judgment in Kallmeyer v. Poore res judicata of the issues in the present action?*

[3] This question must also be answered in the negative. The judgment in *Kallmeyer v. Poore* decreed that (a) lot A was to be reconveyed, and (b) \$847.53 was to be paid to Mr. Kallmeyer within forty days after the judgment became final. The present action to quiet title involves the simple issues of whether or not these conditions have been met.

As we have pointed out above, it is conceded that lot A was conveyed to Mr. Kallmeyer within the prescribed period, and the evidence sustains a finding that the \$847.53 was also paid within the time limited by the decree.

Fourth: *Did the statute of limitations in section 336(1), Code of Civil Procedure, bar plaintiff's action?*

This question must likewise be answered, in the negative. The judgment became final on July 20, 1942. The present action was commenced November 23, 1945, which is well within the five year period prescribed in section 336(1) of the Code of Civil Procedure.

Fifth: *Was plaintiff's cause of action barred by the provisions of section 318 of the Code of Civil Procedure?*

[4,5] This question must also be answered in the negative. Mr. Poore, who was plaintiff's predecessor in interest, was in possession of the property August 4, 1937. The present action was commenced November 23, 1945, which was eight years, three months and nineteen days after August 4, 1937, at which time plaintiff's predecessor in interest was in possession. The Soldiers' and Sailors' Civil Relief Act provides: "Sec. 525. Statutes of limitations as affected by period of service. The period of military service shall not be included in computing any period now or hereafter to be limited by any law * * * for the bringing of any action * * * by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action * * * shall have accrued prior to or during the period of such service * * * ." (Oct. 17, 1940, ch. 888, Sec. 205, 54 Stat. 1181, 50 U.S.C.A. Appendix, § 525.

The trial court found, supported by substantial evidence, that: "On April 17, 1942, plaintiff herein was inducted into the Armed Forces of the United States, and thereafter served continuously in the Army of the United States to and until August 27, 1945."

Thus the period of plaintiff's military service, which was not to be computed in the period within which this action might be brought was three years, four months and ten days. Deducting this period from the total elapsed time from August 4, 1937 to November 23, 1945, we have left four years, eleven months and nine days. It thus follows that the present action was commenced within the time prescribed in section 318 of the Code of Civil Procedure.

Sixth: *Did the trial court commit prejudicial error in permitting plaintiff to introduce in evidence, (a) the grant deed from Mr. Watson to himself, and (b) certain exhibits showing that plaintiff was seised of the property at the commencement of this action?*

[6, 7] This question must be answered in the negative. (a) The grant deed was properly introduced to show the title conveyed to plaintiff by Mr. Watson; and (b) in view of the fact that defendant had set up the statute of limitations (section 336(1), Code of Civil Procedure) as a defense, the other documents tending to show plaintiff's *seisin* of the property within the five year period prior to the commencement of the action were properly received in evidence.

The judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.



87 Cal.App.2d 98

HUNT et al. v. STATE BOARD OF CHIROPRACTIC EXAMINERS et al.

Civ. 13691.

District Court of Appeal, First District,
Division 2, California.

Aug. 4, 1948.

Hearing Denied Sept. 30, 1948.

1. Mandamus ☞12

Mandate is not a writ of right to be freely issued whenever a court disagrees with the policy of the administrative action, but it is limited by statute to the compelling of performance of that act which the law specially enjoins, as a duty. Code Civ.Proc. § 1085 et seq.

2. Mandamus ☞72

When a statute imposes upon an administrative body discretion to act under certain circumstances, mandate will not lie to compel the exercise of such discretion in any particular manner. Code Civ.Proc. § 1085 et seq.

3. Mandamus ☞63

Where an administrative board has acted capriciously or arbitrarily, mandate will issue to compel board to perform act required by statute. Code Civ.Proc. § 1085 et seq.

4. Physicians and surgeons ☞4

Statute providing that an applicant for admission to practice as a chiropractor shall be a graduate of school teaching a course of not less than 2,400 hours in specified subjects, and authorizing adoption of rules and regulations proper and necessary to performance of duties of board of chiropractic examiners, was intended to permit board to take cognizance of changing conditions and improvements in healing arts so as to provide more efficient treatment of the sick. Gen.Laws, Act 4811, §§ 4(b, e), 5.

5. Physicians and surgeons ☞4

Under statute providing that an applicant for admission to practice as a chiropractor shall be a graduate from school teaching a course of not less than 2,400 hours in specified subjects and authorizing adoption of rules and regulations proper and necessary to performance of duties of board of chiropractic examiners, board could raise the educational requirements for admission to practice so as to require applicants to have attended chiropractic school 4,000 academic hours. Gen.Laws, Act 4811, §§ 4(b, e), 5.

6. Physicians and surgeons ☞4

State board of chiropractic examiners had power to adopt rule applicable to all those seeking license to practice as chiropractors requiring 50 per cent. vision and hearing, and no major physical defects. Gen.Laws, Act 4811, § 4(b, e).

7. Physicians and surgeons ☞4

Rule adopted by state board of chiropractic examiners requiring applicants for admission to practice as chiropractors to have 50 per cent. vision and hearing, and no major physical defects, is not unreasonable, arbitrary, or capricious. Gen.Laws, Act 4811, § 4(b, e).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by Ratledge System of Chiropractic Schools, a corporation against State Board of Chiropractic Examiners and others, for declaratory relief concerning rules

of board relating to required study and education, consolidated with actions in mandate, and injunction, by Marjorie Frances Hunt, Joseph Albert Clark, Kenneth C. D. Scott, and Ray Penix, against same defendant. From judgments for plaintiff in each case, defendant appeals.

Judgments reversed.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson and Leo T. Englert, Deputy Attys. Gen., for appellant.

Frank V. Kington, of Redwood City, for respondent.

NOURSE, Presiding Justice.

Three actions in mandate, one in injunction, and one in declaratory relief were consolidated for trial. All involved the question of the power of the defendant board to adopt rules governing the examination and licensing of chiropractors. Three of the plaintiffs sought mandate to admit them to examination though they had not completed the hours of study required by the rules of the board. One sought an injunction against enforcement of a rule requiring fifty percent vision and hearing. The Ratledge School sought declaratory relief attacking the rules of the board relating to required study and education. Plaintiffs had judgment in each case. The only question requiring consideration on defendants' appeal is whether the board has power to enact rules imposing requirements and restrictions on applicants for license above or in excess of those enumerated in the initiative act.

The chiropractic board was created by initiative act, approved November 7, 1922 (Bus. & Prof. Code, Appendix p. 849; Deering's Gen. Laws, Act 4811). Section 4(b) and (e) read: "To adopt from time to time such rules and regulations as the board may deem proper and necessary for the performance of its work, copies of such rules and regulations to be filed with the Secretary of State for public inspection. * * * To do any and all things necessary or incidental to the exercise of the powers and duties herein granted or imposed." Section 5 provides that an applicant shall be a graduate of an incorporated chiropractic school which teaches a

course of "not less" than two thousand four hundred hours in specified subjects. The requirement is declared to be a "schedule of minimum educational requirements" (sec. 5).

In conformity with the provisions of section 4 above noted, the board adopted on February 12, 1944, the rule¹, which provides in part: "(a) The required number of academic hours of attendance in any Chiropractic School or College in the State of California will be four thousand (4000) for all students matriculating after March 1, 1944." At the same time the rule² was adopted reading as follows: "(c) All students shall have at least fifty (50) per cent vision and hearing, and no major physical defects."

Directed to the three plaintiffs who sought mandate to admit them to licensure examinations and to the school seeking declaratory relief the issue is whether the provisions of the act fixing minimum educational requirements exclude the right of the board under its rule making power to demand additional and higher educational standards.

[1-3] Before we answer the question propounded it is well to look at the elementary rules governing mandate. This is not a writ of right to be freely issued whenever a court disagrees with the policy of the administrative action. It is limited by the Code of Civil Procedure (secs. 1085 et seq.) "to compel the performance of an act which the law specially enjoins, as a duty * * *." It is settled law that when a statute imposes upon an administrative body discretion to act under certain circumstances mandate will not lie to compel the exercise of such discretion in a particular manner. 16 Cal. Jur. p. 809, 817. Hence, if the chiropractic board has power under the statute to raise the educational requirements for admission to practice, the advisability or wisdom of the board's regulations is not a matter to be controlled by the courts. What may be deemed a qualification of this statement is the rule which is applied when the administrative board has acted capriciously or arbitrarily. Then mandate will issue to compel the board to perform the act which the statute requires. But

¹ 16 Cal. Adm. Code 322(f).

² 16 Cal. Adm. Code 322(h).

these side issues are not applicable here and cases of that nature cited in the briefs have no bearing since the facts of these proceedings do not bring them within the scope of the rules. Here the single controlling issue is whether the appellant board had the power under the statute to enact and enforce the rules complained of.

The statute prescribes a schedule of "minimum" educational requirements prerequisite to examination for license to practice covering 2400 academic hours. This was enacted in 1922. The appellant board, in 1944, by rule increased the required number of academic hours to 4000. It is hardly necessary to allude to the great number of changes and improvements that have been made in the healing arts during this period of twenty-two years. It can not be argued that the appellant board acted arbitrarily or unreasonably in demanding this additional education. To the contrary, it would be more reasonable to say that it would have been deficient in its duties as an agency concerned with the public health and welfare if it had neglected to so act.

[4,5] It is a fair and reasonable interpretation of the statute that it was intended to permit the board to take cognizance of these conditions so as to provide more efficient treatment of the sick, and that it was with such purpose in view that the statute fixed the "minimum" requirements and gave to the board the power to enact rules "proper and necessary for the performance of its work." If this is not a proper interpretation of the statute, then we can see no reason for the use of the word "minimum" in section 5. Respondents' argument that the statute was enacted to relieve the chiropractors from the unreasonable control of the medical board does not explain the use of the word "minimum." If the purpose was to fix a schedule of educational requirements which no board or agency could exceed then the proper word would have been "maximum." But in fixing a "minimum" schedule the meaning expressed in the clear language of the statute is that "at least" such hours of in-

struction were required and thus it was left open to the board to require additional instruction either in the same subjects of study specified in the statute or in new or additional subjects as the board might determine. For these reasons the judgments in the four causes which were based on the additional educational requirements cannot be sustained.

[6,7] The appeal from the judgment in favor of Ray Penix presents no legal difficulties. On February 12, 1944, the board adopted the rule² reading: "All students shall have at least fifty (50) per cent vision and hearing, and no major physical defects." The judgment declares the rule unenforceable. The respondent defends the judgment on the ground that the board was without power to adopt the rule and argues that the question of the reasonableness of the rule is not open to discussion. With this we do not agree. The question of power is answered in what we have said heretofore. Since the rule is applicable to all those seeking license to practice it is clearly within the powers of the board. No provision of the statute fixes physical qualifications. The rule is therefore not in conflict with the statute, and the only question debatable is whether it is unreasonable, arbitrary or capricious. The effect of respondent's argument is that the board is without power to deny a license to one who is totally blind, deaf, or without arms or hands, or to one who is confined in a state penitentiary or mental institution. The unreasonableness of this possibility negatives the contention that the statute does not authorize the appellants to forestall the absurdities by appropriate rules and regulations. The respondent does not contend that the application of the rule to his case was unreasonable or improper on any other ground.

The judgments in each of the five consolidated actions are reversed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER, J., dissenting.

86 Cal.App.2d 566

**PEOPLE of the State of California, plaintiff
and respondent, v. Helen Virginia CA-
BELL, defendant and appellant.**

Cr. 4206.

District Court of Appeal, Second District,
Division 3, California.

July 16, 1948.

On petition for rehearing.

Rehearing denied.

Prior opinion 195 P.2d 53.

SHINN, Acting Presiding Justice.

I dissent from the order denying appellant's petition for rehearing. As I understand the main opinion the factual basis upon which it proceeds is that appellant did not pay or intend to pay all or any part of her fine. The record shows only that her attorney declared her inability to pay a fine of \$1,000, and represented that the fine to be imposed would be paid by her employer. It was entirely proper for this court to proceed in the belief that no part of the fine had been paid. It now appears that the record before us was incomplete. In appellant's petition for rehearing she represents that she made three successive monthly payments of \$50 each, and that at the time probation was revoked she owed only \$50 of a maximum legal fine of \$200. The trial court held her in default to the extent of \$850. No excuse is offered for the failure to bring to this court the record upon which the trial court made the order revoking probation, and we are not required to afford appellant an opportunity to do so now. But we should not stand upon technicalities when to do so would compel us to render a decision upon a record which we have reason to believe is false or seriously incomplete. We should grant a rehearing and order transmitted here a complete record upon which the trial court acted, including the report of the probation officer which apparently furnished the evidence upon which the trial court based its order. It may be that we would then have before us important evidence, in addition to the fact that \$150 of the fine had been paid. It might appear, and in all probability would appear, that appellant would have

paid the remaining \$50 if she had been given that opportunity. What is our duty in the premises? I have always understood it to be the function of a reviewing court to correct errors of law which have led to a miscarriage of justice. My associates agree that there was error and if they do not believe that justice has miscarried, they must believe that justice has been served. But how has it been served? I do not find in the main opinion any reason for sustaining the order revoking probation unless it be the assumption that appellant would not have paid a legal fine of \$200. As I have heretofore pointed out, that is an unjustified assumption. Inability to pay a fine of \$1,000 does not prove inability to pay a fine of \$200, and much less would it prove inability to pay a balance of only \$50. Therefore, the decision of this court affirming the order rests upon an unsound factual basis.

The legal basis of the judgment of affirmance is equally unsound. The decision rests squarely on the presumption that appellant knew the law and therefore knew that she could satisfy the fine by the payment of \$200. This is to say, in effect, that the accused is responsible for all of the mistakes of the court and the lawyers, unless at the time they are made he proceeds to have them corrected. Errors of the court are his errors and he cannot later complain of them. With due respect to my associates I must say that this sounds to me like a satire on court procedure. Judges make errors and they correct errors. The error here involved was never called to the attention of the trial judge. It is our plain duty to call to his attention a mistake of law, and by a reversal of the erroneous order open the way for him to correct it.

The order of affirmance is unjust, not only to the appellant, but to the trial judge as well, for, as I have said before, he is one who would not hesitate to correct an error that threatened an obvious injustice. In all fairness appellant should be afforded an opportunity to pay the balance of a legal fine, which I am assuming, for the purpose of this opinion, to be \$50, and not \$200.

The petition for rehearing should be granted.

80 Cal.App.2d 530

CITY OF EL CAJON v. HEATH et al.

Clv. 3681.

District Court of Appeal, Fourth District,
California.

June 30, 1948.

1. Municipal corporations ⇨708, 712

Cities have the power to construct and maintain sewers and to provide reasonable regulations for the tapping of and connection with such sewers.

2. Municipal corporations ⇨709

Where defendants' lands outside city limits were assessed to pay for sewer system, the defendants acquired a right to use the system and a beneficial interest in the improvements which could not be taken from them by the annexation by the city of a part of the lands included in the improvement district. St.1911, p. 730; St. 1921, p. 1658.

3. Municipal corporations ⇨36(2, 3)

The general rule that, upon the annexation of a portion of one public corporation to another public corporation, the property in the annexed territory belongs wholly to the corporation to which it is annexed and that the annexed territory is freed from all obligation for the debts of the corporation to which it formerly belonged, does not apply to the sewer system of an improvement district, only part of which is annexed to city.

4. Municipal corporations ⇨709, 711

Where defendants' lands outside city limits were assessed to pay for sewer system and only part of land in improvement district was annexed to city, the city could require defendants to comply with reasonable regulations with respect to use of city sewer system, including payment of reasonable charges for service rendered, but city could not arbitrarily refuse the defendants their right to use of the system.



Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by City of El Cajon against Leslie O. Heath and Nellie E. Heath to enjoin the defendants from discharging sew-

age into sewer system and disposal plant of the plaintiff and for reasonable value of sewage disposal services rendered. From the judgment entered, the plaintiff appeals.

Affirmed.

Donald A. Stewart, of San Diego, for appellant.

Miller, Higgs, Fletcher & Glen, of San Diego, for respondents.

MUSSELL, Justice pro tem.

This is an appeal from a judgment for defendants in an action brought by the plaintiff City of El Cajon to enjoin the defendants from discharging sewage into the sewer system and disposal plant of the plaintiff and for the reasonable value of sewage disposal services rendered.

The City of El Cajon is a municipal corporation of the sixth class and owns and operates a municipal sewage disposal system. The defendants own a portion of Lot 10 of Ardell Acres in San Diego County, which property is contiguous to the city limits. In 1929 under the provisions of the Improvement Act of 1911, St.1911, p. 730, as authorized by the Improvement Act of 1921, St.1921, p. 1658, the defendants' property and other adjoining land outside the city limits of the City of El Cajon was improved by the construction of a complete system of trunk lines and sewer laterals. No outlet or sewage disposal plant was ever constructed to serve the area. Lot 10 of Ardell Acres was a part of the improvement district and the improvements were paid for by bonds issued under the authority of the Improvement Act of 1921. Special assessments were levied upon the lots owned by defendants to pay for the improvement bonds for the construction of the sewer system. All of the assessments have been paid and the bonds have been retired. In 1942, the area embraced within the improvement district was occupied and used by the United States Army for the establishment of temporary military installations and a sewer main approximately 80 yards long was constructed from the sewage system in the improvement district to the sewer main line of the city and connection made there-

to by the United States Army. The area was evacuated in 1944 and in that year 75% of the area comprising the assessment district was annexed to the city under the provisions of the Annexation Act of 1913, St.1913, p. 587. Lot 10 of Ardell Acres, a portion of which was owned by defendants, was not included in the petition for annexation or in the part of the area annexed to the city.

After the annexation, property owners within the city, in the area annexed, were permitted to use the sewer system and disposal plant of the plaintiff.

One of the sewer laterals which was connected to the sewage disposal plant of the city is located in the alley between Lots 6 to 10 inclusive, of Ardell Acres, and the center of the alley is the boundary line of the city limits.

In 1946 the defendants constructed a residence on the portion of Lot 10 of Ardell Acres owned by them, and caused a sewer line to be constructed from the house to the sewer lateral in the alley. A permit was obtained from the plumbing inspector of plaintiff to construct the sewer line from the residence to the lateral but no permit was secured from the city to connect to the lateral or to use it for the disposal of sewage. Defendants made the connection and have used the lateral for the disposal of sewage since on or about January 28, 1947.

The trial court granted an injunction against plaintiff restraining it from disconnecting or interfering with the defendants' use of the sewer laterals and mains upon the condition that defendants pay a service charge in an amount determined by the court. Jurisdiction was retained by the court to adjust the service charge each year.

The plaintiff contends that the sewer system is the property of the city and that private property owners have no right to connect private sewers with a public sewer without the consent of the municipality.

[1] It is well settled that cities have the power to construct and maintain sewers and to provide reasonable regulations for the tapping and connection with such sewers. *Harter v. Barkley*, 158 Cal. 742,

745, 112 P. 556. In the present case, however, we are concerned with the regulation and use of a sewer system which the city did not construct nor purchase, a part of which is outside the boundaries of the municipal corporation. The position taken by the plaintiff is substantially that by the annexation proceedings the city became the owner of all the lines and laterals of the improvement district in the area annexed and became entitled to control the entire sewer system to the exclusion of defendants, whose property was assessed to pay for an undivided portion of all lines constructed in the improvement district.

The Annexation Act of 1913 contains a provision to the effect that when the annexation is complete the annexed territory shall be to all intents and purposes a part of such municipal corporation. The act does not contain any provision concerning the transfer of title to improvements in annexed territory.

In the case of *Pixley v. Saunders*, 168 Cal. 152, 141 P. 815, the effect of the annexation of a part of a sanitary district by a municipality was under consideration. In that case the owners of the Pixley Ranch brought an action to restrain the defendant, as tax collector, from selling the ranch for delinquent taxes levied thereon by a sanitary district. At the time of the organization of the sanitary district the ranch was within the boundaries of the district. Thereafter the sanitary district issued bonds for the purpose of constructing a sewer, and at the time of the levy of taxes, a portion of the principal of the bonds had not been paid. Subsequently the town of Larkspur was incorporated and the Pixley Ranch was included within its territorial limits. The town levied and collected taxes on the Pixley Ranch, the assessor of the sanitary district made his assessment of the property of the district, including the Pixley Ranch. The assessment on the Pixley Ranch was not paid and the assessor proceeded to sell the property. It was contended by the plaintiff that by reason of the inclusion of the Pixley Ranch within the limits of the town of Larkspur, the property had passed out of the control and jurisdiction of the sanitary district and that the proposed tax sale was without authority.

The court upheld the validity of the tax and denied the injunction, saying, 168 Cal. at page 160, 141 P. at page 818:

"For the reasons above stated, it is the conclusion of the court that in enacting the Sanitary District Acts, the Legislature had in mind the sanitation of any territory which might conveniently be served by a single system, whether wholly unincorporated or not, and that a sanitary district formed under said act preserves its identity and retains its powers over the whole territory, except in the event of its complete absorption by a municipality."

The Improvement Act of 1911 provides a comprehensive scheme for the making of certain enumerated improvements, (including construction of sewers) upon streets, alleys, lanes, places or courts which are open or dedicated to public use. 19 Cal.Jur. 362. The improvement must be a public one and it must confer an especial and local benefit upon the property which is to be assessed. (Federal Construction Co. v. Ensign, 59 Cal.App. 200, 212, 210 P. 536.)

[2] The property of the defendants in the present action was assessed to pay a part of the cost of the entire sewer system within the improvement district. The assessments were paid and the bonds retired. Defendants acquired a right to the use of the system and a beneficial interest in the improvements, which could not be taken from them by the annexation of a part of the improvement district. If the property upon which the United States Army constructed the sewer main, 80 yards in length, had been annexed to the city, including, let us say, 5% of the improvement district, according to plaintiff's contention, the city would own 5% of the entire sewer system to the exclusion of all other property owners in the improvement district. The owners of 95% of the property within the district would then be deprived of an outlet for the sewer system which was constructed and paid for by them. Such a contention cannot be successfully maintained in a court of equity.

[3] The general rule is that upon the annexation of a portion of one public corporation to another public corporation is that the property lying in the annexed territory belongs wholly to the corporation to which it is annexed, and the annexed territory is freed from all obligation for the debts of the corporation to which it formerly belonged. *Pixley v. Saunders*, supra.

In the case of a school district the rule works no injustice because the transfer is nothing more, in effect, than the naming by the State of other trustees to manage the property which it owns. The beneficial title to the estate is not affected and the property is used for the same purposes as before the transfer. *Pass School Dist. v. Hollywood District*, 156 Cal. 416, 419, 105 P. 122, 26 L.R.A.,N.S., 485, 20 Ann.Cas. 87.

It would be impractical to apply the same rule to the sewer system of an improvement district, because all of its parts are so related to each other that the severance of one part would necessarily impair or destroy the usefulness of the other.

[4] Plaintiff undoubtedly has the authority to require that the defendants comply with reasonable regulations with respect to the use of the city sewer system, including the payment of reasonable charges for the service rendered, but the city should not be permitted to arbitrarily refuse the defendants the right to the use of the system. In this connection it appears that the defendants have offered to pay a reasonable charge for use of plaintiff's disposal plant. The amount fixed by the trial court in this respect seems to us to be reasonable, and since the court retained jurisdiction, the service charges may be adjusted from time to time as the circumstances may warrant by proper proceedings in the lower court.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

87 Cal.App.2d 66

HOLBROOK v. SMITH.

Civ. 7480.

District Court of Appeal, Third District,
California.

Aug. 2, 1948.

1. Appeal and error ⇨882(3)

An appellant may not be permitted to change his theory on appeal.

2. Assignments ⇨138

In action to recover against administrator on a writing "October 17, 1946 make check to J. W. Holbrook \$3,000.00", executed by deceased prior to his death and delivered to bank handling escrow, whereby deceased would receive more than such amount, which was never accepted in writing, instruction that the writing was not an assignment unless supported by valuable consideration was not error. Civ.Code, § 3213.

3. Assignments ⇨138

Whether there was an assignment for which a valuable consideration was given was a question of fact for the jury.

4. Trial ⇨253(1)

An instruction requested by plaintiff which does not contain all of the elements essential to recovery was properly refused, where missing elements were not elsewhere stated in the instructions.

Appeal from Superior Court, Mendocino, County; Lilburn Gibson, Judge.

Action for damages by J. W. Holbrook against the Bank of Willits and another, wherein D. C. Smith, as administrator of the estate of Albert H. Joslin, deceased, was substituted as the defendant. Judgment for defendant, and plaintiff appeals.

Affirmed.

Burke & Rawles, of Ukiah, and A. G. Lyon, of Willits, for appellant.

Mannon & Brazier, of Ukiah, for respondent.

ADAMS, Presiding Justice.

On March 2, 1945, Albert H. Joslin entered into a contract to sell to S. E.

Satchwell et al. certain real and personal property for \$5600. A cash payment of \$1500 was made, and the balance, together with interest, was to be paid at the rate of \$35 per month. These monthly payments were made for a time, same being paid to the Bank of Willits and by the latter to Joslin.

On September 19, 1946, the purchasers having made arrangements with the bank to borrow a sufficient amount to pay the balance due on the contract, the bank wrote to the title company handling the transaction, enclosing a deed from Joslin to the Satchwells and a deed of trust from the Satchwells to the bank, with instructions to bring the title up to date, and if the property was free of encumbrances, to record the instruments. Later that month, the title company having found defects in the descriptions in the deeds, new deeds were prepared, and on September 28, 1946, Joslin wrote a letter to the bank enclosing a new deed to the Satchwells, and authorizing the bank to deliver same "when you have for my account the sum of \$3360.00." This letter also instructed the bank to "make Cashiers check for \$3360.00 less costs and mail to me on Satchwell transaction." On October 17, 1946, Joslin went to the bank and signed and delivered to Leta L. Noonan, an employee thereof, a writing as follows: "Oct. 17, 1946 Make check to J. W. Holbrook \$3000.00." Said instrument was never accepted by the bank in writing as required by Civil Code Section 3213. It was placed among the papers relating to the foregoing transaction, but was not brought to the attention of Mr. Archer, the bank official handling the escrow, until after Joslin's death on October 22, 1946, as that official was away on a vacation.

On December 17, 1946, plaintiff filed a "Complaint for Damages," naming as defendant the Bank of Willits and Leta L. Noonan, praying judgment in the sum of \$3000 for the refusal of defendants to pay said sum to him on demand. On or about December 20, 1946, D. C. Smith was appointed and qualified as administrator of Joslin's estate, and defendants thereafter gave notice of a motion to substitute the administrator in their place as defendants

in said action, asserting that they claimed no interest in the said \$3000 and that the administrator claimed same, and asking leave to deposit said sum with the court to await a determination of whether plaintiff or said administrator was entitled thereto. On January 17, 1947, the court made such an order, also ordering that the complaint be amended accordingly and served upon the administrator. On January 20th the money was deposited with the clerk of the court, and on January 31st plaintiff filed an amended complaint, making Smith a defendant, but retaining both the bank and Mrs. Noonan as defendants. Smith demurred to that complaint and his demurrer was sustained with leave to amend. A second amended complaint was then filed, the same defendants being named. Thereupon the trial court made an order dismissing the action as to the bank and Mrs. Noonan, and amending the title accordingly. On July 28th and 29th the action was tried by a jury and resulted in a unanimous verdict for defendant Smith. Judgment was entered thereon, and a motion by plaintiff for a new trial was subsequently denied. Plaintiff then appealed from the judgment and also from the order of substitution of defendants and the order dismissing the bank and Mrs. Noonan. However, before this court but one point is urged, and that is that the trial court misdirected the jury as to the applicable law, and erred in refusing to give one instruction requested by appellant, all involving the effect of the writing of October 17, 1946, given by Joslin to the bank.

The instructions given to which exception is taken are:

"I instruct you that a bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a certain sum in money to order or to bearer.

"I instruct you that it is the rule that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank and that the drawee's authority to pay it is

revoked by the drawer's death before payment or acceptance.

"If the bill of exchange as hereinabove defined is given for a valuable consideration, such operates as an equitable assignment, may be enforced as such, and the death of the maker in such an event is immaterial.

"I instruct you that the order of A. H. Joslin, dated October 17, 1946, to make check for \$3,000.00 to J. W. Holbrook, was not under the facts of this case an assignment of that amount to plaintiff unless it was supported by a valuable consideration. A valuable consideration is synonymous with a good consideration as the latter is defined under the law of this State. And in that behalf you are instructed that the term good consideration is defined as follows:

"Any benefit conferred or agreed to be conferred upon the promisor or by any other person to which the promisor is not lawfully entitled or any prejudice suffered or agreed to be suffered by such person other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promisor is a good consideration for a promise. [This paragraph was given at plaintiff's request.]

"I instruct the Jury that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto have rescinded it."

The instruction refused reads:

"If you should find from the testimony and evidence introduced that Albert H. Joslin and his wife, Mary Elizabeth Joslin had made an agreement whereby, if Mary Elizabeth Joslin predeceased Albert H. Joslin, at the termination of Albert H. Joslin's life he was to leave the children of Mary Elizabeth Joslin the money or property originally turned over to Albert H. Joslin, and if you further find that pursuant to said agreement, Albert H. Joslin made, executed and delivered to Bank of Willits his authorization in writing directing said bank to pay the sum of \$3,000.00 to J. W. Holbrook, then you must find in favor of plaintiff."

Appellant's theory, as stated in his brief, is that there was an assignment to him of a

part of a particular fund in the hands of Bank of Willits; that this fund was in the form of an escrow, and even though at the time of the delivery of the order relied upon by plaintiff, the fund may not have actually been in existence, it did have a potential existence, and insofar as the facts of this case are concerned and the law involved, it was a particular fund in the hands of the bank in the nature of a bailment; that holding money in escrow to be returned to the *vendee* if title is found to be defective, and to be paid to the *vendor* if title is approved renders the bank holding such escrow a bailee; that there was no relationship of debtor and creditor; that the moneys in the hands of the bank were in the nature of a special deposit, and in the eyes of the law, the bank stood as a bailee and not as a mere creditor; and that an order drawn upon a particular fund constitutes an equitable assignment even though there may have been a gift involved.

[1] We note that in his second amended complaint plaintiff alleged that the order of October 17th was executed for a valuable consideration; and on the trial he asserted that the entire case rested upon whether or not there was any consideration and that this was a question of fact. An appellant may not be permitted to change his theory on appeal. *Ernst v. Searle*, 218 Cal. 233, 240, 241, 22 P.2d 715; *Hayward Lumber & Investment Co. v. Ford*, 64 Cal. App.2d 346, 354, 148 P.2d 689.

Appellant attempted to show a consideration by his own testimony and that of his sister, Mrs. Stover, which testimony was, in substance, that some 12 or 15 years before the trial, and after the marriage of Joslin and his wife, who was the mother of plaintiff, Mrs. Stover, and George Holbrook, all three children by a former marriage, Mr. and Mrs. Joslin had had a conversation in the presence of plaintiff and Mrs. Stover, in which Mrs. Joslin had said that she wanted the property she owned, "or as much of it as was available at the time of both of their deaths to go to us children," and he (Joslin) had said "that was perfectly alright with him"; that on October 17, 1946, plaintiff had had a conversation with Joslin just prior to an opera-

tion which the latter was to undergo, in which the latter said "I believe I will go down to the bank and have them transfer your name on that check I am supposed to get for \$3,000, so in case I die, why, I will have done what I agreed to do." Nothing further was said to explain what Joslin meant by that statement. Plaintiff further testified, however, that Joslin had added that if his operation was successful he expected to get the money back. No other consideration for the order is or was claimed by appellant.

Respondent contends that the moneys received by the bank for Joslin constituted a general fund in its hands and not a special one. He cites 4 California Jurisprudence 185, where it is said that bank deposits are either general or special, a general deposit being one which is to be repaid upon demand, in money, and a special deposit being one where the depositor is entitled to the return of the identical coin or other article deposited; that a deposit will always be deemed general unless made special by agreement; and that even if the reason for the deposit be known to the bank to be an obligation owed by the depositor to a third person, nevertheless the depositor must, at the time of making the deposit, specify that the funds are to be kept apart from other moneys of the depository and devoted only to the payment of the depositor's debts.

People v. California Safe Deposit & Trust Co., 23 Cal.App. 199, 137 P. 1111, 1115; *American Surety Co. v. Bank of Italy*, 63 Cal.App. 149, 218 P. 466, and *Allen v. Rainey*, 4 Cal.App.2d 558, 563, 41 P.2d 374, are cited by respondent as authority for the rule that a deposit is deemed to be general unless made special by agreement; and he points out that when Joslin wrote the bank, on September 28, to "make cashier's check to me" he impliedly invited the bank to commingle the money it received from the buyer of the property with its own.

The evidence indicates that the buyers secured a loan from the bank to pay off the balance due on the property sold, and whether the money lent was credited to Joslin's account or not does not appear. It does appear, however, that Joslin authorized

the bank to accept same "for his account," to pay therefrom certain charges and to make a cashier's check to him, Joslin, for \$3360. In order to do those things the money had to be mingled with the bank's funds.

The case of Fidelity Savings & Loan Ass'n v. Rodgers, 180 Cal. 683, 182 P. 426, appears to be similar to the case before us and to be decisive against appellant. There Sarah Rounds deposited with plaintiff Association a sum of money in excess of \$3500.00. Thereafter she made and delivered to Z. L. Parmelee the following order:

"Los Angeles, Cal., Nov. 8th, 1915.

"Received of Fidelity Savings & Loan Association \$3500.00 thirty-five hundred and no/100 dollars.

"Charge to account of Sarah C. Rounds.

"Pay to Z. L. Parmelee.

"Sarah C. Rounds."

Said order was given to Parmelee in trust to collect the money from plaintiff and apply it to the construction of a building to be used as a school. There was no other consideration for it. Parmelee demanded payment of the order, but was refused because the association had been informed that Mrs. Rounds was not of sound mind, though this was not true; but one month after the execution and delivery of the order Mrs. Rounds died, and Rodgers, the executrix of her estate, then demanded that plaintiff Association pay the money to her. The court said that nowhere in the record was it expressly stated whether the money deposited by Mrs. Rounds with plaintiff was received by it as a mere bailment of the identical money, or as a credit in her favor; that the expressions used, however, showed that it was regarded and treated by her as an "account" in her favor against plaintiff, to be paid out by it on her order; that both parties had discussed the case upon the theory that it was a general deposit for exchange or credit, and it would be assumed that such was its character. It then went on to say, 180 Cal. at pages 686, 687, 182 P. at pages 427, 428:

"The effect of such a deposit is to create the relation of debtor and creditor between the two parties concerned; the title to the

money passing to the person with whom it is deposited, and such person becoming the debtor of the depositor for the amount thereof. Civ.Code, secs. 1818, 1878; Shoemaker v. Hinze, 53 Wis. 116, 10 N.W. 86; Talladega Ins. Co. v. Landers, 43 Ala. 115.

"The instrument executed by Mrs. Rounds to Parmelee was, therefore an order by a creditor to a debtor to pay the debt, or a part thereof, to a third person. Although it contains many unnecessary words, it is, in legal effect, a bill of exchange. Wheatley v. Strobe, 12 Cal. 92, 97, 73 Am.Dec. 522; Civ.Code, § 3171. It does not purport to transfer to Parmelee the title to the money mentioned nor to the debt or obligation of the plaintiff to repay the same to her, but merely directs the plaintiff to pay to Parmelee the said sum of money. Consequently it is not in form, or in legal effect, a present assignment to Parmelee of the right or title to the money or to the obligation therefor. Cashman v. Harrison, 90 Cal. 297, 302, 27 P. 283; Lawrence Nat. Bank v. Kowalsky, 105 Cal. [41], 43, 38 P. 517. Being in legal effect a bill of exchange, it did not create a legal obligation from plaintiff to Parmelee until it was accepted by the plaintiff and such acceptance could not be made except in writing. Civ.Code, § 3193; Wheatley v. Strobe, supra. It was not accepted in any manner; consequently it does not constitute a direct obligation on the part of the plaintiff to pay the money to Parmelee. It is executory in character, a mere order directing that the money be paid by plaintiff to Parmelee, but accomplishing no transfer of title until the intended transaction should be completed by a transfer of the possession, or, it may be, by the written acceptance of the plaintiff. If it had been given for a valuable consideration, it would have operated as an equitable assignment of the demand of Mrs. Rounds against the plaintiff for the sum of money, and could have been enforced as such. Wheatley v. Strobe, supra; Pope v. Huth, 14 Cal. [403], 406; Pierce v. Robinson, 13 Cal. [116], 121; Joyce v. Wing, 87 Cal. 424, 25 P. 545; Curtner v. Lyndon, 128 Cal. [35], 36, 60 P. 462. But it was intended as a gift in trust, and was without valuable consideration.

It is the settled doctrine that an order or writing for the payment of money or the delivery of property, which does not by its legal effect constitute an assignment and which is executed as a gift and for no other consideration, will not be upheld or enforced as an equitable assignment. *Pullen v. Placer County Bank*, 138 Cal. [169], 175, 66 P. 740, 71 P. 83, 94 Am.St.Rep. 19; *Brokaw v. Brokaw*, 41 N.J.Eq. 221, 4 A. 66; 5 Cor.Jur., p. 931."

And it concluded that the transaction constituted an uncompleted attempt to make a gift in trust, which vested no right in the donee, and that the trial court was in error in concluding that Parmelee was entitled to the money.

The *Rodgers* case is cited with approval in *Baumgarten v. California Pacific Title & Trust Co.*, 127 Cal.App. 649, at page 656. 16 P.2d 332, at page 335 (hearing in Supreme Court denied) where the court said:

"The above order [on the escrow holder], being one for the payment to respondent of a part only of the whole fund due the drawer, and never having been accepted by the drawee, cannot be said to constitute a legal assignment, pro tanto, of the obligation due the Blackmore Investment Company or of any part thereof. *Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 138 Cal. 183, 71 P. 93, 94 Am.St.Rep. 28; *Fidelity Savings etc. Ass'n v. Rodgers*, 180 Cal. 683, 182 P. 426; *Guggenlime & Co. v. Lamantia*, 207 Cal. 96, 276 P. 995, 997; *Harlan v. Gladding, McBean & Co.*, 7 Cal. App. 49, 93 P. 400."

In *Shoemaker v. Hinze*, 53 Wis. 116, 10 N.W. 86, cited in *Fidelity Savings etc. Ass'n v. Rodgers*, supra, plaintiff requested defendant to take care of \$40 for him. Defendant received the money and put it in his wallet with other money of his own. He thereafter took out a portion of the money in the wallet for use, and also added \$100 thereto. His wallet was stolen. In an action by plaintiff to recover the amount deposited with defendant, the court held that the transaction did not constitute a bailment but a general deposit.

[2,3] The instructions given to which appellant takes exception are in conformity

with the rules laid down in the foregoing cases. And as for the argument of appellant that there was an assignment for which a valuable consideration was given, as hereinbefore stated appellant conceded on the trial that whether there was such consideration was a question of fact for the jury; and they resolved it against him.

[4] As for the contention that the court erred in refusing to give the instruction requested by plaintiff set forth above, the instruction was properly refused, since it does not contain all of the elements essential to a recovery by plaintiff, and the missing elements are not elsewhere stated in the instructions. See *Mazzotta v. Los Angeles R. Corporation*, 25 Cal.2d 165, 169, 170, [153 P.2d 338,] and cases there cited.

The judgment and the orders appealed from are affirmed.

THOMPSON and PEEK, JJ., concur.



87 Cal.App.2d 24

ELBERT, LTD., v. NOLAN et al.

Civ. 16108.

District Court of Appeal, Second District,
Division 3, California.

July 30, 1948.

1. Statutes ⇨225, 231

Sections of the Political Code and 1933 statute comprising a plan for sale of realty for nonpayment of taxes which became delinquent in the year 1933, must be considered and construed together as a correlated whole, rather than as separate and distinct enactments. Pol.Code, §§ 3764, 3771, 3771a, 3785, 3785b; St.1933, p. 1520.

2. Taxation ⇨749

Where realty was duly assessed for taxation in 1932, but taxes so assessed were not paid, and realty was sold by tax collector to the state on September 2, 1933,

for nonpayment of such delinquent taxes, and realty was not redeemed, it was proper for the tax collector to make a deed of the realty to the state on July 2, 1938, and therefore tax deed was properly admitted in action to quiet title to the realty, over objection that deed was void because issued less than five years after realty had been sold to the state. Pol.Code, §§ 3764, 3771, 3771a, 3785, 3785b; St.1933, p. 1520.

3. Taxation ⇨770

Where realty was duly assessed for taxation in 1932, but taxes so assessed were not paid, and realty was sold by tax collector to state on September 2, 1933, for nonpayment of such delinquent taxes, and realty was not redeemed, and on July 2, 1938, tax collector deeded realty to the state, alleged defect or irregularity in deed to state because it was made on July 2, 1938, instead of September 2, 1938, was validated by validating acts of 1943 and 1945. Gen.Laws, Act 8443, §§ 1, 2; Gen. Laws, Act 8443a.

4. Taxation ⇨688, 770

The Legislature may cure irregularities in tax proceedings or omissions to comply with provisions of a statute, regarding taxation, which could have been omitted in the first instance, but it cannot cure defects which are jurisdictional.

5. Constitutional law ⇨285

Taxation ⇨770

Five-year period referred to in section of Political Code providing that, if property is not redeemed within five years from date of sale to state for delinquent taxes, tax collector must make the state a deed of the property, is not a jurisdictional requisite within due process provisions of the state and federal Constitutions, and failure to comply therewith may be validated by validating acts. Gen.Laws, Act 8443, §§ 1, 2; Gen.Laws, Act 8443a; Pol.Code, § 3785.

6. Statutes ⇨77(1)

A law is not "special legislation" merely because it does not apply to all persons.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Legislation".

7. Constitutional law ⇨208(1)

The Legislature may classify for purpose of meeting conditions, naturally requiring different legislation, in order that legislation may be adapted to needs of the people.

8. Statutes ⇨68

Legislative classification must not be arbitrarily made for the mere purpose of classification, but must be based on some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation, and subject to those limitations a law is a "general law" though it operates only on a class of individuals or things, if it applies equally to all persons or things within the class to which it is addressed.

See Words and Phrases, Permanent Edition, for all other definitions of "General Law".

9. Constitutional law ⇨48, 70(1)

Every presumption is in favor of the validity of a legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded on nor supported by reason.

10. Statutes ⇨95(3)

Statute providing that, notwithstanding provisions of the Political Code, time for publication of delinquent tax list and time of sale for delinquency in payment of taxes for fiscal year 1932-33 shall be extended and postponed for a period of 61 days, was not "special legislation" forbidden by provisions of the Constitution that the Legislature shall not pass local or special laws extending the time for collection of taxes. St.1933, p. 1521, § 1, Const. art. 4, § 25, subd. 13.

11. Constitutional law ⇨42

Where owners of realty which was sold by tax collector to the state in 1933 for nonpayment of taxes were not adversely affected by operation of statute which was enacted in 1933 at time when they owned the realty, and which provided that time of publication of delinquent list and time of sale for delinquency in payment for taxes for fiscal year 1932-33 shall be ex-

tended and postponed for a period of 61 days, they were not in a position to raise question of unconstitutionality of the statute. St.1933, p. 1521, § 1.

12. Constitutional law — 42

A contention that a statute denies equal rights and privileges by discriminating between persons and classes of persons may not be raised by one not belonging to the class alleged to be discriminated against.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action to quiet title to realty by Elbert, Ltd., a corporation, against Martin Francis Nolan and Nora Nolan. From a judgment for the plaintiff, the defendants appeal.

Judgment affirmed.

James M. Gammon, of Los Angeles, for appellants.

John F. Bender, G. Loshoney, and Robt. E. Rosskopf, all of Los Angeles, for respondent.

WOOD, Justice.

In this action to quiet title to real property, based on a tax deed, judgment was in favor of plaintiff. Defendants Nolan, who alleged ownership in themselves, appeal from the judgment.

The property was duly assessed for taxation in 1932. The taxes so assessed were not paid, and the property was sold by the tax collector to the State of California on September 2, 1933, for nonpayment of such delinquent taxes. The property was not redeemed, and on July 2, 1938, the tax collector deeded it to the State. On August 23, 1945, the State, acting through the tax collector, sold the property at public auction to, and deeded it to, the plaintiff.

When the deed of July 2, 1938, to the State was offered in evidence the appellants objected to the offer on the ground that the deed was void, in that, it showed on its face that it was not issued after the lapse of five years from the date of the sale to the State, as required by section 3785 of the Political Code—that it was issued less than five years after the property had been

sold to the State, that is, less than five years after September 2, 1933. The deed did recite that the property was sold on September 2, 1933, and that five years had elapsed after the property was sold. That objection was overruled. Appellants contend that the court erred in overruling said objection. That contention is not sustained.

[1] Section 3785 of the Political Code, upon which said objection was based, provides in part: "If the property is not redeemed within five years from the date of the sale to the state, the tax collector * * * must make the state a deed of the property." That section then sets forth the required form of the deed to the State. Under the provisions of that section, standing alone, it would appear that the deed was void for the reason that on July 2, 1938, when the deed was made, the period of five years for redeeming the property after the sale to the State, on September 2, 1933, had not elapsed. The parties hereto agree, as shown by their briefs, that the time in 1933 for making a sale of tax delinquent property to the State, under the provisions of section 3771 of the Political Code and without regard to the extension of time hereinafter mentioned, was July 1st. It was proper, however, to make the sale to the State on September 2, 1933, instead of July 1st, for the reason that in May of 1933, a statute (sometimes referred to as a moratorium act) was enacted whereby the time for making a sale to the State in 1933 was extended 61 days from and after July 1, 1933. Stats. 1933, ch. 591, p. 1520, Act 8491, Deering's Gen.Laws. In the 1933 statute, just cited, it was provided that "Notwithstanding the provisions of sections 3764 and 3771, and other provisions of the Political Code, the time of publication of the delinquent list and the time of sale for delinquency in the payment of * * * taxes for the fiscal year 1932-33 * * * shall be extended and postponed for a period of sixty-one days." Also in said 1933 statute, just cited, it was provided in section 4 thereof as follows: "Notwithstanding the provisions of section 3764 of said code, sales of property sold to the State for delinquency in payment of taxes for the fiscal year 1932-33 shall be made in the year 1938, at the same time and in the same manner as if no extension of

time or postponement of sale to the State, in accordance with the terms of this act, had been made. The words 'five years' as used in said section 3764 shall be construed to mean and include the period of time that will elapse between the actual date of such sale in the year 1933 and the time fixed by law for the sale by the State of such property in the year 1938." It is to be noted that said section 4 of said statute does not refer to section 3785 of the Political Code, upon which appellants based their objection. Appellants argue that although the 1933 statute does state that the property might be sold at the same time in 1938 as if no extension of time had been made in 1933, there is no reference therein to section 3785 and nothing therein to nullify the force of section 3785. The sections of the Political Code, above referred to, sections 3764, 3771, 3771a, 3785, 3785b, and said 1933 statute, must be considered and construed together as a correlated whole, rather than as separate and distinct enactments. Those sections and that statute comprise a plan for the sale of real property for the nonpayment of taxes which became delinquent in the year 1933. See *Jacoby v. Wolff*, 198 Cal. 667, 678, 247 P. 195. In that last cited case it was said at page 678, of 198 Cal., at page 199 of 247 P.: "A perusal of the provisions of sections 3764, 3771, and 3785b of the Political Code makes manifest that they must be considered and construed together as a correlated whole rather than as separate and distinct enactments. These sections comprise a complete plan for the sale of property for the nonpayment of taxes." In order to indicate how said sections are correlated, the subject matter of each section and the references therein to other sections should be stated. Section 3764 of the Political Code, in effect at the times herein mentioned, contains provisions relative to publishing the delinquent tax list and publishing notice of sale at public auction of property which was sold to the State five years previous to the date fixed for the sale under section 3771a of the Political Code; and said section 3764 also contains a form for such notice of sale, which form includes the statement that the tax collector will, on a certain date, sell at public auction "the several parcels and lots

of property hereinafter described upon which date five years will have elapsed from the date of sale of said property to the state." Section 3771 is to the effect that sales to the State should be made at the time fixed for the sale in the delinquent tax list. Section 3771a of the Political Code, referred to in said section 3764, provides in part that, at the time fixed for the sale in accordance with said section 3764, all property which has not been redeemed from the sale to the State, or the sale thereon canceled, shall be sold by the tax collector at public auction; and that if no sale is had under said section 3771a "then said property shall be deeded to the state" as provided in section 3785 of said code. Section 3785, as above stated, is to the effect that if property is not redeemed within five years after sale to the State then a deed must be made to the State; and that section then sets forth the form of such deed. Section 3785b of the Political Code provides that when the property is sold under section 3771a to a purchaser other than the State that the tax collector must execute a deed to such purchaser; and said section also sets forth the required form of such deed.

It therefore appears that section 3764, mentioned in the 1933 statute, refers to section 3771a and to the same five years mentioned therein; that section 3771a refers to sections 3764 and 3785—to the making of a sale at "the time fixed" in accordance with section 3764, and to the making of a deed to the State as provided in section 3785.

[2] As above stated, section 3785 contains the form of the deed to be made to the State if the property is not redeemed within five years from the date of the sale to the State. Is is clear that the redemption referred to in said section 3785 is redemption according to the plan set forth in the various other sections mentioned, and it is also clear that the "five years" for redemption, referred to in said section 3785, is the same five years mentioned in section 3764 and in all the other said sections. Therefore, since section 4 of the 1933 statute refers to the five years mentioned in section 3764, and since section 3785 refers to the same five years, and

since both sections 3764 and 3785 are parts of the whole statutory plan for the sale of tax delinquent property, it appears that section 4 of the 1933 statute is applicable to section 3785, and that the definition of the words "five years," stated in said section 4 of the 1933 statute, is applicable to the words "five years" as used in section 3785. That definition, as above stated, is that the words "five years" mean the period of time between the actual date of sale in 1933 and the time fixed by law for the sale of such property in 1938. In this instance the "five years," under that definition, would be the period of time between September 2, 1933, the actual date of the sale in 1933, and July 2, 1938, the time fixed by law for the sale in 1938. Furthermore, said statute provided, as above stated, that such a sale in 1938 should be held "at the same time and in the same manner as if no extension of time or postponement of sale to the State, in accordance with the terms of this act, had been made." If no extension had been made under the terms of said act, the time for the sale in 1938 would have been July 2, 1938, the date when the sale and deed herein were made to the State. It was proper, by virtue of the 1933 statute, to make the deed to the State on July 2, 1938.

[3] Even if there had been a defect or irregularity in the deed to the State by reason of its having been made on July 2, 1938, instead of September 2, 1938, such defect or irregularity was validated by the Act of 1943 (Stats.1943, ch. 458, p. 1993, Gen.Laws, Act 8443) and by the Act of 1945 (Stats.1945, ch. 1134, p. 2176, Gen. Laws, Act 8443a), which were enacted to validate certain acts relating to taxation.

The 1943 Act provides as follows: "Section 1. Every act and proceeding heretofore taken by any county, city and county or the officers thereof relative to the preparation * * * or fixing the budget or the tax rate * * * of any county * * * or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equaliza-

tion and levy, are hereby confirmed, validated and declared legally effective.

"Sec. 2. (a) This act is limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements of law under which the acts hereby confirmed, validated and declared legally effective were taken. (b) This act is limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions."

[4,5] The 1945 Act is in substance the same as the 1943 Act, but it was made applicable to the tax proceedings of all taxing agencies and revenue districts including those covered by the 1943 Act. The Legislature may cure irregularities in tax proceedings or omissions to comply with provisions of a statute, regarding taxation, which could have been omitted in the first instance, but it cannot cure defects which are termed jurisdictional. *Miller v. McKenna*, 23 Cal.2d 774, 781, 782, 147 P.2d 531. See also *Barrett v. Brown*, 26 Cal.2d 328, 331, 158 P.2d 567. The curative acts of 1943 and 1945, above mentioned, "validate anything the Legislature could have dispensed with or any matter of procedure for which the Legislature could have provided." *Wall v. State of California*, 73 Cal.App.2d 838, 844, 167 P.2d 740, 743. In *Miller v. McKenna*, supra, it was held that some of the jurisdictional requisites are: (a) A duly constituted taxing authority; (b) property to be taxed within the territorial jurisdiction of the taxing body; (c) property legally subject to the tax; and (d) sufficient notice and opportunity for hearing to constitute compliance with due process. There is no question herein regarding compliance with jurisdictional requirements. The Legislature could have referred specifically to said section 3785 in the said 1933 statute. Also the Legislature could have amended the provisions of section 3785 to provide for the issuance of the deed to the State within a shorter period than five years, or for the issuance of such a deed after five years. The five-year period

mentioned in said section 3785 was not a jurisdictional requisite within the due process provisions of the State and Federal Constitutions.

[6-10] Appellants assert that the Legislature had no power to extend the time for the collection of taxes in 1933. They state that the Constitution of California, Article IV, section 25, subdivision 13, prohibits the extension of the time for collection of taxes. It is to be noted that said provision of the Constitution does not prohibit the extension of time for the collection of taxes, but it does recite that no special law shall be passed extending the time for the collection of taxes. That provision of the Constitution is as follows: "The Legislature shall not pass local or special laws in any of the following enumerated cases * * *. Thirteenth—Extending the time for the collection of taxes." Appellants also assert that said 1933 statute was special legislation for the benefit of a particular class, and was in effect a deferment of taxes more favorable to those who had not paid their taxes on July 1st than it was to other persons who had paid their taxes prior to enactment of the statute. These contentions are not sustained. The said statute of 1933 was not a special law. It applies equally to all persons within the class to which it is addressed. It is a general law having a uniform operation upon a class of persons differentiated from another class of persons by reason of the necessities peculiar to the subject matter of the legislation. "A law is not special legislation merely because it does not apply to all persons. It is a settled principle of constitutional law that the Legislature may classify for the purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to the needs of the people. * * * The classification, however, must not be arbitrarily made for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the law, but the

individual, components of the class must be characterized by some substantial * * * attributes which suggest the need for and the propriety of the legislation. Subject to these limitations a law is general despite the fact that it operates only upon a class of individuals or things, if it applies equally to all persons or things within the class to which it is addressed." *Martin v. Superior Court*, 194 Cal. 93, 100, 101, 227 P. 762, 765. "The power to thus classify necessarily carries with it a wide discretion in the exercise thereof. * * * Every presumption is in favor of the validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason." *Martin v. Superior Court*, supra, 194 Cal. at page 101, 227 P. at page 765. It appears that there was good and sufficient reason for making the classification involved herein. Regarding the reason for the legislation, it is stated in said 1933 statute, section 6, that "This act is hereby declared to be an urgency measure * * * necessary for the immediate preservation of the public peace, health and safety, and shall take effect immediately. The facts constituting such a necessity are as follows: Whereas, because of economic conditions existing throughout the State the Legislature has extended the time for the payment of taxes, it is necessary to define and prescribe the duties of public officials charged with the collection of taxes in connection with the computation of penalties, publication of delinquent taxes and sale of property for delinquent taxes. * * * to the end that the extension granted * * * be made operative and to prevent confusion and uncertainty as to the duties of public officials in relation thereto and to protect the rights of taxpayers."

[11,12] Furthermore, it seems that rights of the appellants were not adversely affected by the operation of the 1933 statute, and that appellants are not in a position to raise the question of unconstitutionality of the statute. Apparently, they were the owners of the property in 1933 when the statute was enacted, and they had the

benefit of the extension of time afforded by the statute. "[A] contention that a statute denies equal rights and privileges by discriminating between persons and classes of persons 'may not be raised by one not belonging to the class alleged to be discriminated against.'" A. F. Estabrook Co. v. Industrial Accident Commission, 177 Cal. 767, 769, 177 P. 848.

The judgment is affirmed.

SHINN, Acting P. J., and McCOMB, J. (Assigned), concur.



86 Cal.App.2d 714

**HOLT v. BOARD OF POLICE AND FIRE
PENSION COM'RS OF CITY OF LONG
BEACH et al.**
Civ. 16245.

District Court of Appeal, Second District,
Division 2, California.
July 13, 1948.

As Amended on Denial of Rehearing
July 29, 1948.

Hearing Denied Sept. 23, 1948.

1. Municipal corporations ⇨220(9)

The charter provisions of the city of Long Beach providing for pensions must be construed in accordance with the rule that all pension laws must be liberally construed to carry out their beneficent policy, and rights vested by such charter provisions may not be denied by a strained judicial construction. St.1931, pp. 2787, 2789, §§ 187(3) 188.

2. Municipal corporations ⇨187

Charter provisions of Long Beach providing that when any member of police department shall become physically disabled or by reason of bodily injuries received in discharge of duties, etc., he shall be retired from further service and shall be paid pension equal to one-half of the amount of salary attached to rank or posi-

tion held by him, a policeman who sustained an injury in course of his employment that disabled him could not be deprived of pension merely because he first resigned from the police force and then filed application for pension. St.1931, pp. 2787, 2789, §§ 187(3), 188.

3. Municipal corporations ⇨187

The pension provisions of Long Beach charter are an integral portion of contemplated compensation set forth in contract of employment between city and members of police department, and are an inseparable part of the contract, and right to pension becomes vested upon the acceptance of such employment by an applicant. St.1931, pp. 2787, 2789, §§ 187(3), 188.

4. Municipal corporations ⇨187

The fact that policeman who had been injured in the course of his employment had resigned before applying for pension and could not be required to return to position in case disability should be cured could not defeat policeman's right to pension in the first instance. St.1931, pp. 2787, 2789, §§ 187(3), 188.

5. Workmen's compensation ⇨2086

The city of Long Beach was not entitled to credit against pension due policeman any payments made to policeman under Workmen's Compensation Act. St.1917, p. 831; St.1931, pp. 2787, 2789, §§ 187(3), 188.

6. Municipal corporations ⇨187

Where city of Long Beach admitted that policeman had sustained an injury during course of his employment arising out of such employment that rendered him unable to continue his employment, the city was as a matter of law liable to policeman for pension in conformity with charter provisions. St.1931, pp. 2787, 2789, §§ 187(3), 188.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Mandamus proceeding by Robin H. Holt against Board of Police and Fire Pension Commissioners of the City of Long Beach, Robert C. Swanson, George E. Merrill and

Frank Garretty, as members thereof, to compel respondents to grant petitioner a disability pension. From a judgment denying peremptory writ, the petitioner appeals.

Judgment reversed with directions to issue peremptory writ.

Kenneth Sperry of Long Beach, for appellant.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty. and Clifford E. Hayes, Deputy City Atty., all of Long Beach, for respondents.

MOORE, Presiding Justice.

Appeal from a judgment denying a peremptory writ of mandate to compel respondents to grant a disability pension.

Appellant became a member of the Long Beach police department on July 16, 1928. During his incumbency, to wit, on August 19, 1942, he sustained an injury in the course of, and arising out of, his employ-

ment, resulting in his partial, permanent, physical disability. He continued to be a member of the police department, but by reason of his injuries he was unable to continue his work as a patrolman, and on June 21, 1944, his voluntary resignation was accepted. He was not thereafter reinstated. On August 15, 1944, he filed with the pension board his certificate of disability and medical reports as provided by the city charter. Also, he filed a claim for pension. His claim was rejected by the Board of Police and Fire Pension Commissioners on January 4, 1945.

[1] The question for decision is whether under the Long Beach charter a member of the police department may be granted a pension based upon a service-connected disability after having resigned from the department because of such disability. The pertinent sections of the Long Beach city charter are given in the footnote.¹ Its provisions have been construed on various prior

¹ Article XVI, section 187, subsection 3; Statutes 1931, p. 2787. "Whenever any member of the Police or Fire Department shall become physically disabled or by reason of bodily injuries received in, or by reason of sickness caused by the discharge of duties of such person in such department, or shall become so physically or mentally disabled as a result of such injury or sickness as to render necessary his retirement from active service, the commission shall order and direct that such person be retired from further service in such department; and thereafter such person so retired shall, during his lifetime, be paid from said pension fund a yearly pension equal to one-half ($\frac{1}{2}$) of the amount of the salary attached to the rank or position held by him in such department at the date of such retirement order. Such person shall be paid in equal monthly installments. Provided, however, that any pension granted to any member of the Police or Fire Department for disability or sickness, or the result thereof, as provided for in this section, shall cease when the disability or sickness, or the result therefrom, ceases, and such person shall, subject to civil service provisions of the City Charter, and other provisions of this Charter governing the appointment of city employees, be restored to active duty in such department of which such person was a member at the time of re-

tirement, to the same rank or position which such person held at said time; and provided further, that in event such disability is of a continuing nature, the extent of which, however, will not prevent such person from performing certain prescribed duties within such department, the pension commissioners may, upon certificate as to such partial disability from regularly licensed physicians in the manner hereinafter provided for, order such person restored to the department from which he was retired at the same compensation which he received prior to retirement, and in which event his pension shall cease.

"Provided further, that no person shall be retired as provided in this section, or shall receive any benefits from said pension fund, unless there shall have been filed with said pension commission, prior to the granting of such pension, certificates of disability subscribed and sworn to by such person and by three regularly licensed practicing physicians of said city, one of whom shall be the police surgeon, one to be selected by said commission, and one by the person applying for such pension."

"Section 188. This provision is intended to be in lieu of and take the place, in so far as it applies, of the Workmen's Compensation, Insurance and Safety Act of 1917, of the State of California, and amendments heretofore or hereafter to be adopted, and any

appeals and it has been consistently held that "the charter provisions must, of course, be interpreted in accordance with the well-recognized rule that all pension laws are liberally construed to carry out their beneficent policy." *England v. City of Long Beach*, 27 Cal.2d 343, 346, 163 P.2d 865, 867. See also *Dillard v. City of Los Angeles*, 20 Cal.2d * * * 599, 602, 127 P.2d 917, 128 P.2d 537. The rights vested by such charter provisions may not be denied by a strained judicial construction. *Larson v. Board of Police and Fire Pension Commissioners*, 71 Cal.App.2d 60, 63, 162 P.2d 33.

[2,3] A reasonable interpretation of the quoted charter sections compels the conclusion that an injured police officer cannot be deprived of his right to a pension merely because he first resigned from the police force and then filed application therefor. The reasons are not far to seek. The pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and members of the police department, and are an inseparable part of that contract. Also, the right to a pension becomes vested upon the acceptance of such employment by an applicant. *Dryden v. Board of Pension Commissioners*, 6 Cal.2d 575, 579, 59 P.2d 104. This principle was subsequently reemphasized when the foregoing declaration was supplemented by the announcement that such pension rights become "vested as to each employee at least on the happening of the contingency upon which the pension becomes payable." *Kern v. City of Long Beach*, 29 Cal.2d 848, 851, 179 P.2d 799, 801. The contingency in the instant case was the accident which disabled Officer

Holt. If thereby his rights became vested how could they have been subsequently divested? Certainly not by the pension board or by the city council, for they are not the authors of the pension rights; not by the courts, for they must follow the law as they find it; not even by the act of the officer in resigning from the police department, unless in specific terms he and his wife renounce his pension right. A part of the compensation for which appellant contracted at the time of his employment consisted of his pension rights which were vested by his becoming disabled. To deprive him of them would be analogous to, if not identical with, the act of refusing to pay his earned salary. *Ibid.*, 29 Cal.2d 855, 179 P.2d 799. For this very reason his resignation was ineffective to deprive him of the pension to which he had already become entitled. If by resigning he did not forfeit his rights to his accrued salary, and if his pension is part of that salary, he did not thereby forfeit his rights to his pension. Indeed, in each of three cases cited in the briefs (*Larson v. Board of Police and Fire Pension Commissioners*, 71 Cal.App.2d 60, 162 P.2d 33; *Johnson v. Board of Police and Fire Pension Commissioners*, 74 Cal.App.2d 919, 170 P.2d 48; *Kinney v. Sacramento City Employees Retirement System*, 77 Cal.App.2d 799, 176 P.2d 775) the application for pension was filed after services to the municipality had been discontinued. While it is true that the precise point was not raised on such appeals, yet those decisions point the way to a just solution of the instant controversy.

Respondents contend that since appellant has resigned he cannot be required to return to his position in the department

person who would be entitled to a pension under the provisions of this amendment and who applies for a pension hereunder shall be deemed to have waived all provisions under the Workmen's Compensation, Insurance and Safety Act of 1917; but should it be decided by the Supreme Court of the State of California that the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917 cannot be waived, payments that may have been made

hereunder shall be credited on the amounts allowed under said Act, and all pensions granted hereunder for causes included within the purview of said Workmen's Compensation, Insurance and Safety Act shall become null and void except as to such an amount as will, when added to the amount allowable under said Workmen's Compensation, Insurance and Safety Act, equal the total monthly pension herein provided for."

and the city would be deprived of his services even if he could render a satisfactory performance thereof to the city. This may be conceded but it does not follow that the city would in that event be compelled to continue paying his pension. Two termination provisions of the charter wisely contemplate such a contingency: (1) "Any pension granted * * * shall cease when the disability * * * ceases." (2) "In event such disability is of a continuing nature, the extent of which, however, will not prevent such person from performing certain prescribed duties within such department, the pension commissioners may, * * * order such person restored to the department from which he was retired at the same compensation which he received prior to retirement, and in which event his pension shall cease." Charter of City of Long Beach, sec. 187, subsec. 3.

[4] It is important to note that the provisions for the termination of a pension are automatic, and that the provisions for reinstatement of employment are not for the protection of the city but for the benefit of the employee should his disability cease or lessen. Respondents' argument therefore begs the question as to appellant's right to a pension in the first instance. Holt's initial right to a pension should not be precluded by considerations of the city's subsequent right at some future date to terminate that pension. Nor is the right to a pension contingent on the city's right to recall appellant to the police force. The words of the charter are clear and mandatory: "Whenever any member * * * shall become physically disabled * * * the commission shall order and direct that such person be retired from further service * * * and * * * be paid * * * a yearly pension." Ibid. Indeed this section of the charter does not even provide for the filing of an application for pension, although it does require filing of "certificates of disability subscribed and sworn to by such person and by three regularly licensed practicing physicians." The mere requirement that a disabled officer file his certificates, coupled with the mandate that the commission shall retire him on a pension, leaves no room

for argument that he can be deprived of his pension if he files such documents proving his disability. While it is conceded that appellant's certificate of disability and medical reports were filed, yet respondents argue that since they were filed after appellant resigned they were filed too late. The only charter requirement is that they be filed prior to a granting of the pension.

[5] Respondents concede that because of the holding in *Johnson v. Board of Police and Fire Pension Commissioners*, 74 Cal.App.2d 919, 170 P.2d 48, and *Larson v. Board of Police and Fire Pension Commissioners*, 71 Cal.App.2d 60, 162 P.2d 33, appellant's acceptance of workmen's compensation does not constitute a waiver of his pension rights. However, respondents contend that as against such pension the city of Long Beach is entitled to credit any payments made to appellant under the Workmen's Compensation and Safety Act, St.1917, P. 831. But respondents' contention is borne out neither by the charter itself nor by appellate decisions. The charter provides that the pension provision is intended to be in lieu of and take the place of the Workmen's Compensation Act. It does not provide that the Workmen's Compensation Act is to be in lieu of and take the place of the pension provisions. Thus the charter provisions deal with the converse of the situation here presented. *Larson v. Board of Police and Fire Pension Commissioners*, supra. If appellant had first received a pension and then applied for workmen's compensation benefits there would be presented for decision the issue which respondents raise. The *Larson* decision expressly withheld opinion on this precise question. But to hold now that acceptance of workmen's compensation effects a pro tanto reduction of pension benefits would in effect nullify the *Larson* and *Johnson* decisions and be contrary to the clear implication of the charter. Since an employee is entitled to receive his entire salary in addition to disability indemnities (*Department of Motor Vehicles v. Industrial Accident Commission*, 14 Cal.2d 189, 194, 93 P.2d 131; *Department of Motor Vehicles v. Industrial Accident Commission*, 78 Cal.App.2d 626, 630, 178 P.2d

43), and since in the instant case the pension benefits are a part of that salary (*Kern v. City of Long Beach*, 29 Cal.2d 848, 851, 179 P.2d 799), appellant is entitled to his entire pension without set-off or deduction. This is in conformity with the *Larson* and *Johnson* decisions, *supra*. If a pro tanto credit were permitted the compensation indemnities might exceed the pension allowances and nullify the charter provisions as well as the effect of those decisions. Furthermore, pension rights are secured in part by contributions by the employee, and therefore constitute the protection which he has purchased for himself and his family and not the protection furnished under the compulsion of the Workmen's Compensation Act.

[6] By their answer respondents admitted that appellant "sustained an injury during the course of his employment, arising out of his employment as such police officer; thereafter said disability caused his condition to become such that he was physically disabled and due to said facts, was unable to continue his employment with the city of Long Beach." Such admission renders unnecessary further inquiry into his claim of being physically disabled "by reason of bodily injuries received in * * * the discharge of duties" as a member of the Long Beach police department. Therefore, since no legal cause exists for denying his right to a disability pension, it became and was the duty of the court below to enter judgment requiring the issuance of a peremptory writ of mandate to compel respondents to grant appellant's application for a disability pension, dating from June 21, 1944, in an amount equal to one half of the salary attached to the rank held by petitioner at that time. See *Casserly v. City of Oakland*, 6 Cal.2d 64, 66, 56 P.2d 237; *Kern v. Long Beach*, 29 Cal.2d 848, 855, 179 P.2d 799.

It is therefore ordered that the judgment be and is reversed and that the court below be and is directed to issue a peremptory writ of mandate as demanded by the first amended petition.

McCOMB and WILSON, JJ., concur.

Hearing denied; EDMONDS, TRAYNOR, and SPENCE, JJ., dissenting.

87 Cal.App.2d 126

LA MAR v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 16553.

District Court of Appeal, Second District,
Division 2, California.

Aug. 4, 1948.

Rehearing Denied Aug. 18, 1948.

Hearing Denied Sept. 30, 1948.

1. Mandamus ⇨163

Demurrer to petition for writ of mandate containing an argument but stating no grounds for demurrer would be overruled.

2. Mandamus ⇨164(3)

Answer to petition for writ of mandate to compel amendment of interlocutory judgment of divorce, containing a denial of any mistake or inadvertence of trial court in entry of judgment and consisting otherwise of argument and citation of authorities but no denial of allegations of fact contained in petition, was demurrable for failure to raise an issue of fact.

3. Judgment ⇨297

Court has inherent power to correct a judgment so as to make it actually express the decision declared by court and such power may be exercised even after appeal and affirmance of judgment, provided amendment does not affect the substantial rights of the parties.

4. Judgment ⇨326

A judgment may be corrected nunc pro tunc as of its original date so as to conform to judicial decision actually made without notice and on court's own motion and without regard to lapse of time, since statute providing for relief from judgments taken by mistake, etc., and for correction of clerical mistakes in judgments is not controlling. Code Civ.Proc. § 473.

5. Judgment ⇨271

Clerk of court must enter judgment in conformity to decision by court as evidenced by its findings of fact and conclusions of law. Code Civ.Proc. §§ 632, 664.

6. Judgment ⇨306

A "clerical error" in judgment subject to correction nunc pro tunc is not neces-

sarily one made by clerk of court but may be an error made by judge or court.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error".

7. Divorce ⇨186

Superior court had jurisdiction to make all corrections in interlocutory judgment of divorce necessary to carry judgment into effect, notwithstanding affirmance of judgment on appeal.

8. Divorce ⇨254

Court had jurisdiction and manifest legal duty to amend nunc pro tunc interlocutory divorce judgment awarding to divorced husband stated sum as his share of community property so as to enable him to obtain execution to enforce payment of stated sum which court by its findings of fact and conclusions of law determined former wife should pay to husband as his share of community property.

9. Divorce ⇨263

Execution could not issue on an interlocutory judgment of divorce awarding divorced husband stated sum as his share of community property in absence of a judgment for such amount.

10. Mandamus ⇨3(2)

A writ of mandate will issue where there is not a plain, speedy and adequate remedy in the ordinary course of law. Code Civ.Proc. § 1086.

11. Mandamus ⇨3(2)

Whether the remedy in the ordinary course of law is plain, speedy and adequate so that a writ of mandate will not issue is a question of fact to be determined from a consideration of the circumstances of each case by the court to which application for the writ is made. Code Civ.Proc. § 1086.

12. Mandamus ⇨176

On application for writ of mandate, the court should act in such manner as will promote justice and conclude the controversy without delay. Code Civ.Proc. § 1086.

13. Mandamus ⇨3(2), 4(1)

A writ of mandate will issue, even though order complained of is appealable or other legal remedies are available, if

such remedies are not speedy and adequate. Code Civ.Proc. § 1086.

14. Mandamus ⇨4(4)

The remedy by appeal from order denying a motion to amend judgment nunc pro tunc is neither speedy nor adequate so as to preclude issuance of a writ of mandate to compel amendment, if movant upon reversal of order would be required to renew his motion and present the same question to the same court that had previously decided it. Code Civ.Proc. § 1086.

15. Mandamus ⇨4(4)

The remedy by appeal from order denying motion to amend nunc pro tunc interlocutory judgment of divorce awarding divorced husband stated sum as his share of community property so as to enable him to obtain execution to enforce award was not "speedy and adequate" so as to preclude issuance of writ of mandate to compel such amendment, since husband would have no security for payment pending appeal and reversal of order would leave husband in same position, that is, with the right to the money but without the means of enforcing such right. Code Civ.Proc. §§ 963, 1086.

16. Mandamus ⇨52

Where superior court refused to amend nunc pro tunc its interlocutory judgment of divorce awarding husband stated sum as his share of community property so as to conform to findings of fact and conclusions of law determining that wife should be ordered to pay stated sum to husband, husband was entitled to peremptory writ of mandate commanding superior court to amend the judgment so as to provide that husband have judgment against wife in stated sum with interest thereon at specified rate. Code Civ.Proc. §§ 632, 664, 1086.

Petition by Jack C. LaMar for a writ of mandate to compel the Superior Court of the State of California, in and for the County of Los Angeles, to amend an interlocutory judgment of divorce.

Peremptory writ ordered.

John W. Preston and David L. Sefman, both of Los Angeles, for petitioner.

No appearance for Superior Court.

Don Lake, of Los Angeles, for Helen Sanders LaMar, real party in interest.

WILSON, Justice.

Petition for a writ of mandate to compel respondent Superior Court to amend an interlocutory judgment of divorce.

[1, 2] No appearance has been made for the Superior Court. Helen Sanders LaMar, the real party in interest, has appeared and filed a demurrer to the petition which contains an argument but states no grounds for the demurrer. It will therefore be overruled. She also filed an unverified answer consisting of argument and citations of authorities but no denial of any of the allegations of fact contained in the petition. There is a denial that there was any mistake or inadvertence on the part of the trial court in the interlocutory decree, which is a conclusion of law. In the absence of a denial that raises an issue of fact petitioner's demurrer to the answer will be sustained.

In November, 1945, Helen Sanders LaMar as plaintiff commenced an action against petitioner Jack C. LaMar as defendant for a divorce in which she sought an award of all the community property of the parties. Defendant answered the complaint and filed a cross-complaint praying for a divorce, for an accounting, and for an award to him of the community property. After a trial of the action the court made findings of fact and conclusions of law wherein it found (1) that plaintiff was entitled to a divorce on the ground of extreme cruelty, (2) that she be awarded certain property specifically described, and (3) that she be ordered to pay to defendant the sum of \$2500 as his share of the community property. An interlocutory judgment of divorce was entered accordingly. The paragraph of the judgment giving rise to this proceeding reads as follows: "It is further ordered, adjudged and decreed that defendant be and he hereby is awarded the sum of \$2500.00 cash as his share of the community property."

Upon appeal the interlocutory judgment was affirmed. *LaMar v. LaMar*, 30 Cal.2d 898, 186 P.2d 678.

Following the affirmance of the judgment petitioner, defendant in the divorce action, requested the clerk of the superior court to issue an execution against Helen Sanders LaMar for the purpose of enforcing payment of the amount which had been awarded to him by the court, but the clerk refused to issue the writ on the ground that the judgment contained no order for payment by Helen Sanders LaMar to petitioner of the amount awarded.

In March, 1948, petitioner filed a notice of motion in the superior court for a nunc pro tunc order amending the interlocutory judgment so that it would specifically declare that he had a judgment against plaintiff for the sum of \$2500. After a hearing the motion was denied by the court without stating the reasons, if any, for such denial.

On the grounds (1) that an appeal from the order would be neither speedy nor adequate and if successful would leave petitioner in the position which he now occupies in respect to a correction or amendment of the judgment, and (2) that pending an appeal he would have no security for the payment of the judgment contemplated by the findings and conclusions of law, he seeks a writ of mandate to compel the superior court to make an appropriate amendment to the interlocutory decree giving him a judgment against the plaintiff in the divorce action for the sum of \$2500.

[3, 4] In determining whether a writ of mandate should issue certain established rules must be borne in mind. The court has inherent power to correct a judgment so as to make it actually express the decision declared by the court and such power may be exercised after appeal and affirmance of the judgment as well as before an appeal has been finally determined, provided that the amendment does not affect the substantial rights of the parties. In *re Estate of Goldberg*, 10 Cal.2d 709, 713, 714, 76 P.2d 508; *Boust v. Superior Court*, 162 Cal. 343, 345, 122 P. 956; *Chadwick v. Superior Court*, 205 Cal. 163, 165, 270 P. 192; *Fay v. Stubenrauch*, 141 Cal. 573, 575, 75 P. 174; *Fallon v. Brittan*, 84 Cal. 511, 514, 24 P. 381; *Dreyfuss v. Tompkins*, 67 Cal. 339, 340, 7 P. 732. The provisions of section

473 of the Code of Civil Procedure are not controlling. An order may be made correcting a judgment nunc pro tunc as of its original date without notice and on the court's own motion so as to make it conform to the judicial decision actually made, and this is true regardless of the lapse of time. *Benway v. Benway*, 69 Cal.App.2d 574, 579, 159 P.2d 682; order for correction made 14 years after entry of judgment; *In re Estate of Goldberg*, supra; 35 years after entry of decree of distribution; *Kohlstedt v. Hauseur*, 24 Cal.App.2d 60, 62, 74 P.2d 314; *Kaufman v. Shain*, 111 Cal. 16, 23, 43 P. 393, 52 Am.St.Rep. 139. Error should be corrected without vacating the judgment and entering a new one. *Erickson v. Stockton*, etc., R. R. Co., 148 Cal. 206, 207, 82 P. 961.

[5] The findings of fact and conclusions of law constitute the decision of the court and judgment must be entered accordingly. Code Civ.Proc. sec. 632; *Prothero v. Superior Court*, 196 Cal. 439, 443, 238 P. 357; *Aspegren & Co., Inc., v. Sherwood, Swan & Co.*, 199 Cal. 532, 537, 250 P. 400. The court has nothing to do with the entry of a judgment, since that is a duty devolving on the clerk of the court who is but an instrument of the court to make a correct memorial of its orders. *City and County of San Francisco v. Brown*, 153 Cal. 644, 650, 651, 96 P. 281. It is the ministerial duty of the clerk to enter a judgment "in conformity to the decision of the court" as evidenced by its findings of fact and conclusions of law. Code Civ.Proc. sec. 664; *Takekawa v. Hole*, 170 Cal. 323, 324, 149 P. 593; *San Joaquin Land & Water Co. v. West*, 99 Cal. 345, 347, 33 P. 928; *Crim v. Kessing*, 89 Cal. 478, 488, 26 P. 1074, 23 Am.St.Rep. 491.

[6] A clerical error is not necessarily one made by the clerk of the court. The meaning of the term "clerical error" has been so broadened as to include an error made by the judge or by the court. *Benway v. Benway*, 69 Cal.App.2d 574, 580, 159 P.2d 682; *In re Estate of Goldberg*, 10 Cal.2d 709, 715, 76 P.2d 508. The signature of the judge to the judgment does not establish that an error therein is not a clerical error. *Bemmerly v. Woodward*, 124 Cal. 568, 576, 57 P. 561. The judgment may be corrected

even though the misprision was that of the court. *Kohlstedt v. Hauseur*, 24 Cal.App.2d 60, 62, 74 P.2d 314; *Kowalsky v. Nicholson*, 23 Cal.App. 160, 162, 137 P. 607; *Christie v. Christie*, 99 Cal.App. 53, 56, 277 P. 872.

[7] Tested by these rules the court had power, notwithstanding the affirmance of the judgment on appeal, to make all corrections in the judgment necessary to carry it into effect. By its findings of fact and conclusions of law the court determined that the community property of the parties should be divided between them in the following manner: that property specifically described should be awarded to plaintiff *Helen Sanders LaMar*, and that she "be ordered to pay to defendant [Jack C. LaMar, petitioner in this proceeding] the sum of \$2500 as his share of the community property." In the interlocutory decree of divorce it was adjudged and decreed that the described property be awarded according to the findings and conclusions and "that defendant be and he hereby is awarded the sum of \$2500.00 cash as his share of the community property."

[8] Not only did the court have power to amend the judgment as requested by defendant, petitioner here, but it was its definite and manifest legal duty so to do. In denying petitioner's motion to amend the court deprived him of the power to enforce the decision which the court had made in his favor. By reason of the absence of apt language usual in a money judgment petitioner was unable to obtain a writ of execution for the purpose of enforcing payment of the amount that the court had declared was justly and legally due to him. Since the court had determined that petitioner was entitled to the amount awarded it was the plain duty of the court to amend the judgment in such manner as would enable petitioner to obtain the fruits of the court's decision. The refusal to amend the judgment as requested left petitioner without a remedy to enforce the award in his favor, and allowed the entire community property to remain in the possession of *Helen Sanders LaMar*, contrary to the express and plainly declared decision of the court.

[9-11] The remaining question is, What recourse has petitioner to obtain the share of the community property awarded to him? Without ability to obtain a writ of execution he cannot collect that which the court has declared to be his, and an execution cannot issue on an "award" of the sum mentioned in the absence of a "judgment" for such amount. A writ of mandate will issue when there is not a plain, speedy and adequate remedy in the ordinary course of law. Code Civ.Proc. sec. 1086. Petitioner concedes that he has the right of appeal, since the order complained of is a special order after final judgment. Code Civ.Proc. sec. 963. An appeal from the order is a plain remedy but is it speedy and adequate? There is no rigid and undeviating rule that determines when the writ will issue or when it will be refused. Whether the remedy is plain, speedy and adequate in the ordinary course of law is a question of fact that must be determined from a consideration of the circumstances of each case, and when the ordinary remedies are not plain, speedy and adequate the court has jurisdiction to issue the writ. *City and County of San Francisco v. Superior Court*, 94 Cal.App. 318, 320, 271 P. 121; *Evans v. Superior Court*, 20 Cal.2d 186, 188, 124 P.2d 820; *Sullivan v. Superior Court*, 185 Cal. 133, 140, 141, 195 P. 1061.

[12-14] The question whether the legal remedy is speedy and adequate is always a matter to be determined by the court to which the application is made (*Jensen v. McCullough*, 94 Cal.App. 382, 392, 271 P. 568) and the court should act in such manner as will promote justice and conclude the controversy without delay. Even though the order is appealable, mandate is available and the writ will issue if the remedy by appeal is not speedy and adequate. *Archer v. Superior Court*, 81 Cal. App. 742, 745, 254 P. 939; *Edwards v. Superior Court*, 88 Cal.App. 260, 262, 263, 263 P. 347; *Holtum v. Greif*, 144 Cal. 521, 527, 78 P. 11; *Evans v. Superior Court*, supra; *Sullivan v. Superior Court*, supra; *City and County of San Francisco v. Superior Court*, supra. The writ will likewise issue though there be other legal remedies than by appeal. *Betty v. Superior Court*, 18

Cal.2d 619, 623, 116 P.2d 947; *Sullivan v. Superior Court*, supra. The remedy by appeal is neither speedy nor adequate if the petitioner be required to renew his motion and present the same question to the same court that had previously decided it. *Betty v. Superior Court*, supra; *Sullivan v. Superior Court*, supra, 185 Cal. at page 141, 195 P. 1061.

[15] Especially applicable to the situation now before us is the case of *Holtum v. Greif*, 144 Cal. 521, page 527, 78 P. 11, page 13, where it is said: "The appeal, in the ordinary course, would not be decided for a long time, and pending the appeal there would be no security for the payment of the judgment; and, besides, nothing would necessarily result from an appeal beyond a reversal of the order, and this would merely confirm the right of the petitioner to execution—a right already complete." In the instant case there would be no security for payment pending the appeal and the reversal of the order would leave petitioner in the position he is now in—he has a right to the money but he is without the means of enforcing such right.

In *Boust v. Superior Court*, 162 Cal. 343, 345, 122 P. 956, it is held that if the judgment as entered does not conform with the facts the court should be required by mandamus to make the necessary correction. No evidence is needed to aid in determining petitioner's right to an amendment to the judgment in question in this proceeding in order to enable him to enforce payment of the amount awarded to him. The justness of his contention appears on the face of the record—the recital in the conclusion of law that his wife be ordered to pay him \$2500 as his share of the community property (all other property having been awarded to her) and the specific declaration in the judgment that he be awarded that sum.

The cases cited on behalf of Mrs. LaMar are not authority for refusing a writ of mandate in such a case as this. In *Kerr v. Superior Court*, 130 Cal. 183, 62 P. 479, it is held that a writ will not lie to compel the court to issue a citation pursuant to an accusation based on section 772 of the Penal Code, since (1) the court would necessarily

exercise discretion in determining whether the accusation contained sufficient allegations to warrant the proceeding and (2) if the court should be compelled to issue the citation there would be nothing to prevent it from dismissing the proceeding after the party had been brought into court. *Shewitt v. Superior Court*, 4 Cal.App.2d 619, 41 P.2d 941, involved an order dismissing an action which had not been brought to trial within the statutory period. *Mason v. Del Valle*, 213 Cal. 30, 1 P.2d 419, holds that a judgment which contained precautionary provisions did not adjudicate any rights beyond those expressly covered by the judgment. The statement in the opinion to the effect that the judgment is the only real conclusion of law and displaces all former statements in the findings on the subject is rested on *Roberts v. Hall*, 147 Cal. 434, 437, 82 P. 66, 67, and an analysis of the *Mason* opinion shows that such statement was unnecessary to the decision of the case. A similar statement appears in the *Roberts* case. The court there held that the findings supported the judgment and that the provisions of the judgment complained of were within the general scope of the conclusions of law. It was then added that "were it otherwise, the point would not be good" because the judgment supersedes the conclusions of law. Since the judgment did not go beyond the conclusions of law it was unnecessary to surmise the result if the rule were "otherwise" and the statement referred to is therefore dictum. In *Newlands v. Superior Court*, 171 Cal. 741, 154 P. 829, the court was considering the discretion of the trial court to allow alimony pending an appeal from a judgment of divorce and obviously that case has no place in the discussion in the instant proceeding. Nothing in any one of the cases relied on by *Helen Sanders LaMar* can be converted into a declaration or an intimation that a judgment cannot be amended so as to give complete effect to the formal and solemn decision of the court or that if the trial court fails to make its judgment effective a writ cannot be issued to compel it to give the complete relief to which a party is entitled and which is

plainly intended by the findings and conclusions.

[16] The findings of fact and conclusions of law concluded with the words "Let judgment be entered accordingly." Since it was the ministerial duty of the clerk to act "accordingly" to the direction of the court, to wit, to enter a judgment whereby petitioner would be enabled to enforce his award, and since the clerk failed and neglected to perform his plain duty in that regard it was the function of the court to order the judgment to be appropriately amended and corrected. The court having refused to perform its obligation, a writ of mandate should issue as prayed.

The demurrer of *Helen Sanders LaMar* to the petition for a writ of mandate is overruled and petitioner's demurrer to her answer is sustained. A peremptory writ of mandate is ordered to issue commanding the superior court to amend and correct the interlocutory judgment of divorce made and entered in the action entitled *Helen Sanders LaMar*, plaintiff, v. *Jack C. LaMar*, defendant, No. D-295701, to conform to its findings of fact and conclusions of law in the following particular: The paragraph reading "It is further ordered, adjudged and decreed that defendant be and he hereby is awarded the sum of \$2500.00 cash as his share of the community property." shall be corrected and amended nunc pro tunc as of the date of entry of said interlocutory decree to read as follows: "It is further ordered, adjudged and decreed that defendant be and he hereby is awarded the sum of Two Thousand Five Hundred Dollars (\$2500.00) in cash as his share of the community property, and that defendant have judgment against the plaintiff in the sum of Two Thousand Five Hundred Dollars (\$2500.00), with interest thereon at the rate of seven per cent per annum from date hereof until paid."

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

87 Cal.App.2d 89

PEOPLE v. McKNIGHT.

Cr. 2529.

District Court of Appeal, First District,
Division 1, California.

Aug. 3, 1948.

1. Criminal law §407(1)

Deputy sheriff's testimony that defendant's brother-in-law in defendant's presence accused defendant of stabbing deceased and that defendant gave an evasive or equivocal reply was admissible to show defendant's consciousness of guilt, where defendant was aware of accusation in spite of her hysteria and accusation was such as to call for a reply.

2. Criminal law §345, 351(3, 5)

Evidence of conduct tending to show a consciousness of guilt or intent, such as flight, concealment, preparation, or other acts or declarations inconsistent with theory of innocence, is admissible as exception to hearsay rule.

3. Criminal law §407(1)

The test for admitting accusatory statement against defendant and defendant's failure to deny such statement is not whether defendant had opportunity to deny accusation but is whether accusation was made under circumstances calling for reply, and each case must be determined upon the facts and circumstances therein presented.

4. Criminal law §419(1)

Statements made by others in presence of defendant are hearsay.

5. Criminal law §407(1)

Evidence of accusatory statements is admitted only as the basis for evidence of accused's conduct in the face of such accusations.

6. Criminal law §736(2)

Where defendant's brother-in-law accused defendant of killing deceased, it was for trial court in first instance to determine whether defendant's conduct or response was such as to give rise to an inference of acquiescence or guilty consciousness, and it was for jury to decide whether defendant by reason of hysteria or otherwise was

aware that statements were made and whether under all the circumstances such statements called for disclaimer and whether actions and statements of defendant showed consciousness of guilt.

7. Criminal law §1159(2)

Jury's function is to draw proper inferences from evidence, and appellate court may not substitute its findings for that of jury.

8. Criminal law §742(1), 743

The weight to be given unqualified denials of defendant's guilt by defendant and witness was for jury.

9. Criminal law §1144(13)

On appeal in criminal case, appellate court must assume in favor of verdict the existence of every fact which jury deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

10. Homicide §250

Evidence warranted manslaughter conviction of defendant stabbing her common law husband after a lengthy quarrel.

Appeal from Superior Court, Contra Costa County; Hugh H. Donovan, Judge.

Doretha McKnight was convicted for manslaughter, and she appeals from the judgment of conviction and order denying a new trial.

Judgment and order affirmed.

Hoey & Hoey, of Martinez, and Stanley C. Smallwood, of Oakland, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant was charged with the murder of one Robert Harvey Pergerson, and was convicted of the crime of manslaughter, from which conviction, as well as from the order denying a new trial, she appeals, making two contentions: (1) that certain testimony as to alleged accusatory statements

in her presence was inadmissible; (2) that the evidence for the prosecution "is so far outweighed by evidence for the defense that the verdict is against the evidence."

The prosecution relies for conviction upon the testimony concerning defendant's attitude in the face of the alleged accusatory statements, and upon her admissions and incriminating statements.

The Alleged Accusatory Statements Were Admissible.

For six or seven months prior to the killing, defendant had been living in Crockett with Pergerson as his common law wife, in a cabin, consisting of two small rooms, nine or ten feet square. Her sister Thelma and the latter's husband, Charles Anderson, lived in an adjoining cabin, which was about four feet away from the Pergerson cabin.

The first witness was Deputy Sheriff Josephs, whose testimony was substantially as follows: He, together with a doctor, arrived at the Pergerson cabin about 7:15 p. m., entering the kitchen. There he saw the body of the deceased lying on a pile of groceries, against the wall. (The doctor examined the body and found the victim to be dead, and at the trial testified that the cause of death was a wound four and a half inches deep in the chest, which could have been caused by the knife hereafter mentioned.) Charles and Thelma Anderson, defendant, another deputy sheriff and a deputy constable, were in the cabin. Anderson was sitting in a chair facing the body of the deceased, and through the door into the adjoining bedroom, which was open, Josephs saw Thelma and defendant seated on the bed. Defendant was facing the kitchen and was about four and a half feet from where Josephs was standing while talking to Anderson. Defendant came into the kitchen once or twice during this conversation. Josephs noticed a kitchen knife, which had blood stains on it, lying on the sink. He asked Anderson what had happened. Anderson said that the four of them, Pergerson and defendant, Thelma and he, had been to Valona that morning and had been doing a little drinking; that they had left Pergerson and defendant, and

gone to Vallejo. A little before 7 p. m. the Andersons were returning to their cabin and heard a commotion in the Pergerson cabin. Anderson entered the Pergerson kitchen and saw deceased grab defendant, who was facing deceased with her two hands together extended towards him and outward about a foot from her chin. Pergerson then fell against the ice box. Anderson said, "Doretha [the defendant], you done hurt Bob." Anderson saw defendant put the knife on the sink, and he moved it back against the wall. Deceased's shirt was open, and Anderson stated that defendant had been washing the blood off deceased's body with a cloth. (Defendant later admitted doing this.) Josephs, with the knife in his hands, walked into the bedroom and talked to defendant, who was hysterical. She said, "If they say I killed him I guess I did." She then said that the four of them had been in Valona, and the two couples separated. Deceased had purchased a pint of whiskey. At the Southern Pacific depot they met two men. Pergerson went with them into the men's room to drink. Defendant became provoked and she and deceased argued on the way and after they arrived home. "We were arguing a Hell of a lot coming down the track." She explained that she was quite disturbed over the fact that Pergerson had divided the whiskey with the two men. She didn't remember any more than that as "we were doing quite a bit of drinking and we were arguing quite a bit."

[1-5] When the witness Josephs was asked to testify to his conversation with Anderson in the presence of defendant, an objection that such conversation would be hearsay was made. The following then occurred:

"Mr. Taylor [for the prosecution]: If Your Honor please, we intent to show the conversation was definitely within Mrs. McKnight's presence; certain explanation of the crime was made at that time and there was no denial.

"Mr. J. Hoey [for the defense]: If Your Honor please, we object; the conversation of some other individuals certainly isn't binding on the defendant. Of course, there

is a rule that if you don't deny it it is admitted, but it must be only for that purpose.

"Mr. Taylor: That is the only purpose.

"Mr. J. Hoey: Can we have the record show that if this conversation is admitted it is solely for the purpose of showing that there was no statement or no denial made by the defendant.

"Mr. Taylor: That is correct; that the defendant was accused of the crime and did not deny it." The court then questioned the witness as to the proximity of the defendant and the situation in the cabin at the time of the conversation, and then told the witness to proceed. No further objection was made concerning this line of testimony. It is apparent that counsel waived his former objection and consented to the introduction of this evidence for the purpose mentioned. Moreover, the testimony was admissible for the limited purpose of showing a consciousness of guilt on the part of the defendant. The rule as to accusatory statements is as follows: "The admission of such evidence is an exception to the hearsay rule. Evidence of conduct is receivable if it tends to show a consciousness of guilt or intent—such as flight, concealment, preparation, or other acts or declarations inconsistent with the theory of innocence." *People v. Yeager*, 194 Cal. 452, 486, 229 P. 40, 54. " * * * the test for admitting such a statement into evidence is not, as announced by the trial court, that the accused 'had an opportunity to deny it,' but 'whether the accusation has been made under circumstances calling for a reply * * *'. *People v. Simmons*, supra, 28 Cal.2d [699], page 712, 172 P.2d [18], at page 25. * * * Each case must, therefore, be determined upon the facts and circumstances therein presented, *People v. Simmons*, supra, 28 Cal.2d page 715, 172 P.2d 27." *People v. Spencer*, 78 Cal.App. 2d 652, 655, 656, 178 P.2d 520, 522. "Statements made by others are no less hearsay when made in the presence of a defendant. * * * Evidence of accusatory statements, however, may be received for but one purpose, namely, as the basis for evidence of the conduct of the accused in the

face of such accusations." *People v. White*, 44 Cal.App.2d 183, 186, 112 P.2d 60, 61.

Defendant contends that there is no reasonable interpretation of the evidence which would support an inference that her conduct in regard to the accusatory statements was the result of, or was evidence of, a consciousness of guilt, and that her actions and statements, when considered in connection with the statement of Josephs that she was hysterical, were her way of expressing her ignorance of what took place. It is doubtful if her actions could be susceptible of that interpretation. But assuming that such is a possible inference, it is not the only one, and a more reasonable inference that could be drawn by the jury is her consciousness of guilt. Moreover, in all her statements she details all incidents before and after the stabbing (although she tells contradictory stories concerning them). In her earlier statements it is only the immediate time and circumstances of the stabbing of which she claims to be ignorant. Her memory appears to be a convenient one.

Defendant was within a few feet of Anderson, who said he saw her with her hands extended towards Pergerson; that Pergerson then dropped to the floor; that she then placed the bloody knife on the sink. While Anderson did not see the knife in her hands, her position, the falling of Pergerson with a stab wound, and her having the knife, leave no doubt that he was accusing her of stabbing Pergerson. He said he told her, "Doretha, you done hurt Bob." At no time during the relating of this conversation did defendant deny the charges being made by Anderson, and then when confronted by the deputy sheriff with the knife she said, "If they say I killed him I guess I did." This was hardly the statement of an innocent person, particularly when considered with the fact that, far from not knowing what had occurred, as defendant now contends her actions indicated, she claimed at the trial to know in detail what had occurred.

In *People v. Simmons*, 28 Cal.2d 699, at page 715, 172 P.2d 18, 26, the court quotes from *People v. Amaya*, 134 Cal. 531, 536,

66 P. 794, 796, as follows: "It is, no doubt, true that, to render evidence of this character admissible, the occasion and the circumstances must have been such as to afford the accused person an opportunity to act or speak, and the statement must have been one naturally calling for some action or reply. Greenl.Ev. par. 197. But in this state it has been uniformly held that an accusation of crime does call for a reply, even from a person under arrest. (Citing cases.)" In the instant case, defendant was not under arrest or restraint, but was definitely being accused by Anderson of killing the deceased. This accusation certainly called for a reply. If defendant's answer was not an admission of guilt, it was what is characterized in *People v. Simmons*, supra, 28 Cal.2d page 712, 172 P.2d page 25, as "an evasive or equivocal reply."

[6] While it was for the court in the first instance to determine whether the defendant's "conduct or response was such as to give rise to an inference of acquiescence or guilty consciousness" (*People v. Simmons*, supra, 28 Cal.2d page 712, 172 P.2d page 25), it was for the jury to decide whether the defendant, by reason of hysteria or otherwise, was aware the statements were made, whether under all the circumstances shown they called for a disclaimer, and whether the actions and statements of the defendant did show a consciousness of guilt. The jury, by its verdict, found against defendant on these issues. That defendant was aware of the accusations, in spite of her hysteria, is shown by her statement, "If they say I killed him I guess I did."

The Verdict Is Not Against The Weight Of Evidence.

In addition to the statements of defendant as testified to by the witness Josephs, the actions and statements of the defendant thereafter are important. Approximately three hours later, in the sheriff's office at Martinez, defendant related in detail the circumstances of the drinking and the quarrel, substantially as theretofore given by her to Josephs. When asked if she had killed deceased, she replied, "I wouldn't say I did and I wouldn't say I didn't"; and when again asked she said

she didn't know, and in reply to the question, "Would you say you didn't?" she said, "Well, I wouldn't say that."

Defendant lays stress upon the fact that the witness Josephs made the statement at one time in his testimony that the defendant was hysterical. The extent of that hysteria was not brought out. It is significant, however, that her statements made at the time were practically identical with those made later that night when there is no contention that she was hysterical.

Another circumstance which the jury was entitled to consider on the question of her guilt was her testimony at the trial, which was directly contradictory of her statements to Josephs and at the sheriff's office. For example, in the latter statement, after telling about arguing with deceased about the whiskey, she stated that she and deceased finished the whiskey and she went to bed. "When I woke up, whether we have another argument or what, that is all I remember. * * * After I went to bed I don't remember any more that happened." When asked if there was anybody else around who could have done the killing she said, "I don't know." She said she didn't "know if someone was crying or what woke me up." She didn't know how she got in the kitchen. Practically the first time she remembered anything after going to bed was when she was washing the face of the deceased, after he had been stabbed. She was asked several times if there had been any misunderstanding between deceased and Anderson, and she said not as far as she knew, and then that if they had had trouble that night she didn't know it. She admitted that she used one of the butcher knives to cut weenies for sandwiches just before retiring. She stated, "We quarreled about the whiskey. I said, 'Bob, you could at least asked me to have a drink of whiskey.' * * * I was drunk and Bob was drunk." "I could have, drinking and drunk. I could have, but to actually say I did I won't say I did, because I don't know I did."

Contrast those statements with her testimony at the trial. She testified that after deceased came out of the men's room at the depot there was no argument about the whiskey. When they got home she saw

that half the whiskey was gone and she then told deceased that he should have waited to open the bottle until they got home. That was all there was to the whiskey incident. Defendant went to bed and to sleep. She remembers Anderson coming in and wanting to borrow some money. "I don't remember any more outside of a little loud talking, and Charlie [Anderson] says 'Bob is dead' loud." She jumped out of bed, grabbed a towel and washed deceased's face. She looked up and said, "Thelma, who killed Bob?" "Thelma said she didn't know, whoever, killed him they would find the fingerprints on the butcher knife. I looked at Charlie. He had the butcher knife wiping the handle off, and a little later he says to me, 'Tell the law that you and Bob was playing with the butcher knife.'" No suggestion of this incident was made at any time prior to her taking the stand, and it is directly in conflict with her previous statements. At some length she detailed the presence of visitors at the cabin before she went to bed and their consuming the whiskey, in direct contradiction to her previous statements in which she said she and deceased were alone and that the two of them finished the bottle. She then definitely denied that she and deceased had any argument that day. While she previously stated she was drunk, she now denied it, saying that she remembered everything that happened. She then stated that she had told deceased not to drink all the whiskey as she wanted him to save some, "because I knew he was going to buy some more Sunday, and I was only trying to save money to buy him a suit for Christmas."

A reading of the testimony of defendant not only shows that it is completely contradictory of and inconsistent with her previous statements, but also that as a witness she was evasive and unsatisfactory. The jury was justified in believing that her story on the stand was a manufactured and untruthful one in its essential aspects. In effect she accused Anderson of committing the crime, claiming that she saw him pick the knife up off the floor and wipe the fingerprints off. Yet she studiously avoided actually accusing him. The jury could reasonably infer from her actions and those of Anderson and his wife that the three of

them decided to shift the blame for the killing towards Anderson, but to make sure that it was not sufficiently shifted as to cause him to be held responsible for the crime.

Anderson apparently was cooperative with the officers immediately after the killing, and according to the testimony of Deputy Sheriff Rhoades agreed to come to the office of the district attorney or of the sheriff whenever requested. By the time of the coroner's inquest, however, he had disappeared. When they located him in Texas and brought him to the trial, he refused to testify on the ground that he might incriminate himself. Both defendant and Thelma testified as to the good relationship between the deceased and his brother-in-law Anderson, and that they never quarreled. No motive whatever was shown which would have caused Anderson to kill the deceased.

Thelma Anderson, like her sister, the defendant, was a most unsatisfactory witness. She, too, was evasive and her testimony was completely inconsistent with her statements previously given the officers. At the trial, she claimed that while in her cabin she heard Anderson and deceased talking loudly and arguing in the Pergerson cabin. Then she heard a thump like somebody falling. She went into the Pergerson kitchen, saw defendant in bed and heard Anderson say, "Bob is dead." Anderson picked the knife up off the floor and placed it on the sink. She said that the fingerprints would tell who committed the crime. Thereupon Anderson wiped off the knife. In her statement to the district attorney given prior to the trial, she stated that after returning from Vallejo she started to undress. Anderson went out. The next thing she heard was defendant crying; she didn't hear deceased or Anderson at all, nor did she hear any noise or anything except the defendant crying. Her explanation of why she didn't tell the district attorney the truth was, "I had to tell you something." As was the case with the defendant, the jury could readily infer that Thelma was not telling the truth on the stand.

Thelma testified that the fact that she had heard the noise of defendant and her

husband quarreling came to her after she had told the district attorney that the only thing she heard that evening from the Pergerson cabin was the sound of defendant crying. She further said that the fact that she saw Anderson pick up the knife and wipe it off came to her "After I thought about things." At various times in her testimony, she altered her story as to the location of defendant when she first entered the Pergerson cabin. She stated that defendant was getting out of bed, that she was out of bed and on her way to the kitchen, and that she was leaning over the deceased washing his face. She denied making most of the answers read to her from her statement given to the district attorney. Defendant stipulated that if the reporter who transcribed the statement were present, she would testify that it was a true and correct copy of that taken at the time.

[7] An examination of the testimony discloses that the jury could very well conclude that the testimony of defendant and Thelma about Thelma saying the fingerprints on the knife would reveal the killer, and Anderson then wiping off the knife, as well as other identical testimony given by them, was an afterthought and fabrication. "The right to draw proper inferences from the evidence is a function of the jury; and as long as its conclusions do not do violence to reason, an appellate court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof." *People v. Latona*, 2 Cal.2d 714, 725, 43 P.2d 260, 265. See also *People v. Perkins*, 8 Cal.2d 502, 511, 66 P.2d 631.

Under the testimony in this case, for the jury to find other than that defendant, after a lengthy quarrel with the deceased, had stabbed him, would have been a miscarriage of justice. The verdict, instead of being against the weight of evidence, is completely borne out by it. The claim of the defendant that the statement of Anderson to Josephs that he had moved the knife on the sink, causes the conclusion that the story of defendant and Thelma that she mentioned fingerprints and he wiped them off, is inevitably true, is far fetched. Unfortunately, while the evidence shows that

there were no "identifiable" prints on the knife, it does not show whether this was due to a wiping of the knife or a blurring of prints thereon.

[8] Because on the stand the defendant and Thelma made an unqualified denial of defendant's guilt, defendant contends that the verdict is against the weight of the evidence. It was for the jury to determine what weight to give to these denials. Their testimony was impeached by prior statements, and by the evasiveness of the witnesses and the contradictions in their testimony.

[9] The duty of this court is expressed in *People v. Pratt*, 77 Cal.App.2d 571 at page 576, 175 P.2d 888, at page 890, where the court quotes from *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, as follows: "We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict."

[10] The evidence here reasonably justifies the verdict. The judgment and order denying a new trial are affirmed.

PETERS, P. J., and WARD, J., concur.



87 Cal.App.2d 135

RIBERO et ux v. CALLAWAY et al.
Civ. 13665.

District Court of Appeal, First District,
Division 2, California.
Aug. 5, 1948.

1. Appeal and error ⇐715(1)

Where parties had considered a certain file to have been in evidence, reviewing court would also consider it to have been in evidence, although it did not so appear from clerk's transcript.

2. Appeal and error ⇐151(2)

Where two partners had appeared in proceeding to charge judgment debtor's al-

leged interest in partnership and had denied that judgment debtor was interested in partnership, such partners were entitled to appeal from charging order as "parties aggrieved". Code Civ.Proc. § 938; Civ. Code, § 2422.

See Words and Phrases, Permanent Edition, for all other definitions of "Parties Aggrieved".

3. Appeal and error ⇐150(1)

A person having sufficient interest to make him a party to an action generally has sufficient interest to appeal from an adverse judgment.

4. Partnership ⇐220(4)

In proceeding to charge judgment debtor's alleged interest in partnership, a minute order which did not appoint a receiver did not finally dispose of the proceeding or preclude court from thereafter entering a formal charging order and appointing a receiver. Civ.Code, § 2422; Rules on Appeal, rule 2(b) (2).

5. Appeal and error ⇐1011(1)

In proceeding to charge judgment debtor's alleged interest in partnership and for appointment of receiver, conflicts in the evidence as to whether judgment debtor had an interest in partnership were within sole discretion of the trial judge. Civ.Code, § 2422.

6. Receivers ⇐32, 38

Summary proceedings for appointment of a receiver are not subject to as strong requirements of proof and of formality of pleading as proceedings on the merits.

7. Partnership ⇐220(2)

Where judgment debtor had made no objection to proceeding to charge his alleged interest in partnership and for appointment of receiver, other partners were without right to object to appointment of receiver on ground that such relief was unnecessary, since manner of reaching judgment debtor's interest did not concern them. Civ.Code, § 2422.

8. Appeal and error ⇐150(1)

An appellant cannot attack a decision on grounds in which he has no interest and which the party interested does not pro-pound.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Proceeding by James Ribero and his wife against C. E. Callaway, S. E. Callaway, and Frank L. Leard, and Earl W. Callaway, individually and as copartners doing business as the Montana Club, to charge the interest of C. E. Callaway in the partnership business and for the appointment of a receiver. From two orders in favor of the plaintiffs, the last two named defendants appeal.

Orders affirmed.

H. Boyarsky, of Oakland, for appellants.

Fred A. Watkins and Paul I. Myers, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Frank L. Leard and Earl W. Callaway, individually and as copartners, appeal from two orders charging the interest of Clyde E. Callaway in a partnership business operating the "Montana Club and Hotel, Ltd." at San Francisco, and composed of said appellants, said Clyde E. Callaway and M. Lerner with the payment of the unsatisfied portion of a judgment in favor of respondents Ribero and appointing a receiver pursuant to section 2422 of the Civil Code. The first order appealed from is a minute order of July 1, 1947, reading: "H. S. motion to appoint receiver and to charge partner's interest granted." The second order is a formal order dated July 24, 1947, and filed August 20, 1947, containing the charging order with description of the interest charged and the appointment of W. Neil Walsh as Receiver with statement of the scope of his authority.

Appellants denied that the judgment debtor C. E. Callaway was a partner or had any interest in the Montana Club and Hotel. The judgment debtor himself did not oppose the motion for the charging order and the appointment of a receiver and does not appeal.

[1] No oral evidence was introduced. Three affidavits to be detailed later, and a file No. 26836 containing the certificate of Limited Partnership of Montana Club and Hotel, Ltd., with Affidavit of Publication

were transmitted by the clerk below to this court as exhibits. It does not appear from the clerk's transcript that said file No. 26836 was received in evidence, nor is it marked by him as such. However respondents state in their brief that the court received said file as part of the proof introduced in support of respondents' motion and appellants do not deny this. As the parties must have considered the file to be in evidence we shall also consider it to have been so. *O'Callaghan v. Bode*, 84 Cal. 489, 497, 24 P. 269.

With respect to the disputed copartnership of the judgment debtor, an affidavit of respondent James Ribero only states that Clyde E. Callaway "is a copartner" in "Montana Club and Hotel Ltd." The certificate of limited copartnership of Montana Club and Hotel, Ltd., certifies that the partnership was formed on January 10, 1946, by appellants and said Clyde E. Callaway as general partners, each having contributed \$4,500 in cash, and M. Lerner as limited partner, having contributed one dollar. The partnership is to continue for a period of 10 years unless sooner terminated by the mutual written consent of all partners. The profits, except for one dollar yearly to be paid to Lerner, shall be divided equally between the general partners. The file No. 26836 does not show any cancellation or amendment pursuant to section 2500 of the Civil Code. An affidavit of appellants states in substance that the limited partnership agreement certified was purely nominal to protect certain interests of M. Lerner in liquor licenses and that actually as between appellants and the judgment debtor said certificate was superseded by another agreement of the same date, signed by appellants and Clyde E. Callaway only, according to which the judgment debtor advanced approximately \$10,500, and would remain a partner and entitled to an equal share in the profits only until this capital investment would have been paid off out of the profit shares of the appellants. However, thereafter it was agreed that appellants would pay off the money advanced as speedily as they could raise it, without regard to their share of the profits. The final repayment took place on Febru-

ary 28, 1947, and on that date the judgment debtor gave a release in full of his interest in the Montana Club and Hotel, Ltd. It is conceded, however, that the liquor licenses are still in the name of all partners certified. An affidavit of Gordon W. Andrus accountant of the Montana Club and Hotel certifies that Clyde E. Callaway contributed two amounts aggregating \$10,148.22, and until February 28, 1947, was repaid four amounts aggregating \$10,010.

[2, 3] Before reviewing the errors assigned by appellants we must examine respondents' contention that appellants have no such interest in the subject matter of the proceedings as to entitle them to appeal as parties aggrieved within the meaning of section 938 of the Code of Civil Procedure. It is true that the charging order and appointment of a receiver under section 2422 of the Civil Code, section 28 of the Uniform Partnership Act, is restricted to the share of the judgment debtor and that the judgment creditor does not acquire as to the other partners and the partnership any greater rights than the debtor is entitled to for his own benefit. Commissioners' Note to sec. 28 of the Uniform Partnership Act. The motion does not ask and the order does not grant relief as against appellants. Nevertheless appellants and the partnership were made parties to the proceedings by being given notice of the motion. In England, from where section 28 of the Uniform Partnership Act derives, service on the copartners is expressly required by law. *Lindley on Partnership*, 10th Edition, p. 432. It seems expedient that copartners should from the beginning have an opportunity to prevent unwarranted charging orders in behalf of creditors of persons clearly without interest in the partnership. If a person has sufficient interest to make him a party to an action he has as a rule sufficient interest to appeal, should the judgment be against him. 4 C.J.S., *Appeal and Error*, § 177, p. 349; *State v. Cranney*, 30 Wash. 594, 71 P. 50. In this case appellants appeared and denied any interest of the judgment debtor, contending to be themselves the sole parties beneficially interested in the partnership. The implied rejection of their position was injurious to

their alleged sole interest as to which it at least raised a doubt even if it be conceded that as to appellants the order made in these summary proceedings does not conclusively determine the existence of a share of the judgment debtor in the partnership. In *re Estate of Rathgeb*, 125 Cal. 302, 57 P. 1010; 15 Cal.Jur. 106; *Freeman on Judgments*, secs. 666, 667. We hold that the appellants are parties aggrieved entitled to appeal under section 938 of the Code of Civil Procedure.

[4] However, appellants' assignments of error are without merit. Appellants contend that the minute order of July 1, 1947, was a final disposition of the motion; that, as the minute order did not direct that a written order be filed (Rules on Appeal, rule 2(b) (2)) the court had no power to make such an order and it is void (*Pessarra v. Pessarra*, 80 Cal.App.2d 965, 968, 183 P.2d 279) but that the minute order itself is also ineffective as to the appointment of a receiver, as the scope of the receivership is not defined. It seems clear that the minute order of July 1, 1947, which did not appoint anyone to be a receiver, did not finally dispose of the motion, certainly not with respect to the appointment of a receiver. It could therefore not terminate the court's power to make any further orders in the matter. Even if it were held that the minute order was final as a charging order, section 2422 of the Civil Code expressly provides that the appointment of the receiver may take place at the time of the charging order *or later*.

[5,6] Appellants further contend that the orders were erroneous as the evidence showed that the judgment debtor had no interest in the partnership. The evidence was conflicting. The certificate of limited partnership, sworn to by appellants, combined with the fact that it was not cancelled or amended and that the liquor licenses of the business were not transferred to reflect

the alleged termination of the interest of C. E. Callaway in the partnership constitute substantial evidence that said C. E. Callaway was and still is a partner. Whether this evidence was overcome by the affidavits of appellants and their accountant and the alleged secret agreement, which was not acknowledged, and to which M. Lerner, the limited partner, was not a party, was in the sole discretion of the trial judge, the more so as summary proceedings for the appointment of a receiver are not subject to as strong requirements of proof and of formality of pleading as proceedings on the merits. Compare *Pearce v. Elwell*, 116 N.C. 595, 21 S.E. 305; *Williams v. Southern Cotton Oil Co.*, 5 Cir., 45 F.2d 387; *Jackson v. South Carolina Colored State Fair Ass'n*, 109 S.C. 283, 96 S.E. 116.

[7,8] Finally appellants contend that the appointing of a receiver is erroneous since respondents made no showing that the relief was necessary in order to preserve and protect the rights of the parties, or that the result could not be obtained by less stringent means as by the sale of the interest charged. An appellant cannot attack a decision on grounds in which he has no interest, and which the party interested does not propound. *Clapp v. Lorraine*, 92 Cal. App. 270, 276, 267 P. 911; *Von Gal-Scale v. Cottrell*, 2 Cal.App.2d 29, 31, 37 P.2d 715; *Capital National Bank v. Smith*, 62 Cal. App.2d 328, 336, 144 P.2d 665. Whether sale or receivership of the judgment debtor's interest is more onerous is a matter which only regards the judgment debtor himself, who does not object. Appellants' argument in this respect must be disregarded. We therefore need not decide whether the appointment of a receiver of a partner-debtor's interest under section 2422 of the Civil Code requires the same showing of necessity as in other cases.

The orders are affirmed.

GOODELL and DOOLING, JJ., concur.

87 Cal.App.2d 53

PRESTON v. HUBBELL.
Civ. 16125.

District Court of Appeal, Second District,
Division 3, California.

Aug. 2, 1948.

Hearing Denied Sept. 30, 1948.

1. Physicians and surgeons ⇨18(8)

In action for damages from alleged negligence in removal of tooth with result that jaw was fractured, evidence that tooth removed was an infected wisdom tooth, that mandible on lingual side where fracture occurred was, due to an infected condition, "paper thin," and that defendant employed usual care and skill in the operations performed by him, sustained denial of recovery. Code Civ.Proc. § 2055.

2. Physicians and surgeons ⇨18(9)

In action for damages from alleged negligence in removal of tooth, evidence of negligence in discharge of patient as cured at time defendant discontinued his treatment was insufficient for jury.

3. Assault and battery ⇨2

Generally, in cases of emergency, or unanticipated conditions which require immediate action for preservation of life or health of patient, surgeon is justified in extending operation to remove and overcome such conditions without express consent of patient, in the event it is impracticable to obtain consent prior to operation or treatment.

4. Assault and battery ⇨42

Where evidence of whether an unauthorized operation is necessary is in conflict, question should be submitted to jury as one of fact.

5. Assault and battery ⇨2

Where specialist was employed to remove infected wisdom tooth and during operation and while patient was still under influence of anaesthetic, patient's jaw was fractured, consent to repair jaw without patient's consent was implied.

6. Assault and battery ⇨2

Consent to one operation is not always to be regarded as implied consent to

performance of another operation, unanticipated by patient but which surgeon on discovering unexpected conditions may deem advisable, and each case must be governed by its own facts.

7. Physicians and surgeons ⇨18(10)

In action for damages from alleged negligence in removal of tooth, where contributory negligence was not pleaded generally, but was alleged specifically by assertion that patient failed to follow diet prescribed by specialist subsequent to extraction, a general instruction on contributory negligence and other instructions, not supported by the evidence, based on a hypothetical finding of negligence by patient in not returning for further treatment or in seeking other medical care, were improper because not responsive to allegations of answer and to the evidence.

8. Negligence ⇨117

Contributory negligence is affirmative defense and specific acts must be alleged.

9. Negligence ⇨119(4)

Where specific acts of negligence are alleged, they are the only ones that can be relied upon at the trial.

10. Appeal and error ⇨1066

In action for damages from negligence in removal of tooth, where defendant charged plaintiff with contributory negligence in failing to obey his instructions with reference to care and medication, a general instruction which would permit consideration of all acts of patient in determining whether she had been guilty of want of ordinary care, and instructions permitting recovery if patient was negligent in failing to return to defendant for treatment or promptly to seek treatment elsewhere, were prejudicial, particularly in absence of evidence on such issues.

11. Physicians and surgeons ⇨18(9)

In action for damages from negligence in removal of tooth, evidence that defendant's methods were rough and his manner discourteous was insufficient to prove malice or oppression, and issue of exemplary damages was properly withdrawn from jury.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Vern Preston against Adrian O. Hubbell for damages for alleged negligence in removal of a tooth. Judgment for defendant and plaintiff appeals.

Reversed.

F. A. Knight, of Long Beach, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

In this action for damages resulting from alleged negligence in the removal of a tooth, plaintiff appeals from a judgment on verdict in favor of defendant.

Plaintiff's dentist advised the removal of an impacted wisdom tooth and defendant, a specialist, performed the operation. While plaintiff was under an anaesthetic defendant chiseled away the bone over the tooth, removed the top half, separated the tooth from the jaw bone down to the lower one-fourth of the roots and removed it with an elevator. There was evidence that the operation was a difficult one, under the conditions, and that defendant so advised plaintiff. During the operation a fracture occurred on the inner side of the jaw. While plaintiff was still under the influence of the anaesthetic defendant repaired the fracture by means of wires which held the parts together, and also held the jaws together in a closed position. Thereafter, plaintiff received treatment from defendant for several weeks, was discharged, developed infection in the jaw, consulted another doctor who lanced the jaw for the removal of an abscess.

[1] The complaint was in two causes of action. In the first it was alleged that defendant was negligent in removing the tooth and that as a result thereof the jaw was fractured. The answer consisted of denials and a plea of contributory negligence. The case went to the jury on this cause of action and verdict and judgment were for the defendant. The allegations of the first cause of action were repeated in the second, and certain additional facts were alleged which it is contended stated

a separate cause of action. It was alleged that the fractured jaw was not properly set, that plaintiff received treatment from defendant from the date of the operation, June 9, to July 5, 1944, was then discharged as cured, although the jaw was infected, that plaintiff was required to have an operation for the removal of an abscess which was performed by another surgeon, and that defendant in the course of his treatment was rough, brutal, abrupt, discourteous, gruff, short, uninformative and indifferent. It was further alleged that defendant proceeded to repair the fractured jaw without plaintiff's knowledge or consent. In each cause of action it was alleged that defendant was guilty of malice and oppression in the operations that he performed, and there was a prayer for exemplary damages. At the close of plaintiff's evidence defendant moved for a nonsuit on the second cause of action and the motion was granted. The instructions withdrew from the jury the issue of exemplary damages. The grounds of appeal are: (1) insufficiency of the evidence to justify the verdict on the first cause of action; (2) error in granting a judgment of nonsuit on the second cause of action; (3) error in instructing on contributory negligence and unavoidable accident; and (4) error in instructing that there was no evidence of malice or oppression on the part of defendant.

Plaintiff's claim that the verdict on the first cause of action was unsupported by the evidence, is not sustained by the record. An expert called by her testified, in effect, that the force used by defendant in removing the tooth was not in conformity with the standard of care and skill commonly used in the community by dentists or specialists in the extraction of teeth. He based this opinion solely upon the fact that the fracture occurred. Expert witnesses testified for defendant. It appeared without question that after defendant had removed the top half of the tooth there were two methods which might have been employed for the removal of the remainder, one by the use of a burr to break up and further separate the roots from the surrounding bone, and the other

the use of an elevator to loosen and remove it. Defendant employed the latter method and there was expert testimony that it was a matter of judgment which would have been the safer method, and further testimony that there would have been as great, if not greater, danger in using the burr in the deepest part of the jaw, as in the use of the elevator. Defendant testified that the mandible on the lingual side where the fracture occurred was, due to an infected condition, "paper thin." Plaintiff relies strongly upon the testimony of defendant given under section 2055, Code of Civil Procedure, that when he discovered this condition he thought he had but "a slim chance of removing the tooth without a fracture"—that a fracture was "almost inevitable." All of the expert testimony on the subject was that it was necessary to complete the operation by one or the other of the described methods. Dr. Emil Tholen, who has practiced in Los Angeles and taught oral surgery in the University of Southern California for twenty-six years, testified in answer to a hypothetical question that defendant employed the usual care and skill in the operations performed by him. Other qualified experts testified to the same effect. The jurors were fully warranted in giving full effect to this testimony in determining that defendant was guilty of no breach of duty.

[2] We shall discuss next certain of the allegations of the second cause of action and the contention that there was sufficient evidence to require submission to the jury of the issues arising thereunder. There was no evidence which would have sustained a finding of negligence in the discharge of plaintiff as cured at the time defendant discontinued his treatment. Plaintiff testified there was a soreness and swelling in her cheek, which defendant told her might not disappear for several months. She received instructions from defendant as to care of her injury, her diet and certain medication to be self-administered. While it is asserted in the opening brief that plaintiff's jaw and face were at that time infected and that an abscess had formed, there was no evi-

dence that infection then existed or that further instruction or treatment for the swollen condition was then indicated. Plaintiff had received treatment almost daily from June 9 until July 5. About the middle of July she consulted Dr. McCoy and received treatment from him until some 8 or 10 days later, when he made an incision and removed an abscess. Dr. McCoy was not called as a witness.

The next point is that the fracture was repaired without plaintiff's express consent. When defendant was employed to extract the tooth there was no discussion of other services that might be required and, since plaintiff was unconscious while the jaw was being repaired, she did not give express consent to that operation. The question is whether plaintiff's employment of defendant to remove the tooth was implied consent to the repair of her jaw that was broken during the operation, or in other words, whether plaintiff did not impliedly consent to the performance of such emergency work as became necessary in order to completely repair a condition that developed during the operation. We think the only rational answer to this question is that plaintiff must be deemed to have consented to the repair of the fracture. Defendant either had to reduce the fracture while plaintiff was unconscious or wait until she became conscious and then request her consent to a repair of the damage. It was necessary that the broken jaw be repaired promptly. Making the repair was as much in the line of defendant's professional work as was the extraction of the tooth. No reason is suggested why defendant would not have been requested to make the repair if plaintiff had been in condition to be consulted.

[3-6] It is the general rule that in cases of emergency, or unanticipated conditions where some immediate action is found necessary for the preservation of the life or health of a patient and it is impracticable to first obtain consent to the operation or treatment which the surgeon deems to be immediately necessary, the surgeon is justified in extending the operation to remove and overcome such conditions without the express consent of the patient thereto.

(See cases collected in 41 Am. Jur. p. 222.) It was said in *Delahunt v. Finton*, 244 Mich. 226, 221 N.W. 168, 169, as follows: "It is settled that a surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, in cases of emergency, without the consent of the patient." The court said, in *Jackovach v. Yocom*, 212 Iowa 914, 237 N.W. 444, 449, 76 A.L.R. 551: "While the courts are not entirely in harmony upon the question of consent to an operation, we think the better reasoning supports the proposition that, if, a surgeon is confronted with an emergency which endangers the life or health of the patient, it is his duty to do that which the occasion demands within the usual and customary practice among physicians and surgeons in the same or similar localities, without the consent of the patient." And further, 237 N.W. on page 451: "If the surgeon is not to be permitted to honestly use his best judgment upon the necessity for an operation, without waiting to get the consent of either the patient or his parents, then is the skilled hand of the expert stayed by an unreasonable rule, often to the detriment of the patient and humanity at large." In *McGuire v. Rix*, 118 Neb. 434, 225 N.W. 120, 123, the court said, in part: "The use of anaesthesia in modern surgery has modified to some extent the ancient rule of the common law requiring consent. Of course the general rule requires consent of the patient, but consent may be implied from circumstances and an operation may be demanded by an emergency without consent." The requirement of the common law that the consent of the patient to surgical operations must be obtained was discussed with relation to the present universal use of anesthesia in surgery by the Supreme Court of New Jersey, in *Bennan v. Parsonnet*, 83 N.J.L. 20, 83 A. 948, 950, and in speaking of the practical impossibility of obtaining express consent of a patient under anaesthesia the court said, in part: "To meet this fundamental change in the condition of the patient, it is imperative that the law shall in his interest raise up some one to act for him—in a word, to represent him in those matters affecting his welfare concerning which he cannot act for himself

because of a condition that has become an essential part of the operation. If such a representative has been chosen by the patient himself, the rule we are considering has no application, but, if no one has been so appointed, the law by its constructive power will raise up such a representative without which the welfare and even the life of the patient might be needlessly sacrificed. To meet the requirements of the case, such representative should not only keenly appreciate the nature of the duty that is thus cast upon him, but also be possessed of the knowledge and skill to perform such duty with wisdom and promptness. He should also be one in whom the patient reposes confidence and on whose judgment he would presumably rely. The surgeon whom the patient himself has selected alone fills all of these requirements, and hence upon him the law should cast the responsibilities of this office by the legal implication that the patient intended him to act for him when he had made no other selection." Plaintiff does not question these rules of law, but seeks only to avoid their application in her case. She contends that it was a question for the jury whether the emergency was one in which defendant was justified in repairing the fracture without first obtaining her consent. She merely makes the assertion and offers no supporting argument. In *Valdez v. Percy*, 35 Cal.App.2d 485, 491, 96 P.2d 142, the court recognized the general rule pertaining to the performance of emergency operations without express consent of the patient. It was held in that case, very properly, that where the evidence is in conflict as to whether an unauthorized operation is a necessary one, the question should be submitted to the jury as one of fact. It is clear, however, that we have no such question in the present case. Plaintiff offered no evidence that an immediate operation was not required. The common sense of the situation would persuade us that in such circumstances it would be the duty of a skilled operator to proceed at once to repair the broken jaw. While it was alleged in the second cause of action that defendant proceeded to repair the break without plaintiff's knowledge or consent, it was not alleged that the operation

was unnecessary, nor was any claim made at the trial that immediate repair of the injury was not good practice. It is clear that want of consent was alleged as a mere incident to the allegedly unskillful operation to repair the fracture, and that plaintiff is seeking damages not because the operation was performed without authority, but because it was performed without skill and care. We hold that consent to the repair of the broken jaw was implied under the circumstances of the case. This is not, of course, to hold that consent to one operation is always to be regarded as implied consent to the performance of another operation, unanticipated by the patient, but which the surgeon, upon discovering unexpected conditions, may deem advisable. Each case must be governed by its own facts. Inasmuch as it was not questioned that good practice required prompt repair of the fracture, the operation, if performed with skill and care, would have resulted in no detriment to plaintiff, nor did she allege detriment except as the result of negligence.

[7] The next claim of error to be considered is that it was improper to give certain instructions on contributory negligence. This defense was pleaded in an amendment to defendant's answer in the following terms: "That subsequent to the extraction of plaintiff's tooth and the repair of her said jaw defendant prescribed a diet consisting of soft eggs, gravies, fruit, fruit juices, cereals, milk and ice cream to be followed by said plaintiff and also prescribed emprine compound with one-half grain ($\frac{1}{2}$ gr.) of Codine, which prescription came in the form of pills and plaintiff was directed to take two of said pills every six hours by said defendant; that defendant further prescribed that plaintiff take Stuart's Oral Theratabs and also Stuart's Formula, liquid form; that defendant is informed, and believes and therefore alleges, that plaintiff negligently failed to follow the advice of said defendant as to her said diet, as above described, and carelessly and negligently failed to take the aforesaid medicines prescribed by said defendant and defendant alleges that by reason of her carelessness and

negligence in this regard her system became weakened and that if plaintiff's jaw did become infected such infection was proximately caused and contributed to by the fault, carelessness and negligence of the plaintiff in failing to follow the above advice and directions given her by said defendant." Contributory negligence was not pleaded generally, nor by alleging any acts other than those specified.

At the request of defendant the court gave three instructions on contributory negligence. One was a general instruction under which the jury would have been authorized to resolve the issue in defendant's favor upon proof of any conduct of plaintiff deemed sufficient under the instruction to establish a defense. Another instruction was based upon a hypothetical finding of negligence of plaintiff in not returning to defendant for further treatment when the pain and swelling in her jaw increased, and the third instruction was in the same terms except that it related to her delay in seeking medical care elsewhere when she noticed an increase in the pain and swelling. The instructions were correct statements of the law, and it would not have been improper to give them if they had been responsive to the allegations of defendant's answer and to the evidence. However, it was error to give the instructions for the reasons: contributory negligence was not pleaded in general terms; the instructions did not relate to the specific acts pleaded by defendant; they related to specific acts not pleaded and to claimed negligent conduct on the part of plaintiff as to which no evidence was produced which would have justified a finding of negligence.

[8, 9] Contributory negligence is an affirmative defense and specific acts must be alleged. *Crabbe v. Mammoth Channel Gold Mining Co.*, 168 Cal. 500, 505, 143 P. 714; *Brooks v. City of Monterey*, 106 Cal.App. 649, 653, 290 P. 540; 19 Cal.Jur. 683. When specific acts of negligence are alleged they are the only ones that can be relied upon at the trial. *Hanton v. Pacific Electric Ry. Co.*, 178 Cal. 616, 622, 174 P. 61; *McKeon v. Lissner*, 193 Cal. 297, 304, 310, 223 P. 965; *O'Connor v. Mennie*, 169

Cal. 217, 222, 146 P. 674; *Mobile Electric Co. v. Sanges*, 169 Ala. 341, 53 So. 176, Ann.Cas.1912B, 461; *Atchison T. & S. F. R. Co. v. Dickey*, 1 Kan.App. 770, 41 P. 1070, 1073.

[10] Although specific acts of negligence only were alleged in the answer, under the general instruction first mentioned any and all other acts of plaintiff were to be considered by the jury in determining whether plaintiff had been guilty of want of ordinary care and caution in any manner whatsoever which contributed directly and proximately to the injuries she had sustained. The court in *Carbaugh v. White Bus Line*, 51 Cal.App. 1, 5, 195 P. 1066, 1067, in holding a similar instruction to have been properly refused, stated as follows: "The vice of the foregoing instruction is discovered when it is compared with that portion of the defendant's answer which contains his affirmative plea with regard to the contributory negligence of the plaintiff. His pleading in that regard is specific, setting forth with particular detail the specific acts of the plaintiff's alleged negligence upon which the defendant relies. In the above-quoted instruction, however, after reciting certain of these specific negligent acts, the defendant seeks to have the court charge the jury that—if he (said plaintiff) was negligent in any other particular, and that said negligence or any of it contributed even in a small degree to the accident, then neither of the plaintiffs can recover, and your verdict must be for the defendant." This portion of said instruction is so clearly contrary to law that it requires no authority to uphold the action of the trial court in refusing to give it."

The two succeeding instructions were even more sharply in error.

The terms in which contributory negligence was pleaded gave notice to plaintiff that she would be charged with negligence in failing to obey defendant's instructions with reference to care and medication, but did not require her to anticipate that defendant would endeavor to establish negligence on her part in failing to return to him for treatment or to promptly seek treatment elsewhere.

Our attention has not been called to any evidence, and we have found none, that would have warranted a conclusion that the infection in plaintiff's jaw was caused or aggravated by any failure on her part to comply with defendant's instructions with respect to care and medication. Defendant was evidently of the same opinion. No instruction was given which embodied the facts pleaded by defendant.

Our conclusions as to the harmful effect of the two specific instructions may be stated briefly: the questions whether the delay of a week or ten days to secure further medical attention caused or aggravated the infection, and whether more prompt treatment would have obviated the operation, were for physicians and not laymen. Defendant, having the affirmative of the issue offered no evidence thereon. Plaintiff, having nothing to rebut, offered none. The jury had nothing to serve as a guide in deciding these questions and a conclusion adverse to plaintiff upon this issue would have been unsupported by any evidence. It cannot be assumed as a fact that plaintiff, if called upon to do so, could not or that she would not have offered testimony by Dr. McCoy and others that the abscess could not have been cured by earlier treatment, without an operation. The error in the instructions was obviously prejudicial. There is no occasion here to apply to the plea of contributory negligence the rule that insufficiency of the pleadings will be deemed cured if an issue not pleaded has been fully tried and determined without objection. There was no trial of the issue to which the instructions related.

[11] It was not error to withdraw from the jury the issue of exemplary damages. Plaintiff's testimony that defendant's methods were rough and his manner discourteous fell far short of proving malice or oppression. It is not in evidence that defendant held himself out as a painless dentist, and the fact that his methods were painful does not indicate that they were intentionally cruel.

The judgment is reversed.

WOOD, J., and McCOMB, J., assigned, concur.

86 Cal.App.2d 907

**REDWOOD THEATRES, Inc. v. CITY OF
MODESTO et al.**

Civ. 7450.

District Court of Appeal, Third District,
California.

July 27, 1948.

1. Municipal corporations ⇨79

Charter provisions specifically authorizing city to license shows, exhibitions, lawful games, and businesses, within that city, could not be abrogated or revoked by subsequent legislation. St.1911, p. 1502, § 4(46).

2. Licenses ⇨5½

Theaters and shows ⇨1

City charter would constitute a valid authorization to enforce its duly adopted ordinance in respect to licensing of shows, exhibitions, lawful games, and businesses, within city, if charter contained no restrictions or limitations in that regard. St.1911, p. 1502, § 4(46).

3. Municipal corporations ⇨4

Under the Constitution a city may provide in its charter that it may make and enforce all laws and regulations in respect to municipal affairs, and such laws and regulations will become valid and controlling within the city, except to extent to which express restrictions or limitations thereto may be specifically provided for in charter. Const. art. 11, § 8.

4. Municipal corporations ⇨79

Statute authorizing incorporated cities, in the exercise of police power, and for purposes of regulation, as therein provided, and not otherwise, to license businesses not prohibited by law, had no application to city whose previously adopted charter specifically authorized it to levy and collect license taxes for revenue upon shows, exhibitions, lawful games, or business enterprises. Business and Professions Code, §§ 16000, 16003; St.1911, p. 1502, § 4(46).

5. Theaters and shows ⇨3

Charter authorizing city to license, for purposes of regulation and revenue, businesses not prohibited by law to be transact-

ed or carried on in city, and all shows, exhibitions, and lawful games carried on therein and to fix rates of licenses upon same, and to provide for collection by suit or otherwise, authorized city to adopt and enforce ordinance imposing license tax upon each moving picture theater ticket sold for revenue purposes. St. 1911, p. 1502, § 4(46).

6. Theaters and shows ⇨3

Imposition, pursuant to charter authority, of a license tax for revenue purposes upon each moving picture theater ticket sold, was a "municipal affair" within constitutional powers of city to levy. St.1911, p. 1502, § 4(46); Const. art. 11, §§ 6, 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

7. Pleading ⇨8(6)

Allegation that city ordinance imposing license tax upon each moving picture theater ticket sold by theater located in city was arbitrary, capricious, and confiscatory, and that the ordinance was discriminatory because it imposed upon plaintiff theater owner a greatly excessive share of burden of taxation, were mere conclusions of law.

8. Municipal corporations ⇨122(1)

Mere reference in complaint to the number of an ordinance, without stating the substance of its provisions or the title or the date of its passage, was inadequate, and demurrer was properly sustained. Code. Civ.Proc. § 459.

9. Pleading ⇨214(5)

Conclusions of law in a complaint are not admitted as facts by the filing of a demurrer.

10. Theaters and shows ⇨3

City could lawfully classify all theaters, shows, exhibitions, and games for purpose of taxation, separate and distinct from other ordinary businesses of a different character.

11. Municipal corporations ⇨957(1)

The fact that a business may be required to pay regulatory taxes under police power of a city, under one ordinance, and

to also pay additional property taxes for purpose of revenue under another ordinance, does not render the ordinances illegal or void on ground of double taxation. Const. art. 13, § 1.

12. Licenses ⇨7(7)

Constitutional requirement that taxation be in proportion to value applies only to property taxes and is not applicable to excise taxes. Const. art. 13, § 1.

13. Taxation ⇨47(1)

Constitutional requirement that taxation be in proportion to value prohibits double taxation upon value of property. Const. art. 13, § 1.

14. Taxation ⇨47(1)

Cumulative taxes are not necessarily unconstitutional on the ground of double taxation even though they may be imposed on the same property for the same period of time. Const. art. 13, § 1.

15. Appeal and error ⇨909(6)

On appeal from judgment rendered after demurrer to complaint was sustained in action to enjoin enforcement of city ordinance imposing revenue license tax upon each motion picture theater admission ticket sold by theaters located in city, where complaint failed to show provision of another taxing ordinance, or that the recited ordinance constituted double taxation on the same property, or how recited ordinance discriminated unlawfully against theater owner, court would conclude that recited ordinance did not provide for double taxation, was not an illegal classification of business, and was not discriminatory or void, but was a valid exercise of the power conferred by charter to levy taxes upon shows, theaters, and places of entertainment for revenue purposes. St.1911, p. 1502, § 4(46); Const. art. 13, § 1.

Appeal from Superior Court, Stanislaus County; Ralph McGee, Judge.

Action by Redwood Theatres, Inc., a corporation, against City of Modesto, Cal., a municipal corporation, Mayor of the City of Modesto, Carl W. Shannon, City Council of the City of Modesto, L. M. Morris, and others, and City Tax Collector, Rex E.

Gailfus, to enjoin city and its officers from enforcing ordinance imposing a license tax for admission tickets. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Vincent Hallinan and James Martin Macinnis, both of San Francisco, and Vernon F. Gant, of Modesto, for appellant.

O'Melveny & Myers, of Los Angeles, amici curiae.

Francis W. Halley, of Modesto, and Eugene M. Prince and Harry C. Scott, both of San Francisco, for respondent.

THOMPSON, Justice.

The plaintiff, which owns and operates four moving picture theaters in Modesto, sought an injunction to restrain that city and its officers from enforcing an ordinance, number 772, New Series, adopted pursuant to the authorization of its charter, imposing a license tax of three cents for each ticket of admission sold by any of said theaters.

The complaint and amendments thereto allege that Ordinance Number 772, New Series, was adopted April 23, 1946, for the purpose of revenue, and prescribes penalties of fines for violation of its provisions; that the city previous adopted another ordinance, number 487, New Series, which is in full effect, also imposing license fees for conducting certain businesses, including plaintiff's theater business; that said ordinances are inapplicable to municipal affairs; that said ordinances are arbitrary, unreasonable, discriminatory, unconstitutional and void. It is alleged that plaintiff refuses to pay said taxes and that defendants threaten to enforce ordinance number 772 N.S. by arresting plaintiff's agents and employees, which will interfere with and injure its said business.

After the complaint was amended by leave of the court, a general and special demurrer to the complaint and amendments thereto was sustained without leave to amend the pleading. Judgment was rendered accordingly. From that judgment this appeal was perfected.

The appellant contends that the license taxes imposed by the two separate ordi-

nances referred to constitute a double tax and are "cumulative"; that Ordinance No. 772 N.S. is discriminatory in imposing a "higher tax [on places of amusement] * * * than [that] levied upon any other type of business in the City of Modesto"; that said taxes "for revenue" are in conflict with Article XI, Sections 6 and 8 of the State Constitution; that they are not applicable to "municipal affairs," but are solely within the province of the state to levy, and that said ordinances are therefore unconstitutional and void.

The City of Modesto was authorized by Article III, Section 4(46) of its charter, which was duly adopted and approved (Stats.1911, p. 1495, at p. 1502), to levy and collect license taxes for regulation or for revenue on "every kind of business" conducted therein, including moving picture theaters. That section of the charter provides:

" * * * The city of Modesto shall have the right and power:

* * * * *

"(46) To license for purposes of regulation and revenue all and every kind of business not prohibited by law to be transacted or carried on in the city, and all shows, exhibitions and lawful games carried on therein; to fix the rates of licenses upon the same, and to provide for the collection thereof by suit or otherwise."

Pursuant to that authority, the ordinances in question were duly enacted. Article XI, Section 8(j) of the Constitution authorizes a provision in a charter to empower a city to "make and enforce all laws and regulations *in respect to municipal affairs.*" (Italics added.)

The previously quoted provision of the Modesto charter appears to be a specific grant of power to license businesses within the city for the purpose of revenue. But the later decisions of our courts hold that it is immaterial whether the charter is construed to be an affirmative grant of power in that respect provided it does not contain a definite limitation in that regard. It is said in *West Coast Advertising Co. v. San Francisco*, 14 Cal.2d 516, at page 524, 95 P.2d 138, at page 143:

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"No doubt is entertained upon the proposition that the levy of taxes by a municipality for revenue purposes, including license taxes, is strictly a municipal affair. Ex parte Braun, 141 Cal. 204, 74 P. 780; Ex parte Helm [supra]. 143 Cal. 553, 77 P. 453; Ex parte Lemon, 143 Cal. 558, 77 P. 455, 65 L.R.A. 946; Ex parte Jackson, 143 Cal. 564, 77 P. 457; *Trebilcox v. City of Sacramento*, 91 Cal.App. 257, 265, 266 P. 1015."

Contrary to the contention of the appellant, the California authorities uniformly hold that the provisions of a duly enacted city charter authorizing the city to levy and collect license taxes for conducting businesses within the city, for the purpose of revenue, since the adoption of the amendment to the constitution in 1896, become and are "municipal affairs," and are therefore valid. Ex parte Braun, 141 Cal. 204, 74 P. 780; In re Galusha, 184 Cal. 697, 195 P. 406; In re Nowak, 184 Cal. 701, 195 P. 402; Ex parte Helm, 143 Cal. 553, 557, 77 P. 453; *Trebilcox v. City of Sacramento*, 91 Cal.App. 257, 266 P. 1015; In re Prentice, 24 Cal.App. 345, 141 P. 220; *City of San Mateo v. Mullin*, 59 Cal.App. 2d 652, 139 P. 2d 351; *American Locker Co. v. City of Long Beach*, 75 Cal.App.2d 280, 170 P.2d 1005.

In the Braun case, supra, the petitioner sought by means of habeas corpus to secure his release from custody after having been arrested for violation of an ordinance adopted by the City of Los Angeles pursuant to the provisions of its charter, rendering unlawful the conducting of a wholesale liquor business within the city without first procuring and paying for a prescribed license, therefor. The ordinance was upheld as a valid exercise of municipal affairs, and the prisoner was remanded. The court said [141 Cal. 204, 74 P. 781]:

" * * * It is very clear that the license tax upon the business alleged to be conducted by petitioner was imposed solely for the purpose of raising revenue. * * *

"It is admitted that under the provisions of section 6, art. 11, of the Constitution, as amended in 1896, all cities and towns, and charters thereof framed or adopted by au-

thority of the Constitution, are subject to and controlled by general laws, '*except in municipal affairs.*' But it is contended that the collection of a license tax for revenue is, under the provisions of the Los Angeles charter, a 'municipal affair,' and that therefore, the charter provisions are paramount. This contention presents the real question in the case. Admittedly, the provisions of a charter framed under and in accordance with the provisions of section 8, art. 11, of the Constitution, and approved by the Legislature as therein provided, are, by virtue of the amendment of 1896 to section 6 art. 11, of the Constitution, so far as 'municipal affairs' are concerned, supreme, and beyond the reach of legislative enactment.

"* * * That the power of taxation is a power appropriate for a municipality to possess is too obvious to merit discussion. As was said by Mr. Justice Field in *United States v. New Orleans*, 98 U.S. 381, 25 L. Ed. 225, 'A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.'

"* * * In the absence of constitutional provisions relating to the subject, the legislative department would necessarily have unlimited sway, and could, for the state, confer, modify, or withdraw the power, and prescribe such regulations as it saw fit for its exercise. The state Constitution, is, however, the highest expression of the will of the people of the state, and, so far as it speaks, represents the state. So, where, as here, a power is given in the constitutional method by special charter, and not by direct legislative enactment, it can be withdrawn only by amendment to the charter in the manner provided by the Constitution. * * *

"The power of cities operating under freeholders' charters to raise money by taxation for municipal purposes does not find its source in any grant by the Legislature. There is no enactment of the Legislature purporting to vest such authority in such cities. Such power has been directly granted by the people of the state by the provisions of the state Constitution * * * Those provisions, when legally incorpo-

rated in the charter, constituted a grant from the state of the power to impose a license tax for revenue purposes. This power, being so granted by the state to the municipality for municipal purposes, became a 'municipal affair' of the city of Los Angeles, within the meaning of those words as used in the Constitution, and the Legislature was without authority to withdraw or modify such power. * * *

"Our conclusions are, therefore, that the power to collect a license tax for revenue purposes was actually conferred upon the city of Los Angeles for municipal purposes by the charter framed for its government, * * * and cannot be withdrawn or abrogated by the Legislature."

Section 4(46) of the Modesto charter contains an express grant of power to levy and collect license taxes within the city on shows, exhibitions, lawful games, and on all and every kind of business not prohibited by law. Prior to the amendment of Article XI, Section 6, of the Constitution in 1914, that section provided that "All charters * * *, *except in municipal affairs*, shall be subject to and controlled by general laws." Treadwell's Const., 6th Ed., p. 536. By amendment of said section of the Constitution in 1914, all previously chartered cities were specifically authorized to "amend their charters * * * so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs." Treadwell's Const., 6th Ed., p. 536. We assume that the City of Modesto was not required to amend its charter to validate the express provision which it already contained, authorizing it to license the conducting of businesses within the city. That provision was not contrary to the Constitution as it then existed. On the contrary, the Constitution then provided that chartered cities were subject to the general laws "*except in municipal affairs.*" The clear implication of that provision is that chartered cities were not subject to general laws *in municipal affairs*. In *West Coast Advertising Co. v. San Francisco*, supra, involving the validity of a license tax on the business of outdoor advertising in that city, under an ordinance adopted

pursuant to an amendment of the charter after 1914, the trial court held that the license tax was illegal and invalid. On appeal the Supreme Court reversed that judgment. The respondent contended that since the charter did not specifically authorize the city to license businesses therein, and that "a charter is a grant of power, the right to levy such taxes may not be implied," and the ordinance was therefore illegal and void. The court said in that regard:

"It is now established by a line of decisions of the courts of this state that a city which has availed itself of the provisions of the Constitution as amended in 1914 has full control over its municipal affairs unaffected by general laws on the same subject-matters, and that it has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitations or restrictions placed in the charter. * * *

[Citing authorities.] As stated in *In re Galusha*, 184 Cal. 697, at page 700, 195 P. 406 at page 407, 'The question, then, is not whether the charter grants the power to impose the tax, but whether it prohibits the tax, * * *.' Also in *In re Nowak*, 184 Cal. 701, 704, 195 P. 402, 403, it was said: 'The net result * * * is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and, the imposition of the tax for revenue purposes being strictly a municipal affair, *the city has the power to impose that tax unless the power was taken from it by the charter itself.* [Citing cases.]" (Italics added.)

We assume the previously quoted language that "a city which has availed itself of the provisions of the Constitution as amended in 1914 has full control over its municipal affairs," does not mean that when a previously adopted charter specifically confers power to levy license taxes on businesses in that city, or when that charter contains no limitations in that regard, it is necessary to preserve such rights by an amendment of the charter after the adoption of the amendment to the Consti-

tution in 1914, or such power will be deemed to have been revoked by the amendment to the Constitution. The new charter of San Francisco, which was involved in that case, was adopted in 1931. Stats.1931, p. 2973.

[1,2] Since the charter of the City of Modesto, which was adopted in 1911, contained a specific authorization or grant of power to license shows, exhibitions, lawful games and businesses within the city, that power, as the *Braun* case said, could not be abrogated or revoked by subsequent legislation. Moreover, even though the Modesto charter did not specifically grant that power, if it contained no restrictions or limitations in that regard, it would still constitute a valid authorization to enforce its duly adopted ordinances in that respect. In *City of Oakland v. Williams*, 15 Cal.2d 542, at page 549, 103 P.2d 168, at page 172, construing the effect of the amendments to Sections 6 and 8 of Article XI of the Constitution, the court said:

"* * * In other words, under sections 6 and 8 of article XI of the State Constitution, city charters are no longer grants of municipal power but are merely restrictions and limitations upon such powers. If no restrictions or limitations are found in the charter the power of the city in 'municipal affairs' is full and complete, * * *."

That is exactly what the court said in *In re Nowak*, 184 Cal. 701, 195 P. 402.

It will be observed that the court in *City of Oakland* case does not criticize the *Braun* case or state that a charter adopted prior to the 1914 amendment to Article XI of the Constitution was not a grant of power. All that it says, in commenting upon the effect of those amendments, is that "under sections 6 and 8 of article XI of the State Constitution [as it now exists], city charters are no longer grants of municipal power but are merely restrictions and limitations upon such powers." We assume that language was addressed to the 1914 amendment to section 8, which now provides in subdivision (j) thereof that:

"* * * It shall be competent in any charter framed under the authority of this

section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, *subject only to the restrictions and limitations provided in their several charters* and in respect to other matters they shall be subject to general laws." (Italics added.)

[3] By the foregoing subdivision it seems clear that a city is authorized to provide in its charter that it "may make and enforce all laws and regulations in respect to municipal affairs," and that such laws and regulations will become valid and controlling within the city, except to the extent to which express restrictions or limitations thereto may be specifically provided for in the charter.

It seems immaterial whether we call that authority a grant of power, a conferring of power subject to specified restrictions and limitations, or a limitation of power. In any event it is a legislative recognition and approval of powers conferred upon a city to enact and enforce laws in municipal affairs within the scope of Sections 6 to 8 of Article XI of the Constitution.

[4] The appellant cites Section 16000 of the Business and Professions Code, which was adopted in 1941, in support of its contention that the legislature now has exclusive power to legislate with respect to the licensing of businesses for the purpose of revenue throughout the state. That section provides in part:

"The legislative bodies of incorporated cities may, in the exercise of their police power, and for the purpose of regulation, as herein provided, *and not otherwise*, license any kind of business not prohibited by law * * *." (Italics added.)

That section has no application to a city whose previously adopted charter specifically authorized it to levy and collect license taxes for the purpose of revenue upon shows, exhibitions, lawful games or business enterprises therein, as the charter of Modesto specifically does. *American Locker Co., Inc. v. City of Long Beach*, 75 Cal. App.2d 280, 285, 170 P.2d 1005; Sec. 16003, Bus. & Prof. Code. The last cited section provides that:

"This article [chapter] does not repeal any act vesting municipal corporations with power to license for revenue purposes."

[5,6] We therefore conclude that the City of Modesto was fully authorized by its charter to adopt and enforce ordinance number 772 N. S. for revenue purposes, requiring plaintiff to pay the license taxes provided therein for operating its theaters in said city, and that that procedure was strictly a municipal affair. The ordinance is not unconstitutional or void for either of said assigned reasons.

[7] The complaint and amendments thereto fail to allege facts sufficient to show that either ordinance is unconstitutional or void on the asserted grounds that ordinance number 772 is "arbitrary, capricious and confiscatory" or that it is discriminatory because it "imposed upon said plaintiff a greatly excessive share of the burden of taxation." No facts are alleged in support of those statements. They are mere conclusions of law. Nor does the last paragraph of the amendments to the complaint allege any facts in support of the conclusion therein stated that "the additional business license tax imposed by said Ordinance 772 N. S. * * * constitutes a double tax."

[8] Ordinance number 487 is inadequately pleaded. Neither the substance of its provisions nor the title or date of its passage are alleged in the pleading. The general and special demurrer which was sustained after the complaint had been amended urged each of said defects as inadequate. It has been held that the mere reference to the number of an ordinance in a pleading, as plaintiff alleged in the present complaint, without stating the substance of its provisions or the title or date of its passage, is inadequate. *City of Tulare v. Hevren*, 126 Cal. 226, 229, 58 P. 530; 18 Cal.Jur. 922, sec. 211; C.C.P., sec. 459. The demurrer was properly sustained. In the absence of allegations of the provisions of municipal ordinance 487, or facts requiring the court to take judicial notice of the ordinance, we may assume its provisions differ, with respect to the purpose for levying license taxes, from the provisions of the subsequent ordinance number 772. Indeed, the respondents assert that ordinance num-

ber 487 merely applies to a franchise tax imposed on businesses in general for regulatory purposes, and not to revenue taxes on shows, exhibitions, games and places of amusement, as ordinance number 772 specifically does. Appellant appears to concede that fact. At page 15 of its closing brief plaintiff states that "For many years the City of Modesto, under an ordinance called 487 N. S., has imposed a license tax, said to be for purposes of regulation, upon all businesses within the City." Moreover the complaint fails to allege that plaintiff paid any taxes under ordinance number 487.

It is apparent the complaint was drawn by plaintiff on the erroneous theory that the City of Modesto was not authorized to impose a license tax on businesses for revenue purposes and that such powers are exclusively within the province of the State. That was the only issue discussed by the appellant in its opening brief. It was not until the oral argument in this court and the filing, by leave of court, of its supplemental final brief and that of amici curiae, that the issue of the invalidity of ordinance number 772 was urged on the grounds that it is discriminatory and a double taxation.

There is no foundation in the pleading in this case upon which the court could determine that ordinance number 772 is discriminatory, unconstitutional or constitutes a double taxation because the former ordinance number 487 may have covered the same purpose of raising revenue, since the contents of ordinance 487 are not properly pleaded, and it is not referred to by either title or the date of its passage. *People v. Burkhart*, 5 Cal.2d 641, 643, 55 P.2d 846, 847. In the case last cited the appellant was charged and convicted of violation of Section 112 of the Vehicle Act [now Vehicle Code]. He pleaded not guilty and also that he had been formerly convicted in a justice's court of the same offense under "County Ordinance No. 1735." It was stipulated the appellant was formerly convicted under that ordinance. On appeal, the Supreme Court said:

"It will be observed that the stipulation covers the charge made in the justice's court and the defendant's plea of guilty,

but does not attempt to give the contents of the ordinance. Therefore there is no legal basis for a determination by this court that the offense denounced by the ordinance is included in the offense of violation of section 112 of the California Vehicle Act." (Italics added.)

[9] The allegations of the complaint in this case are inadequate. The mere statements that the taxes imposed by ordinance number 772 are discriminatory, a double taxation, arbitrary, capricious or confiscatory, are merely conclusions of law. They do not constitute allegations of ultimate facts. Such conclusions are not admitted as facts by the filing of the demurrer. *Meyer v. Board of Public Works*, 51 Cal.App.2d 456, 470, 125 P.2d 50. In *Pacific Railways Advertising Co. v. Conrad*, 168 Cal. 91, 141 P. 916, 917, the Supreme Court said: "It is only when such an ordinance is clearly unjustly oppressive and discriminatory that the power of a court may be invoked to right the wrong." Such allegations must be adequately pleaded to constitute a good cause of action on those grounds.

Since ordinance number 487 was not before the court, and the plaintiff's amendments to its complaint in that respect failed to allege otherwise, we may assume it was adopted as a proper exercise of the police powers of the city to regulate businesses therein as distinguished from the purpose of raising revenue, and that it does not cover theaters and places of amusement.

[10-12] The appellant argues in support of its contention that ordinance number 772 is discriminatory and constitutes a double taxation for revenue purposes because it is subject to taxes under both ordinances, and theaters and places of amusement would therefore bear grossly excessive taxes over those imposed upon other ordinary businesses. But the complaint fails to allege what other businesses are subject to license taxes under ordinance 487, what rate or amount of taxes are imposed thereby, or that plaintiff paid any such taxes. There can be no doubt that the city is authorized to lawfully classify all theaters, shows, exhibitions and games for the purpose of taxation separate and distinct from other ordinary businesses of a different character. Ordinance number

772 requires the payment of a three cent tax on each ticket of admission to certain specified entertainments. The burden of taxes is dependent upon the bulk of business or patronage enjoyed. Certainly that is a legitimate classification. The complaint fails to allege facts from which we may determine what burden of taxes is borne by other business enterprises. The mere fact that a business enterprise may be required to pay regulatory taxes under the police power of a city, under one ordinance, and to also pay additional property taxes for the purpose of revenue under another ordinance does not render the ordinances illegal or void on the ground of double taxation. Article XIII of the California Constitution has no application to excise taxes. It applies only to property taxes. *Ingels v. Riley*, 5 Cal.2d 154, 53 P.2d 939, 103 A.L.R. 1. In the case last cited it is said, at page 164 of 5 Cal.2d, at page 944 of 53 P.2d, that:

"It is also urged that the tax is unconstitutional, for the reason that * * * double taxation is imposed by the same taxing agency on the same privilege. * * * There is no merit in this contention. * * * Article 13, section 1, of the State Constitution, has no application, because that section applies only to property taxes."

In *Re Guerrero*, 69 Cal. 88, at page 91, 10 P. 261, at page 263, it is said:

"* * * Imposing licenses for regulating business, etc., is an exercise of the police power, while imposing them for revenue purposes is an exercise of the taxing power. 2 Dill.Mun.Corp., § 768. * * * under the provisions of the constitution which we have quoted, *there is no doubt of the power of municipalities to impose licenses for the purpose of regulation, or revenue, or for both regulation and revenue*, and for those purposes the power of the municipality of Los Angeles has been sustained in *City of Los Angeles v. Southern Pac. R. Co.*, 61 Cal. [59], 60." (Italics added.)

In *Re Higgins*, 50 Cal.App. 533, at page 536, 195 P. 740, at page 742, it is said:

"* * * Under these provisions the power exists both to levy license taxes for revenue and to collect license fees under

the general police power. *Where both powers exist in relation to a specific business, it is a matter of indifference whether the particular enactment is under one or the other or both of the powers.* *Gundling v. Chicago*, 177 U.S. 183-188, 20 S.Ct. 633, 44 L.Ed. 725, [see, also, *Rose's U.S. Notes*]." (Italics added.)

[13] It is true that double taxation upon the value of property, as distinguished from excise taxes imposed for the privilege of conducting a business enterprise, is prohibited. Const. Art. XIII, sec. 1; *Flynn v. San Francisco*, 18 Cal.2d 210, 215, 115 P.2d 3; *Napa Savings Bank v. County of Napa*, 17 Cal.App. 545, 120 P. 449; Rev. & Tax. Code, sec. 102, formerly Pol.Code, sec. 3607. A clear distinction is, however, made with respect to that prohibition between property taxes based upon the value or income from property and mere excise license taxes imposed for the privilege of conducting a business enterprise. *Brunton v. Superior Court*, 20 Cal.2d 202, 206, 124 P.2d 831, 833; *City of Los Angeles v. Los Angeles Independent Gas Co.*, 152 Cal. 765, 93 P. 1006. In the *Brunton* case, supra, the trial court held that certain ordinances adopted by the City of Los Angeles to prohibit the drilling for oil without first procuring a license therefor, were enacted "for revenue as well as for regulation" and therefore unreasonable, discriminatory and invalid. On appeal the determination of the trial court in that regard was reversed. The Supreme Court said:

"Respondents contend that the statement in the foregoing findings that the fees were imposed by the city 'for revenue as well as regulation' indicates the court was of the opinion that under Article XIII, section 1 of the California Constitution no fees for revenue purposes can be imposed by one political subdivision upon another. * * * If the fee required by the ordinances under consideration is a tax, however, *it is not a tax upon the value of the property owned by the Flood Control District but a tax upon the privilege of drilling for oil. It is settled that a privilege tax is not a property tax within the meaning of this and other sections of the Constitution.* [Citing numerous authorities.]" (Italics added.)

[14] Cumulative taxes are not necessarily unconstitutional on the ground of double taxation even though they may be imposed on the same property for the same period of time. *Klemm v. Davenport*, 100 Fla. 627, 129 So. 904, 907, 70 A.L.R. 156; 51 Am.Jur. 336, sec. 284. In the case last cited it is said that "If one is a tax [for revenue on the ownership of the property] and the other a license fee or special assessment, double taxation is not accomplished." And in the text of 51 American Jurisprudence, at page 337, supported by numerous authorities, it is said that "before invalid double taxation may be said to exist, both taxes must have been imposed in the same year, *for the same purpose*, upon property owned by the same person, and by the same taxing authority." The foregoing conditions do not appear in the present case. The complaint in this case fails to allege facts showing that the "cumulative taxes" or so-called "double taxes" were imposed for the same purpose of revenue.

[15] Since the allegations of the complaint in this action fail to show the provisions contained in ordinance number 487, or that ordinance number 772 constitutes a double taxation on the same property, or how it discriminates unlawfully against plaintiff, we must conclude that it does not provide for a double taxation, that it is not an illegal classification of businesses, and that it is not discriminatory or void, but is a valid exercise of the powers conferred upon the City of Modesto by its charter to levy taxes upon shows, theaters and places of entertainment for revenue purposes.

The case of *Knapp v. City of San Bernardino*, recently decided by the Superior Court of San Bernardino County, upon which the appellant chiefly relies in support of its contention that the taxes imposed by ordinance number 772 are discriminatory and constitute illegal double taxation which places an undue and unreasonable burden on plaintiff's moving picture theaters, does not apply to the situation presented in this action. That elaborate opinion of the trial court is printed as Appendix "A" attached to the brief of amici curiae filed by consent of this court after

the oral arguments had been presented. That case was decided after trial upon detailed oral and documentary evidence adduced, showing conclusively that ordinance number 1714 and ordinance number 763 of the City of San Bernardino, both of which were received in evidence, were in full force in 1944, being the period of time involved in that case, and that both ordinances clearly provided that they were enacted *for the purpose of revenue* as distinguished from mere regulation of business enterprises under the city's police power. The inadequacy of the allegations of the complaint in that case was not involved. The sufficiency of the allegations of the complaint in that case was not disputed. That opinion states:

"Reference has already been made to the allegation of the complaint, the truth of which is not disputed, that the ordinance under attack, numbered 1714, *states on its face* that it is not a regulatory measure but one designed solely for raising revenue."

The opinion states that the first ordinance, number 763, imposed license taxes on numerous classes of business "including the business of conducting, carrying on or managing theatres," and that the subsequent ordinance number 1714 was adopted and imposed a similar tax "upon the conduct by plaintiff Knapp of his moving picture theatre under it" for a portion of the same time included in the former ordinance. Both ordinances prescribed a graduated quarterly license tax upon the same moving picture enterprises, and other business enterprises, based upon the gross receipts therefrom. The court said: "Discussion of the case will, therefore, be directed *exclusively* to the question whether the ordinance attacked, including any discriminations that it involves, *transcends the limitations upon the exercise for purposes of revenue* as distinguished from regulation, of the taxing power of the City." A certified public accountant and numerous witnesses testified in great detail to the gross receipts of twenty different classes of business enterprises, as compared with the gross receipts and taxes paid by plaintiff on his moving picture business. From the vast amount of statistics disclosed by that

record the court determined that in comparing the gross receipts of the plaintiff's theater business with those of other business enterprises, it appeared that the taxes imposed by the ordinance of the City of San Bernardino on plaintiff's theater business "is so palpably unreasonable that it can manifestly not be sustained," and that said taxes are therefore illegal and void. The Court thereupon rendered judgment for the plaintiff in the sum of \$274.05, being the amount determined to have been illegally collected by the city for the year 1944, during which period both ordinances were in force. In effect, the Knapp case decides, after trial, that the taxes imposed were grossly unreasonable, discriminatory and founded on double taxation of the same property for the same year and levied for the same purpose of revenue as distinguished from regulation of businesses for police purpose.

Assuming that the Knapp case was properly decided on the evidence which was adduced therein, it is nevertheless not authority determinative of the issues on this appeal. In the present action, which was decided on the pleadings alone, we must assume, on account of a lack of adequate allegations to the contrary, that the license tax imposed by ordinance 772 was not a double tax, in the legal sense of that term, and that it was neither unreasonable nor discriminatory.

We are convinced the other cases relied upon by the appellant may be likewise distinguished.

In this case the plaintiff had an opportunity to amend its complaint, and we assume that it did so amend the pleading to state the issues as favorably to plaintiff as the facts warrant. In neither of its briefs does appellant contend that the court abused its discretion in sustaining the demurrer to the complaint as amended without leave to again amend the complaint. It is true that it is stated on page 28 of its closing brief that, "The Court might very properly have ordered this appellant to plead further or more particularized facts concerning the oppressive nature of the tax burden thus thrust upon it." But the appellant still relies upon the sufficiency of the

facts as alleged in its amended and supplemental complaint, to which it was stipulated the demurrer would be deemed to apply. It is not stated in that brief that the court abused its discretion in sustaining the demurrer *without leave to amend*. That principle is not discussed in the briefs. For the reason that the complaint, as amended, fails to adequately show a double taxation, or that the taxes imposed were unreasonable, discriminatory or unduly burdensome, the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



JABLON v. HENNEBERGER.

Civ. 16503.

District Court of Appeal, Second District,
Division 3, California.

July 29, 1948.

Rehearing Denied Aug. 25, 1948.

Hearing Granted Sept. 23, 1948.*

1. Appeal and error ⇄345(1)

Under rule on appeal, the extended period for filing notice of appeal runs from denial of motion for new trial by order of court or operation of law, and not from entry of order determining such motion in minutes of court. Code Civ.Proc. § 939; Rules on Appeal, rules 2(a), 3(a).

2. Motions ⇄46, 56(1)

The "pronouncement of an order" by court and the "entry of the order" in minutes are separate and distinct acts, and when statute specifies one it does not mean the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Entry of Order" and "Pronouncement of Order".

3. Motions ⇄56(1)

The action of a court does not depend upon entry of its orders by clerk, but upon the fact that the orders have been made, and, whenever it is shown that an order has

* Subsequent opinion 205 P.2d 1.

been made by the court, it is as effective as if it had been entered of record by the clerk.

4. Appeal and error §345(1)

Pronouncement by judge in open court that motion for new trial was denied was immediately effective as an "order of court" within rule on appeal requiring notice of appeal to be filed within 30 days after denial of motion by order of court or operation of law. Rules on Appeal, rule 3(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Order of Court".

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Louis Jablon against Marie Henneberger. From an adverse judgment, plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

H. E. Ehrlich, of Beverly Hills, and Simon Miller, of Long Beach, for appellant.

Bautzer & Silbert, of Hollywood, for respondent.

SHINN, Acting Presiding Justice.

The matter before us is a motion to dismiss the appeal from the judgment upon the ground that the notice of appeal was filed more than thirty days after denial of a motion for new trial, and more than ninety days after entry of the judgment. The following facts are presented in the form of a stipulation: August 14, 1947, judgment entered in favor of defendant; August 22, 1947, notice of entry of judgment served and filed; August 29, 1947, notice of intention to move for new trial filed; October 10, 1947, motion heard and denied by oral pronouncement of the court (entered as hereinafter stated); October 23, 1947, entry made in permanent records, main office of clerk, dated October 10; November 15, notice of appeal filed. The action was tried and the motion was heard in the Santa Monica branch of the superior court. In Los Angeles county it is the usual practice for the clerk of each department to list on

a "trial calendar," in duplicate, the matters set for the day, and to write thereon the orders as announced by the court. On October 10, the clerk wrote under the proper heading in the present case, "Mo. denied. Notice waiver." The prevailing practice was then followed; the original of the trial calendar was retained by the department clerk and placed in a loose leaf binder, ten inches by thirteen inches in size. This book contains all entries of the department clerk relating to proceedings of the court and these records are kept by the department clerk in chronological order for such time as the head clerk may direct. At the present time, the records are kept in the department for two years. A carbon copy of the trial calendar is sent to the main office of the clerk on the day after it is written, except that entries made on Friday are not sent to the main office until the following Monday (so far, at least, as the Santa Monica branch court is concerned). In the main office entry is made from the department minutes in the register of actions, and the clerk's minutes are copied in a book captioned "minutes and orders." These books contain a record of minutes of the several departments of the court and are permanent. The copies received from the department clerks are not retained after they have been copied. There is usually a delay of a number of days between the receipt of the minutes from the department clerk and the completion of the copying process in the main office. The question here is whether the thirty days after denial of the motion for new trial within which an appeal could be taken commenced to run on October 10, when the order was pronounced by the court, or on October 23, when the department minutes were copied into the record books in the main office. The notice was filed thirty-six days after October 10, or ninety-three days after the entry of judgment.

Under Rule 2(a), Rules on Appeal, notice of appeal had to be filed within sixty days from the date of entry of judgment, with the exception stated in Rule 3(a) that "when a valid notice of intention to move for new trial is served and filed by any party within 60 days after the entry of judgment, (1) if the motion is denied, the time

for filing the notice of appeal from the judgment is extended for all parties until 30 days after denial of the motion by order of court or by operation of law," etc. This rule replaces, in part, former section 939, Code of Civil Procedure, repealed in 1945, which read, in part, "if proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other determination in the trial court of the proceedings upon such motion." Appellant's argument is that the phrase of Rule 3(a) "after denial of the motion by order of court or by operation of law" means the same as the phrase of former section 939, "after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion." Appellant cites *Berman v. Blankenship Motors*, 140 Cal. App. 134, 135, 34 P.2d 1035, in which the court held that section 939 meant exactly what it said, namely, that the time did not commence to run until the order was actually entered in the minutes of the court, and further, that an entry did not take place on the day the order was announced, when the clerk made a notation in his "rough minutes," but that the actual entry was the transference of the notation on the following day to the "regular minutes" of the court. From this holding appellant argues that in the present case there was no entry of the order on October 10, nor until October 23. He then maintains that it is the actual entry of the order that starts the time running.

We find it unnecessary to decide whether the entries in the department clerk's records made from day to day under the practice described above, constitute entries in the minutes of the court as of the day they are made. It may be observed, however, that these minutes purport to be complete records, rather than mere notes, since they are intended to contain all the matter that is copied into the permanent records in the main clerk's office. For the time they are kept in the departments, one looking for a record of the proceedings would find the same matter entered in both places.

Upon the other hand, the department records are not strictly permanent, since they are eventually destroyed and, in addition, are in loose leaf form, which is not the usual or accepted form of permanent public records. We would examine the nature of these records further to determine whether the department minutes are the original minutes of the court, were it not for the fact that we are satisfied that the actual entry in the minutes of an order pronounced by the court denying a motion for new trial is not the act which sets in motion the extended time for appeal.

[1, 2] Rule 3(a), quoted above, is not the same as former section 939, either in terms or meaning. Under the code section it was the entry of the order in the minutes that initiated the thirty-day period. Under Rule 3(a), it is the denial of the motion by order of court or by operation of law that starts the time running. It is idle to argue that this change in terms was intended to effect no change of meaning. The pronouncement of an order by the court and the entry of the order in the minutes are separate and distinct acts. When the law specifies one it does not mean the other. There was a purpose in specifying *entry* of the order in section 939, and certainly no want of purpose in its omission from Rule 3(a). We can see no good reason for the revision unless it was to change the law as declared and applied in 140 Cal. App. 134, 34 P.2d 1035.

[3, 4] The final question is whether the pronouncement by the judge in open court that a motion for new trial is denied is immediately effective as an order of court within the meaning of Rule 3(a), or becomes such order only by entry in the minutes. It has been held repeatedly that "the action of the court does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made, and, whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk." *Niles v. Edwards*, 95 Cal. 41, 47, 30 P. 134, 136; *Von Schmidt v. Widber*, 99 Cal. 511, 34 P. 109; *Fresno Estate Co. v. Fiske*, 172 Cal. 583, 597, 157 P. 1127; *Barbee v. Young*, 79 Cal.App. 119, 249 P. 15;

Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313; Sarkisian v. Superior Court, 129 Cal.App. 342, 18 P.2d 739; Willis v. Superior Court, 214 Cal. 603, 7 P.2d 303. Appellant cites Brownell v. Superior Court, 157 Cal. 703, 109 P. 91, as announcing a contrary rule. The same question was not there involved. This is pointed out on page 709 of 157 Cal., 109 P. 91, of the Brownell opinion and the case was also distinguished by the court in 172 Cal. 583, 598, 157 P. 1127, supra.

The notice of appeal was not filed in time; the appeal is dismissed.

WOOD, J., and McCOMB, J. Assigned, concur.



87 Cal.App.2d 145

RICHEY v. McGINNIS INV. CO. et al.
Civ. 16228.

District Court of Appeal, Second District,
Division 2, California.
Aug. 6, 1948.

As Amended on Denial of Appellant's Petition
for Rehearing Aug. 20, 1948.

Respondent's Petition for Rehearing Denied
Aug. 23, 1948.

Hearing Denied Oct. 18, 1948.

1. Brokers ⇨63(1)

Broker who produces a purchaser able, ready and willing to buy is entitled to his commission even if seller refuses to consummate sale.

2. Brokers ⇨63(1)

An owner cannot defeat a broker's right to compensation by arbitrary refusal to sell on his listed terms, to a purchaser willing and able to buy.

3. Brokers ⇨56(1)

The subsequent consummation of a sale on the same terms as originally obtained by a broker entitles him to his commission.

4. Release ⇨27

Agreement of prior prospective purchaser of real property to execute general

releases to all claims in favor of owners in form satisfactory to them, resulted in owners holding title free and clear as against any outstanding claim of the releasing party notwithstanding consideration for the release moved from a later prospective purchaser to the prior prospective purchaser, and release was merely intended to clear the stage for actual transfer of the property from the owners to later purchasers.

5. Corporations ⇨308(11)

In selling agent's action against corporate principal for brokerage commissions allegedly earned when he procured a purchaser able and willing to buy real property trial court's finding, that agent never at any time closed and/or consummated a sale of the property in question, was not supported by the evidence.

6. Corporations ⇨308(11)

Under agreement that selling agent was to receive 60 per cent of brokerage received by corporate principal from a given sale, selling agent was entitled to share of brokerage after he had procured acceptance by owners of realty of an offer of purchasers able and willing to purchase, upon final consummation of the transaction notwithstanding an agreement to purchase made by a prior prospective purchaser first had to be rescinded, and owners did not transfer title until conflicting claims of the two groups of purchasers had been resolved after selling agent had terminated his employment.

7. Corporations ⇨308(1)

Proposals of prospective purchasers of real property which were not acted upon and did not affect purchasers' executed agreement to buy the property, could not affect selling agent's right to commissions under contract with corporate principal guaranteeing salesmen closing deals 60 per cent of brokerage earned.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by E. C. Richey against McGinnis Investment Company, a corporation Donald M. McGinnis and Arnold S. Husted, to recover plaintiff's portion of brokerage paid

to the corporation. From the judgment, plaintiff appeals.

Judgment reversed with directions.

Clifton A. Hix and Walter S. Binns, both of San Pedro, for appellant.

George M. Stephenson, of San Pedro, for respondents.

MOORE, Presiding Justice.

Having procured a competent offer to buy certain realty and an acceptance thereof by the owners who had listed the property with the corporate respondent, appellant as selling agent sued to recover his portion of the brokerage paid to the corporation. His suit having been rejected below, he demands a reversal of the judgment on the ground that his task as salesman was finished when the offer of the buyers had been accepted by the sellers.

Respondent corporation was a licensed real estate broker with respondent Donald M. McGinnis, hereinafter referred to as Donald, also a licensed real estate broker, as its president and general manager. The corporation, herein designated as respondent, employed appellant and respondent

Husted as salesmen. There was no contractual relationship between appellant and Husted or between appellant and Donald. The compensation to be paid to appellant or Husted was governed wholly by the following rule of respondent: "Remuneration: Except by specific arrangement to the contrary, a salesman closing a deal is to receive 60 per cent of the commission derived from a given sale."

In October, 1945, the owners of a hotel listed it for sale with respondent and agreed to pay a commission of five per cent of the selling price. For one month prior to December 3, 1945, appellant negotiated with Matlaw and Carr for the purpose of selling the hotel to them. About December 4, 1945, they signed an agreement¹ to purchase the hotel for the sum of \$136,500 on terms prescribed by the owners, and delivered it to appellant, having theretofore delivered their check to appellant for \$5,000 to be applied to the purchase price, and an escrow was opened. That check remained in the possession of Donald until December 7, 1945, and was then returned to Matlaw and Carr.

¹ "Received from Mr. Julius Matlaw and Mr. Isreal Carr Address Sangran Hotel 2126 Selby Avenue Westwood the sum of \$5,000.00 which will be applied as a part payment on Miramar Hotel, 431 So. Center Street, San Pedro, California At price of \$136,500 payable \$36,500 L.W. B. cash (including the within payment) balance payable as follows: Payable \$333.33 on 1# Trust Deed of \$40,000.00 Plus 5% Interest \$1000.00 Month Plus 5% Interest on 2nd Trust Deed of \$30,000.00 Property to be free and clear of all encumbrance Insurance Interest and Rents and taxes Prorated to clear escrow Property to be free and Clear except for taxes 1945-46 easements restrictions and Reservations of records If Any All Conditions Subject To Present Lease St A

Balance of first payment, to-wit \$16,500 dollars to be deposited in escrow within Demand days from B above data and failing to make such payment, above amount paid shall be retained by McGinnis Investment Co; such amount is accepted by McGinnis Investment Co. as consideration for the execution by it of this instrument and is retained hereunder as such consideration, to cover sales commissions and all expenses incurred in connection with this agreement. Pur-

chaser agrees to purchase said property at above price and terms.

"It is agreed that this instrument contains the entire agreement between the contracting parties and that no statements, promises, representations, warranties or inducements of any kind made by any party hereto or by any employee, agent of salesman of either party hereto, which is not contained in this written instrument shall be binding or valid. That no agent or employee has authority to change, modify or add to any of the terms contained in this instrument; and that this contract may not be enlarged, modified or altered except by written endorsement hereon signed by the parties hereto. McGinnis Investment Co., retaining the right, in lieu of acceptance by the owner, to refund payment within 30 days of the date hereof.

Dated this 28 day of Nov., 1945, at San Pedro, California

Isreal Carr, Purchaser

Julius Matlaw, Purchaser

Agent McGinnis Inv. Co.
Per E. C. Richey

.....
I accept above sale and agree to pay
Commission of
Dated OWNER Stuart G. Ashenberg
L. M. Bruce"

While appellant was engaged in negotiations with his prospective buyers Husted had been negotiating with the K-D Investment Company as a prospective purchaser, and on December 3 had succeeded in procuring the signatures of the owners and of the latter company to an agreement for the purchase of the hotel on terms identical with those contained in the contract executed by Matlaw and Carr, and an escrow was opened for the purpose of effecting a transfer of title to that company.

December 5, 1945, appellant left the employ of respondent corporation. As a result of the contracts for the sale to both buyers on identical terms the transfer of title was stymied, and but for the diplomatic course pursued by Matlaw and Carr and their payment of \$2,500 to K-D Company for a release of its claim against the buyers the situation might have resulted in serious complications and litigation. But upon the payment of such sum and the execution by K-D Company of its release of all claims against the owners the escrow previously established for the latter company was canceled and a new escrow was opened in its stead between the owners of the hotel and Matlaw and Carr as buyers, and thereby title was transferred to the latter.

[1,2] The only question on this appeal is whether appellant, the only agent who negotiated a sale with the ultimate buyers, was on the above facts and by virtue of his contract of employment entitled to 60 per cent of the commission paid to respondent. Inasmuch as appellant was the sole instrumentality that accomplished the sale of the hotel to Matlaw and Carr no legal principle is suggested whereby he may be denied recovery. Appellant's controversy is with neither the buyers, nor the sellers, nor with Husted, nor Donald. His demand is against only the brokerage firm which hired him upon an agreement to pay him a share of the commission. Since respondent received its reward, the only legal conclusion which reasonably can be drawn from the facts is that appellant should receive his share. This conclusion is just, not only from reason and morality but is in accordance with the law as definitively decided by the appellate courts.

A broker who produces a purchaser able, ready and willing to buy is entitled to his commission even if the seller refuses to consummate the sale. *Merriman v. Wickersham*, 141 Cal. 567, 570, 75 P. 180. If an owner cannot defeat a broker's right to compensation by an arbitrary refusal to sell on his listed terms to a purchaser willing and able to buy (*Pellaton v. Brunski*, 69 Cal.App. 301, 307, 231 P. 583) surely a broker cannot deny his selling agent his share of the brokerage because of difficulties in clearing the title which was finally accepted by the purchaser. Appellant's action against respondent is founded upon the contractual relation of the same virtue as that which obtained between respondent and its principals. While in the cited cases no sale was consummated, in the instant controversy the transaction was completed.

[3] It is contended that respondent was relieved of all obligation to pay appellant by reason of the following: (1) the sale to the K-D company had been made prior to the sale to Matlaw and Carr; (2) appellant was entitled to compensation for sales made by him "only while he was in the employ of respondent"; (3) the owners refused to transfer title until the conflicting claims of the two groups of buyers had been resolved. Such contention is not justified by the facts. While K-D company had agreed to buy, its purchase was mutually rescinded and appellant's buyers consummated their acquisition on the very terms included in their contract signed with him. The refusal of the owners to go forward with appellant's buyers until those of Husted had been eliminated is not material to the issue between appellant and respondent. Claims against the titles of properties sold are frequent causes for delay in transferring title. Had K-D company prevailed and acquired the title appellant would not be contending for his portion. But having removed itself from the scene the sale to Matlaw and Carr became an accomplished fact and thereby appellant earned the commission received. As it would have been unjust to deny respondent its agreed brokerage because of the delay in transferring title of the hotel, so likewise it would be inequitable to deny appellant his share of

the commission. The subsequent consummation of a sale on the same terms as originally obtained by the broker entitles him to his commission. *Sessions v. Pacific Imp. Company*, 57 Cal.App. 1, 17, 206 P. 653. Were the rule otherwise iniquitous practices could result and cruel injustices would surely follow without a remedy.

[4] The trial court found that "K-D Investment Company sold, assigned and transferred to * * * Matlaw * * * and Carr all its right, title and interest in and to said real property and to said contract of sale. * * *" This finding is contrary to the exact wording of the executed release, as follows: "1. First parties [K-D Investment Company] agree to execute general releases to all claims in favor of the owners of said real property in form satisfactory to said owners." Such an agreement resulted in the owners' holding title free and clear as against any outstanding claim of the releasing party. It is of no importance or materiality that the consideration for the release moved from Matlaw and Carr to K-D company for by its very terms this release was not an assignment by K-D company to appellant's buyers. The only office or function of such release was to clear the stage for the actual transfer of a property from the seller to the purchaser, the sale of which had been effected by appellant.

[5,6] The trial court found as a fact "that plaintiff never at any time closed and/or consummated a sale of the hotel." If such language be a finding it is not supported by the evidence. The hotel admittedly changed hands by virtue of and in accordance with the terms of the agreement which appellant after a month of effort persuaded the buyer and the seller to sign. It was proved at the trial that this instrument was signed by the buyers on December 4, 1945, the day before appellant terminated his services with respondent. The latter urges that there was no evidence that appellant did any work or made any effort to close the deal after the expiration of the period of his employment. There was no necessity for such effort. The buyers wished to buy, the sellers desired to sell, and all had signed the same instrument

by reason of the prior efforts of appellant. No other evidence was required to show that appellant was the procuring cause of the sale. His production of the buyers who actually purchased the hotel at the price and on the terms stipulated by the sellers left no room for doubt as to his right to his share of the commission. This is evidenced by the instrument which appellant caused them both to sign. Inasmuch as he was the efficient agent and the procuring cause of the sale, the rejection of his demand was error. *Brown v. Mason*, 155 Cal. 155, 158, 99 P. 867, 21 L.R.A., N.S., 328; *Barnes v. Osgood*, 103 Cal.App. 730, 734, 284 P. 975; *Brooks v. Gross*, 106 Cal.App. 277, 281, 288 P. 1089.

Respondent falaciously contends that appellant was entitled to compensation "only in the event that appellant, while in the employ of respondent corporation secured a contract" of purchase and "in the event that the respondent corporation received a commission for and on account thereof." To such contention the record gives an emphatic answer. No attempt was made to deny that on December 4 appellant was still in respondent's employ or that on the same day the owners signed the agreement with Matlaw and Carr for the purchase and sale. That respondent received a commission on the sale in the sum of \$5978 was established by stipulation in open court.

[7] The cases cited by respondent are not in point. It is suggested that the proposals of Matlaw and Carr were counter-offers terminating the offer of the sellers. Such proposals bear no relation to appellant's right to compensation. They were so much conversation, were not acted upon and did not affect the executed agreement to buy the hotel. The proof and stipulations establish that the appellant secured the contract between the buyers and sellers and that respondent received a commission therefrom. By virtue of his employment contract and his performance appellant is entitled to his commission.

The judgment is reversed with directions to enter a judgment in favor of plaintiff for the sum of \$3,586.80.

McCOMB and WILSON, JJ., concur.

87 Cal.App.2d 80

WONG HIM v. CITY & COUNTY OF SAN FRANCISCO et al.

No. 13598.

District Court of Appeal, First District,
Division 1, California.

Aug. 3, 1948.

1. Statutes ⇨158

Repeal of statutes by implication is not favored, especially where prior enactment has been judicially construed and is generally understood and acted upon.

2. Statutes ⇨158

It will be presumed, in absence of express terms, that legislature did not intend to repeal statute by later act, if both can be given effect by fair and reasonable construction.

3. Statutes ⇨159, 167(1)

To overcome presumption that act was not intended to repeal former act, the two acts must be irreconcilable that is, clearly repugnant, as to vital matters to which they relate and so inconsistent that they cannot operate concurrently, or it must be apparent that later act is revision of entire subject matter and designed as substitute for earlier act, or intent to effect repeal must be otherwise expressed in unmistakable language.

4. Statutes ⇨161(1), 225

Two laws on same subject will be so construed as to maintain integrity of both, if reasonably possible, as courts are bound to uphold prior act, if both may well subsist together, but if they cannot be reconciled, the last act governs and repeals former acts so far as they are repugnant.

5. Statutes ⇨158

Theory of repeal of statute by inadvertence will not be considered if another result may be reached by application of any rule of construction.

6. Taxation ⇨798

Statute providing that the owner of real property deeded to the state for taxes, or sold to the state by operation of law prior to July 1, 1939, may bring an action to contest the validity of the tax sale or the tax deed to the state, authorizes such an ac-

tion with respect to property which has been deeded to the state either prior or subsequent to July 1, 1939, but authorizes such action with respect to property sold, but not deeded, only if the sale was prior to July 1, 1939. Revenue and Taxation Code, §§ 175, 3618 et seq., 3620, 3637.

7. Statutes ⇨245

Tax proceedings are in invitum and tax laws must be strictly construed in favor of the taxpayer.

8. Statutes ⇨219

Contemporaneous administrative construction of statute, although not necessarily controlling on the courts, is entitled to great weight.

9. Taxation ⇨791

Special statute requiring that taxpayer's action to contest validity of tax sale or tax deed be brought within one year after execution of deed or within one year after specified date whichever is later, was impliedly repealed, insofar as the special statute referred to actions on tax deeds, by general statute adopted in 1945 requiring that proceeding to determine validity of tax deed be brought within one year. Revenue and Taxation Code, §§ 175, 3618 et seq., 3620, 3637.

10. Statutes ⇨162

General statute will not repeal by implication of former one which is special or which is limited in its application unless there is something in the general law that makes it manifest that legislature contemplated and intended a repeal.

Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

Action by Henry Wong Him against the city and county of San Francisco, and another, to contest the validity of a tax deed. Judgment for defendants and plaintiff appeals.

Affirmed.

For prior opinion, see 194 P.2d 582.

Eugene K. Sturgis and John D. Den-Dulk, both of Oakland, for appellant.

John J. O'Toole, City Atty. and Lawrence S. Mana, Deputy City Atty., both of

San Francisco, for respondent City and County of San Francisco.

Fred N. Howser, Atty. Gen. and E. G. Benard, Deputy Atty. Gen., for respondent State of California.

BRAY, Justice.

Appeal from a judgment of the superior court of San Francisco after order sustaining demurrers of respondents City and County of San Francisco and State of California without leave to amend.

The main question here is whether the adoption in 1945 of section 175 of the Revenue and Taxation Code repealed by implication section 3637 of that Code.

Appellant, Henry Wong Him, was the owner of two lots in the City and County of San Francisco. In the year 1927-28 the city levied its taxes on the realty, and, in addition, on the personal property located thereon. The complaint alleges that this assessment was illegal and invalid because the personal property belonged to persons other than the appellant and other than the legal and assessed owner of the property. The taxes were unpaid, and on June 25, 1928, the property was marked sold to the state by the city and county for nonpayment of the taxes levied for that fiscal year. On September 6, 1933, the city collector made and executed a deed to the State of California for failure to pay taxes. This action was brought on October 22, 1946, under Chapter 5.7, Part 6, Division 1, of the Revenue and Taxation Code and against the city and state, to contest the validity of the tax deed. The deed was alleged to be invalid because the levy upon which the tax was originally based was illegal and void, and because no legal notice of the sale under which the property was deeded to the state was made or given by the city. The demurrers of the respondents on the ground that the action was barred by section 175 were sustained without leave to amend.

Appellant concedes that if section 175 is applicable to this action, then it was not brought in time, as under that section the latest date to bring it would have been September 15, 1946. He, however, contends that section 3637, rather than 175,

applies, and under that section the action could be brought any time up until January 1, 1948.

Chapter 5.7 of the Revenue and Taxation Code, entitled "Taxpayer's Action to Contest the Validity of Tax Sale or Tax Deed," was originally added to the code in 1941. Section 3620 thereof sets forth the purpose of the chapter, and section 3637 provides the limitation of the remedy. The same legislature which had passed section 175 had, just a few weeks before, extended the operation of section 3637. Section 175 was approved by the Governor June 25, 1945, and became effective September 15, 1945. (Stats.1945, Chap. 1017, p. 1963.) Sections 3620 and 3637 were amended and became effective immediately as urgency measures on May 31, 1945. (Stats.1945, Chap. 637, p. 1172.) Respondents' sole contention is that sections 3637 and 175 are inconsistent and irreconcilable, and therefore there was a repeal by implication when the latter was added to the Code. Appellant, however, contends that there is no inconsistency; that section 175 presents a new remedy, making the procedure for that remedy the procedure under Chapter 5.7 and placing its own statutes of limitation thereon, and, therefore, there is no repeal by implication.

[1-5] In order to apply this doctrine, there must, of course, be an irreconcilable conflict between the two. 23 Cal.Jur. 694, Sec. 84, quoted with approval in *Burger v. Hirni*, 50 Cal.App.2d 709, 711, 123 P.2d 891, 893, states: "[Presumption Against Repeal by Implication.] It is elementary that the repeal of statutes by implication is not favored, especially where the prior enactment has been judicially construed and is generally understood and acted upon. Likewise, in the absence of express terms it will be presumed that the legislature did not intend by a later act to repeal a former one, if by a fair and reasonable construction effect can be given to both. To overcome this presumption, the two acts must be irreconcilable—i. e., clearly repugnant—as to the vital matters to which they relate, and so inconsistent that the two cannot have concurrent operation, or it must be apparent that the later statute is a revision of the entire subject matter and de-

signed as a substitute for the earlier act, or the intent to effect a repeal must be otherwise expressed in unmistakable language. Accordingly where there are two laws upon the same subject, they will, if reasonably possible, be so construed as to maintain the integrity of both, the courts being bound to uphold the prior act if the two may well subsist together, though if the two cannot be reconciled, the last act will, of course, govern, and repeals the former in so far as the two are repugnant. The theory of repeal by inadvertence will not be considered if another result may be reached by the application of any rule of construction * * *."

Section 175 was added as Chapter 3 to Part 1 ("General Provisions"), Division 1 ("Property Taxation"), of the Revenue and Taxation Code, and reads: "Chapter 3. Limitation of Actions. Section 175. Tax deeds: Presumption where action not commenced in year: Manner of prosecution. All deeds heretofore and hereafter issued to the State of California or to any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, by reason of delinquency of property taxes or assessments levied by any taxing agency or revenue district, shall be conclusively presumed to be valid unless held to be invalid in an appropriate proceeding in a court of competent jurisdiction to determine the validity of said deed commenced within one year after the execution of said deed, or within one year after the effective date of this section, whichever be later. Such proceedings may be prosecuted within the time limits above specified in the manner and subject to the provisions of Sections 3618 to 3636 of this code."

Section 3637, as originally enacted on May 19, 1941, provided that an action brought under Chapter 5.7 must be commenced within one year after the date of execution of the tax deed, or one year after the effective date of said chapter. (Stats.1941, Chap. 293, p. 1439.) The amendment of May 22, 1943, limited the time to one year after the date of execution of the tax deed or one year after January 2, 1945. (Stats.1943, Chap. 709, p. 2465.) As amended on May 31, 1945, and as it

now reads, the section provides: "Any proceedings brought in accordance with the provisions of this chapter can only be commenced within one year after the date of execution of the tax deed, or within one year after January 2, 1947, whichever is later." (Stats.1945, Chap. 637, p. 1172.)

Whether section 175 provides a new remedy, and whether it is wholly inconsistent with section 3637, depends upon the legislative meaning and intent in enacting section 3620, determining who may bring an action under Chapter 5.7. The latter section has always been passed as an urgency measure, and, as last amended, effective May 31, 1945, reads: "The owner of any real property deeded to the State for taxes, or sold to the State by operation of law prior to July 1, 1939, or any other person who may redeem such property, may bring an action in the superior court of the county wherein the real property is located, to contest the validity of the tax sale or the tax deed to the State."

Appellant contends that this section limits the remedy of Chapter 5.7 to the owner of any real property *deeded or sold* to the state *prior* to July 1, 1939, and that the addition of section 175 provides a new remedy for all tax deeds, and, specifically, for tax deeds made *after* 1939. He contends that before the passage of section 175 there was no provision for any such proceedings as to deeds made *after* July 1, 1939. Respondents, on the other hand, contend that the proper interpretation of this section is that it permits the bringing of an action on property deeded to the state, no matter when the deed was made, but limits the bringing of an action for property sold, but not deeded, prior to July 1, 1939. Thus, the question here is—does section 3620 limit the relief under Chapter 5.7 to property deeded or sold *prior* to July 1, 1939, or does the limitation apply only to property sold but not deeded? If the date refers to both deeds and sales, then the remedy is strictly limited; whereas section 175 applies to all tax deeds without restriction as to date.

As originally enacted in 1941, Chapter 5.7 was entitled "Taxpayer's Action to Contest the Validity of Tax Deed" and section 3620 read as follows: "The owner of any real property deeded to the State

for taxes, or any other person who may redeem such property, may bring an action in the superior court of the county wherein the real property is located to contest the validity of the tax deed to the State."

In 1937 in the case of *Otis v. Los Angeles Co.*, 9 Cal.2d 366, 70 P.2d 633, the court held the tax levy of Los Angeles County for the fiscal year 1933-34 invalid and excessive, thereby invalidating all tax deeds resulting from such levy. The statement of the facts constituting the urgency of the measure indicates that the Legislature had in mind the effect of the decision in the *Otis* case, for, after declaring that numerous levies by taxing agencies had been, directly or indirectly, declared invalid by court decision, it stated: "Many taxpayers are willing to pay these delinquent taxes and to redeem properties from tax sale of a quick and immediate remedy can be afforded for so doing. No such remedy now exists which has met with the approval of title companies and attorneys for public bodies. It is estimated that large amounts of delinquent taxes, necessary to the continued welfare of the fiscal systems of local governments, will be immediately paid upon the adoption of a quick and simple remedy by which such tax liabilities can be determined in an action brought by the taxpayer." (Stats.1941, Chap. 293 p. 1440.)

On May 22, 1943, Chapter 5.7 was again amended in several particulars. The title of the chapter was amended to read: "Taxpayer's Action to Contest the Validity of Tax Sale or Tax Deed." (Emphasis added.) An amendment to section 3620 authorized an action to contest the validity of a tax sale as well as a tax deed. It read in part as follows: "The owner of any real property deeded to the State for taxes, or sold to the State by operation of law, prior to July 1, 1935, or any other person * * *." (Emphasis added.)

Thus, it appears that section 3620 as originally enacted in 1941 limited actions to owners of real property *deeded* to the state, and no limitation was made in that section as to the time when the deed was made. The same year that section 3620 was enacted, section 3637 was also passed. It

provided: "Any proceeding brought in accordance with the provisions of this chapter can only be commenced within one year after the date of execution of the tax deed, or within one year after the effective date of this chapter, whichever is later." (Stats. 1941, p. 1439.) Reading the two sections together, it is clear that the Legislature was referring not only to deeds executed prior to the enactment of the chapter, but also to deeds thereafter to be executed, and that as to deeds already executed, actions thereon must be brought within one year after the effective date of the chapter (1941), and as to deeds thereafter executed, the actions must be brought within one year from their execution.

In 1943, when section 3620 was amended (Stats.1943, p. 2463) by adding the words "or sold to the State by operation of law, prior to July 1, 1935" (thus for the first time covering property sold but not deeded), section 3637 was also amended, changing the date for the commencement of proceedings to one year after the date of the execution of the deed, "or within one year after January 2, 1945, whichever is later." (Stats.1943, p. 2465.) From the fact that a comma precedes the words "prior to July 1, 1935" in section 3620, it would appear at first blush that the right of action was limited to property either sold or deeded prior to that date. However, as the Legislature in amending section 3637 that year provided that actions could be brought within one year after the execution of the deed or within one year after January 2, 1945, it is obvious that the limitation in section 3620 "prior to July 1, 1935" was intended to apply only to property tax sold but not deeded. If the property had to be deeded prior to July 1, 1935, how could a suit commenced in 1943 and after, be brought "within one year after the execution of the deed"?

[6] The same reasoning applies to the amendments of 1945. Section 3620 was amended by changing the date, and leaving out the above mentioned comma, so that the section now reads: "The owner of any real property deeded to the State for taxes, or sold to the State by operation of law prior to July 1, 1939 * * *." (Stats.

1945, p. 1172.) Section 3637 was amended to provide that the proceedings must be commenced "within one year after the date of execution of the tax deed, or within one year after January 2, 1947, whichever is later." (Stats.1945, p. 1172.) By leaving out the comma in section 3620, any ambiguity between that section and section 3637 was eliminated. To give any meaning to the latter section, it necessarily follows that section 3620 means that actions may be brought on property deeded to the state at any time (other than as limited by section 3637), but on property sold, but not deeded, the sale must have been prior to July 1, 1939.

Were it not that the Legislature in its repeated reenactment of these sections intended to place no limitation in section 3620 on tax *deeded* property, there would be no reason for inserting in section 3637 the language "within one year after the date of execution of the tax deed." Actions on property tax sold prior to 1939, but not deeded, must be brought within one year of January 2, 1947. To give any meaning to the language providing that actions on tax deeded property may be brought within one year of the execution of the deed, it obviously follows that there must be no limitation on the date of the deed. A suit brought in 1945 on a deed executed prior to July 1, 1939, could not be brought within one year of the deed's execution.

In the amicus curiæ brief of the County of Los Angeles there appears a photostatic copy of Assembly Bill No. 2003, as it was first introduced in the 1945 Legislature. This bill later became the law which amended sections 3620 and 3637. It appears from such photostat that the elimination of the comma above referred to which was contained in the 1943 amendment was deliberate, and not through inadvertence, as it is shown in the bill with a line drawn through it. While this circumstance is by no means controlling, it is significant in view of the apparent ambiguity between sections 3620 and 3637 as they appeared in the 1943 amendments.

[7] Tax proceedings are *in invitum*, and tax laws must be strictly construed in favor of the taxpayer. *Whitmore v. Brown*, 207

Cal. 473, 279 P. 447; 24 Cal.Jur. pp. 27, 28; *County of Los Angeles v. Jones*, 13 Cal.2d 554, 90 P.2d 802; *Anglo-California Nat. Bank v. Leland*, 9 Cal.2d 347, 70 P.2d 937. The construction given here broadens rather than restricts the remedy provided in Chapter 5.7. To hold otherwise would eliminate all property tax deeded subsequent to July 1, 1939, from the benefits of the chapter.

While the language in the emergency clauses of both the 1943 and 1945 acts may be ambiguous and subject to the interpretation that the Legislature is referring only to property either tax deeded or sold prior to a specific date, the action of the Legislature in each time changing both section 3620 and 3637, conclusively shows that such interpretation is not the correct one.

[8] The construction we are giving these sections is the same as the construction which the attorney general contends in his brief has been given since 1943 by his office and the County Counsel of Los Angeles, in actual practice in actions, many in number, which have been filed pursuant to the provisions of Chapter 5.7. Contemporaneous administrative construction "Although not necessarily controlling * * * is entitled to great weight." *Coca-Cola Co. v. State Board of Equalization*, 25 Cal.2d 918, 156 P.2d 1, 2. However, in view of our holding, it becomes unnecessary to consider such alleged administrative construction.

The Legislature in passing section 175 evidently had Chapter 5.7 in mind, as they referred to all but two sections thereof. The last line of the section states: "Such proceedings may be prosecuted within the time limits above specified in the manner and subject to the provisions of Sections 3618 to 3626 of this code." While the failure to mention section 3637 can be interpreted two ways, the better interpretation, in view of the history of that section, together with that of section 3620, is that the Legislature intended by section 175 to repeal by implication that portion of section 3637 which refers to actions on tax deeds.

[9, 10] Section 3620 supplies the basis for the remedial proceedings provided for in

Chapter 5.7, and applies to all tax deeds whenever executed. Up to 1945 the only limitation of time in which to bring such proceedings was that provided in section 3637. When, in that year, the Legislature enacted section 175 of the same chapter, providing a different limitation upon the time in which proceedings as to *all* tax deeds could be brought, it is manifest that the legislative intent was to repeal by implication section 3637 insofar as it applied to actions on tax deeded property. *Boyd v. Huntington*, 215 Cal. 473, 482, 11 P.2d 383, quoted with approval in *Division of Labor Law Enforcement v. Moroney*, 28 Cal.2d 344, 346, 170 P.2d 3, 4, stated: "a general statute will not repeal by implication a former one which is special or which is limited in its application unless there is something in the general law that makes it manifest that the Legislature contemplated and intended a repeal." The two acts are clearly inconsistent and repugnant to each other, as applied to tax deeded property, and therefore meet the test set forth in the quotation from *Burger v. Hirni* heretofore given. As section 175 applies to the subject matter of this litigation, and as this action was not brought in time thereunder, the judgment of the court is correct, and is affirmed.

PETERS, P. J., and WARD, J., concur.



87 Cal.App.2d 196

**KORNAHRENS v. CITY AND COUNTY
OF SAN FRANCISCO.**

Civ. 13593.

District Court of Appeal, First District,
Division 2, California.

Aug. 10, 1948.

1. Municipal corporations ☞741(1)

The provisions of a municipal charter relative to the time within which claims

against municipality must be filed apply in cases of tort arising out of a municipality's exercise of proprietary functions.

2. Municipal corporations ☞742(4)

Complaint in streetcar passenger's personal injury action against city and county of San Francisco operating the municipal railway failed to state a cause of action, where it showed that a claim for damages was not presented to the controller within 60 days as required by city charter.

3. Municipal corporations ☞741(1)

Claims against a municipality must be presented, not only within the time limited by statute or charter but to the officer, board, or agency designated therein.

4. Counties ☞200

Operation of street railway by the city and county of San Francisco is not a county or "governmental function" but a "proprietary" one carried on by the city under powers derived solely from its charter, and statute fixing time within which claims shall be filed against a county have no application to a streetcar passenger's personal injury claim against the municipality. Government Code, §§ 29700-29105.

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Function" and "Proprietary Function".

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Betty Kornahrens, by and through her guardian ad litem, Rudolph Kornahrens, against the City and County of San Francisco for personal injuries allegedly sustained by plaintiff while a passenger on a streetcar. From a judgment for defendant entered on the pleadings, plaintiff appeals.

Affirmed.

Johnson, Rickson & Johnson, of Oakland (McClymonds, Wells & Wilson, of Oakland, of counsel), for appellant.

John J. O'Toole, City Atty., and John F. Moran and George E. Baglin, Deputy City

Attys., all of San Francisco, for respondent.

GOODELL, Acting Presiding Justice.

Appellant sued for personal injuries alleged to have been sustained on June 7, 1944, through the negligent operation of the street car of the municipal railway on which she was a passenger. The complaint shows that on August 29, 1944, a verified claim for damages was presented to the Controller of the city. In its answer the city pleaded that appellant had failed to comply with the provisions of section 87 of the San Francisco charter requiring the presentation of such claims to the Controller within sixty days after the occurrence, and when the case came on for trial the city pressed that point by moving for judgment on the pleadings. The motion was granted, judgment entered, and this appeal taken.

[1,2] The appellant's sole contention is "that the provisions of a municipal charter relative to the time within which claims must be filed have no application in cases of tort arising out of a municipality's exercise of proprietary functions."

In *Cathey v. City and County of San Francisco*, 37 Cal. App.2d 575, 99 P.2d 1109, the plaintiff sued for an injury sustained while she was a passenger on the same municipal railway. Her claim was presented after the sixty-day period had expired, which fact appeared on the face of the complaint. The city's demurrer on that ground was sustained, and the judgment entered thereon was affirmed by this court.

Although the city makes it perfectly clear in its brief that it relies on that case, appellant in her reply brief makes no attempt to distinguish it. The *Cathey* case is directly in point, and the arguments now made by appellant are answered by that case and by the authorities which it cites.

One of the cases cited therein is *Western Salt Co. v. City of San Diego*, 181 Cal. 696, 186 P. 345, which arose from the collapse of the lower Otay dam operated by the city as a part of its municipal waterworks and in its proprietary capacity. The city charter contained a provision that all

claims for damages against the city had to be presented within six months after the occurrence. The complaint failed to allege a compliance with that provision, and the city's demurrer was sustained on that ground. An earlier case, *Bancroft v. City of San Diego*, 120 Cal. 432, 52 P. 712, had held that the plaintiff's failure to present a claim within six months was fatal. The damages sought in the *Bancroft* case arose from the change of grade of a street, and the appellant in the *Western Salt Co.* case sought to break the force of the earlier decision by contending "that the rule for the presentation of claims is different with reference to those claims incurred by the city in exercising its governmental powers and those incurred in the exercise of powers in private enterprises undertaken by the city." The court said (page 698 of 181 Cal., page 346 of 186 P.): "* * * we see no opportunity for any construction of the language with reference to presentation of claims based upon the fact that some of the powers of the city enumerated in the charter are governmental in character and others authorize the establishment by the city of enterprises which partake of a private character. In either event the city is acting as such, and the damages which accrue against it, under the law, are chargeable against the city." This categorically answers the appellant's argument herein that the charter provision has "no application in cases of tort arising out of a municipality's exercise of proprietary functions."

The respondent contends that "Since there is no general law governing claims against San Francisco as a city arising out of its municipal and proprietary operation of the municipal railway, section 87 of the charter is valid and binding in actions for injuries arising out of such operation."

In the *Western Salt Co.* case the appellant contended that the provision of the charter requiring the presentation of claims was "invalid for the reason that the freeholders' charter conflicts with the general law, and is only supreme in 'municipal affairs,' * * *." With respect to this the court said: "This contention is predicated upon the proposition that by the general law a complaint for damages is a

sufficient presentation of a demand against an individual or private corporation. The question involved here, however, is an entirely different one, namely, the method of securing payment of claims against a municipality, an agency of the state. There is no general law upon that subject, but the charter of each municipality prescribes the method for such payment. The charter controls * * *."

The reason underlying the requirement of the presentation of claims against cities and counties as a prerequisite to the maintenance of actions against them, is given in the same case by quotation from an early case, as follows: "'We think the intention of the Legislature was to prevent the revenue of the county from being consumed in litigation, by providing that an opportunity of amicable adjustment should be first afforded to the county, before she could be charged with the costs of a suit.'" *McCann v. Sierra County*, 7 Cal. 121. A similar reason was given for the rule requiring a presentation of claims to an executor or administrator. *Ellissen v. Halleck*, 6 Cal. 386. This reason applies with like force to all claims against a city, however originating."

[3] The *Western Salt Co.* case was decided in 1919, at which time, as the court held, there was no general law dealing with the presentation of claims against a municipality. Since then several claim statutes have been enacted dealing with various types of liability of public agencies and officers and the appellant discusses them at considerable length, but does not succeed in bringing this case within any of them. The appellant's allegation that her claim was presented to the Controller definitely characterizes this case as one intended by her to come within section 87 of the charter (and not within any of these other enactments) since the Controller is the only officer designated therein. Under none of the acts discussed by appellant is

the Controller so designated. That being so, it is clear that appellant was proceeding under no enactment other than section 87, and the argument that the claim, while too late under that section, was still filed within the time limited in these other acts, falls of its own weight because there was no attempt to plead a compliance with any one of them. It is settled law that such claims must be presented not only within the time limited by the particular enactment but to the officer, board or agency designated therein. *Continental Ins. Co. v. City of Los Angeles*, 92 Cal.App. 585, 268 P. 920, cited approvingly in *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 134, 53 P.2d 353. For these reasons there is no necessity to discuss the cases cited by appellant arising under the several claim statutes.

[4] The argument is made that, because San Francisco is a consolidated city and county government the demand was within time as a claim against a *county*, under sections 29700-29705, Government Code (Stats.1947, pp. 1232, 1233; formerly section 4075, Pol.Code). The first answer to this is that the operation of a street railway is not a county or governmental function but a proprietary one, carried on by the city under powers derived solely from the charter. See, with respect to differing functions, *City and County of San Francisco v. Collins*, 216 Cal. 187, 191, 13 P.2d 912. The second answer is that claims against counties under such act must be presented to the Board of Supervisors, while this was presented to the Controller as noted above.

The case is controlled by *Cathey v. City and County of San Francisco*, *supra*, and *Western Salt Co. v. City of San Diego*, *supra*.

The judgment is affirmed.

DOOLING, J., and GRIFFIN, Justice pro tem., concur.

PEOPLE v. BIRCH SECURITIES CO.

Civ. 7444.

Sac. 5874.

District Court of Appeal, Third District,
California.

July 12, 1948.

Rehearing Denied Aug. 7, 1948.

Hearing Denied Sept. 8, 1948.

1. Appeal and error ⇐917(1)

Where record on appeal contained no demurrer to pleading or indication that a demurrer thereto was filed or passed by the court, District Court of Appeal was required to assume that no demurrer was filed.

2. Pleading ⇐287, 296

In suit by the state against a foreign corporation for franchise taxes, it was not necessary for Franchise Tax Commissioner personally to sign or verify complaint alleging that corporation conducted business within the state for pecuniary profit as defined by the Bank and Corporation Franchise Tax Act and that after examination of corporation's reports and records of transactions, commissioner assessed additional taxes in amounts specified in complaint. Gen.Laws, Act 8488, §§ 1 et seq., 5.

3. Attorney general ⇐7

The Attorney General, as chief law enforcement Officer of the state, has the authority and power, in absence of a statute to the contrary, to institute, conduct and maintain all civil actions involving the rights and interests of the state, such as collection of unpaid franchise taxes.

4. Attorney general ⇐2

Any duties which the Attorney General may perform personally may ordinarily be performed by his regularly authorized assistants.

5. Pleading ⇐290(2)

In suit by the state against foreign corporation for franchise taxes under the Bank and Corporation Franchise Tax Act, it was not necessary that complaint should be verified. Gen. Laws Act 8488, § 1 et seq.; Code Civ.Proc. § 446.

6. Pleading ⇐290(1)

Failure to verify a pleading when verification is required by statute is a mere defect of pleading and is not jurisdictional.

7. Pleading ⇐422

The absence of a demurrer to a pleading because it has not been verified as required by statute, and the proceeding to trial without objection, is a waiver of the asserted defects of pleading.

8. Pleading ⇐14

When facts are available from public records, it is ordinarily improper to allege such facts on mere information and belief.

9. Appeal and error ⇐1039(2)

In suit by the state against foreign corporation for franchise taxes due under the Bank and Corporation Franchise Tax Act, corporation was not prejudiced by direct allegations of essential facts instead of the founding of such recitations on information and belief. Gen.Laws, Act 8488, § 1 et seq.; Const. art. 6, § 4½.

10. Taxation ⇐593(3)

Evidence that Franchise Tax Commissioner prepared and mailed to foreign corporation at its post office address within the state, with postage prepaid, corporation's assessment of additional taxes for certain years, and notices thereof, supported finding that commissioner complied with the Bank and Corporation Franchise Tax Act in serving on corporation by mail the notices of additional taxes due the state. Code Civ.Proc. § 1013; Gen.Laws, Act 8488, §§ 4(3), 25.

11. Taxation ⇐164

Evidence supported finding that foreign corporation was actively engaged in business transactions within the state for financial and pecuniary profit, so as to be liable to the state under the Bank and Corporation Franchise Tax Act for franchise taxes. Gen.Laws, Act 8488, §§ 4(3) (4), 5.

12. Taxation ⇐594

In suit by the state against foreign corporation for franchise taxes under the

Bank and Corporation Franchise Tax Act, court sufficiently adopted findings on the issues in the case, where court found that corporation engaged in business activities in the state during years in question other than receipt and disbursement of dividends from stock or interest from bonds, and that corporation actively engaged in transactions in the state for purpose of financial or pecuniary gain or profit during such years, and that the state's claims mentioned in the complaint were valid and that tax was due, owing and unpaid. Gen.Laws, Act 8488, § 1 et seq.

13. Appeal and error ⇨1071(6)

An appellant is not prejudiced by failure to find on issues which, in support of judgment, would necessarily be adverse to him.

14. Appeal and error ⇨1078(1)

Where appellant failed to discuss question of constitutionality of act involved, and District Court of Appeal was directed to no authority and no reason was assigned on which it might hold the act unconstitutional, it therefore assumed, for purpose of the appeal, that the act was constitutional.

15. Judgment ⇨829(3)

In suit by state against foreign corporation for franchise taxes under the Bank and Corporation Franchise Tax Act, wherein court specifically determined that former federal judgment in action against Franchise Tax Commissioner was not res judicata in the present action and did not constitute an estoppel, state's objection to introduction of record in federal case was properly sustained. Gen.Laws, Act 8488, § 1 et seq.

16. Judgment ⇨829(3)

Judgment of federal court enjoining certain officers of the state from interfering with foreign corporation's business within the state under the Bank and Corporation Franchise Tax Act by forfeiting or suspending corporation's charter or rights within the state, was not res judicata of issues in suit by the state against the corporation for franchise taxes under the act. Gen.Laws, Act 8488, §§ 1 et seq., 30,

32; Civ.Code, § 405; Const.Cal.art. 1, § 13; art. 20, § 6; U.S.C.A.Const. Amend. 14.

17. States ⇨191(1)

Section of the constitution providing that suits may be brought against the state in such manner and in such courts as shall be directed by law, should be strictly construed. Const. art. 20, § 6.

18. Judgment ⇨702

States ⇨191(2)

When a suit is brought only against individually named officers of a state, as such, the suit is ordinarily not an action against or binding on the state.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Suit by the People of the State of California against the Birch Securities Company, a foreign corporation, for franchise taxes due and payable for the years 1935 and 1936, pursuant to provisions of the Bank and Corporation Franchise Tax Act. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

George Acret, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and James E. Sabine, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The State of California brought suit against the defendant, a foreign corporation, for franchise taxes due and payable for the years 1935 and 1936, pursuant to the provisions of the Bank and Corporation Franchise Tax Act. Stats.1929, p. 19, and amendments; 3 Deering's Calif. Gen.Laws, p. 3010, Act 8488. The amended complaint was couched in two counts. The trial court adopted findings favorable to plaintiff, and rendered judgment accordingly upon such cause of action. From that judgment the defendant has appealed.

The appellant contends that the amended complaint fails to state facts sufficient to

constitute a valid cause of action; that the findings and judgment are not supported by the evidence; that the Franchise Tax Commissioner failed to serve notice on the defendant of the levy of additional taxes as prescribed by Section 25 of the Act, as a prerequisite to the maintenance of the action; that the court failed to adopt findings on certain affirmative defenses set up in its answer; that the court erred in rejecting evidence of a prior judgment of the Federal court in a suit entitled "A. Otis Birch v. Charles J. McColgan, as Franchise Tax Commissioner, et al." and that the last mentioned judgment is res judicata and a bar to the maintenance of this suit. The defendant asserts that it is not a business corporation or engaged in any transactions for pecuniary profit and that it is therefore exempt under Section 4, subdivision 4, of the Act from additional franchise taxes. The chief argument is that the State of California is estopped by the Federal judgment, previously mentioned, from levying or collecting additional franchise taxes in this suit.

The defendant is a Nevada corporation which was organized in that state in 1934 and thereafter authorized under Section 405 of our Civil Code to transact business in the State of California. It is not a holding corporation pursuant to Section 4, subdivision 4, of the Act. Its charter declares that the corporation was formed "To acquire by purchase, subscription, or otherwise, and to hold for investment or otherwise and to use, sell, assign, transfer, mortgage, pledge or otherwise deal with or dispose of stocks, bonds or any other obligations or securities of any corporation * * *"; to purchase, own, operate and sell farms and land of every character; to buy, sell and deal in cattle and livestock of every kind; to own and operate vineyards, orchards, nurseries, packing plants and distilling enterprises, and to own and conduct general brokerage businesses of all kinds of goods, wares and merchandise. Ever since October 18, 1934, the corporation has existed and maintained a place of business in Los Angeles, rendering annual reports to the Franchise Tax Commis-

sioner, but has paid only the minimum license fee provided for by Section 4, subdivision 3, of the Act, of \$25 per year.

The complaint alleges that the defendant conducted business in California during the years of 1935 and 1936, for pecuniary profit, as defined by Section 5 of the Act, and that, after examination of defendant's reports and records of transactions of said two years, the Franchise Tax Commissioner ascertained the net income and additional franchise taxes due therefor, together with interest and penalties provided for by the act, and assessed additional taxes in the amounts specified in the complaint; that said assessments and demands were served by mailing them to the address furnished upon defendant's filed reports, with the postage prepaid, as required by the tax act; that the defendant failed to protest said levy within sixty days thereafter, or at all, and that no part of said additional assessments was paid. This suit was thereafter commenced.

The answer denies the material allegations of the complaint, and affirmatively alleges that the defendant is a mere holding corporation and was not engaged in business in California for pecuniary profit; that the defendant did not receive said notices of assessments of additional taxes, and that the plaintiff, State of California, is estopped from maintaining this action by a judgment which was rendered in the United States District Court of Southern California, in February, 1941, in an action entitled Birch v. McColgan, as Franchise Tax Commissioner, et al., 39 F.Supp. 358, which became and is res judicata of the issues of this cause.

The trial court found that the defendant was engaged in business in California for pecuniary profit during said two years and derived the net profits correctly stated in the Franchise Tax Commissioner's return and levy of assessments for additional taxes upon which said taxes were computed, as stated in the complaint, no part of which was paid; that said levy of additional taxes was not protested by the defendant; that notices of said assessments were mailed to the defendant, with the postage prepaid, at the post office address

of the defendant in Los Angeles appearing upon its filed reports; that *said notices were received by the defendant*, and that the judgment relied upon in said Federal court was not between the parties to this action; that it did not adjudicate the issues involved in this case, and that it is not res judicata and does not constitute an estoppel from maintaining this suit.

Judgment was thereupon rendered against the defendant for the additional franchise taxes, together with interest and penalties, as prayed for in the complaint. From that judgment this appeal was perfected.

[1-4] We are of the opinion the amended complaint states a good cause of action for unpaid franchise taxes due to the State of California by the defendant. This suit was brought by the Attorney General and the complaint was signed by two of his deputies. It is not verified. The essential allegations are in the form of positive statements of facts and not upon mere information and belief. The record on appeal contains no demurrer to the pleading or indication that a demurrer thereto was filed or passed upon by the court. We must, therefore, assume no demurrer was filed. The only defects of pleading pointed out by the appellant are that the complaint is not signed by the Franchise Tax Commissioner, or verified, and that the officers who did sign the pleading failed to state the essential facts based upon their "information or belief." There is no merit in this contention. The complaint directly involves the rights and interests of the State of California. It was not necessary for the Franchise Tax Commissioner to personally sign or verify the complaint. The Attorney General, as the chief law enforcement officer of the state, has the authority and power, in the absence of a statute to the contrary to institute, conduct and maintain all civil actions involving the rights and interests of the state, such as the collection of unpaid franchise taxes. *Pierce v. Superior Court*, 1 Cal.2d 759, 761, 37 P.2d 453, 460, 96 A.L.R. 1020; Const. Art. V, sec. 21; 7 C.J.S., Attorney General, page 1226, § 8; Pol.Code, sec. 470. Any duties which the Attorney General may perform personally may ordinarily be per-

formed by his regularly authorized assistants. 7 C.J.S., Attorney General, page 1223, § 5, "Delegation of duties."

[5-9] It was not necessary that the complaint in this case should be verified. Section 446 of the Code of Civil Procedure specifically provides that "When the State, * * * or any officer of the State * * * in his official capacity is plaintiff, the complaint need not be verified." 1 Bancroft's Code Pl., 710 sec. 495. Moreover, failure to verify a pleading when required by statute, is a mere defect of pleading. It is not jurisdictional. The absence of a demurrer on that ground, and proceeding to trial without objection, is a waiver of the asserted defects of pleading. *Security Trust & Savings Bank v. Fidelity & Deposit Co.*, 184 Cal. 173, 176, 193 P. 102; *In re Hynes (In re Staser)*, 84 Cal.App.2d 746, 191 P.2d 791; 21 Cal.Jur. 220 sec. 152. The public records of the Franchise Tax Commissioner were available to the officers who signed the complaint. We must assume they inspected those records and obtained knowledge therefrom of the essential facts related in the complaint. When facts are available from public records, it is ordinarily improper to allege such facts on mere information and belief. *Brooks v. Nelson*, 95 Cal.App. 144, 150, 272 P. 610; *Hall v. James*, 79 Cal.App. 453, 249 P. 876; 21 Cal.Jur. 150, sec. 101. We cannot perceive how the defendant was prejudiced by the direct allegations of essential facts, instead of founding such recitations on information and belief. No judgment may be set aside for mere errors "as to any matter of pleading" unless such error complained of "has resulted in a miscarriage of justice." Const. Art. VI, sec. 4½.

[10] There is adequate evidence to support the finding of the court that the Franchise Tax Commissioner prepared and mailed to the defendant at his post office address at 504 W. P. Story Building, in Los Angeles, with the postage prepaid, as required by Section 25 of the Act, his assessment of additional taxes for the years 1935 and 1936, and the notices thereof. The service of said notices in that manner ful-

fills the requirement of the law. Act 8488, Sec. 25; Code of Civ.Proc. sec. 1013. Section 25 of the Act provides that the Commissioner's certificate of such notices shall be "prima facie evidence of the computation and levy of the deficiency in tax and of the giving of said notices." *People v. Mahoney*, 13 Cal.2d 729, 737, 91 P. 1029. The defendant's return of income, which was filed February 17, 1936, upon which it paid only the minimum fee of \$25, contained the business address above stated. Mr. A. Otis Birch testified that he did not receive the two notices involved in this suit, but admitted he actually received a notice mailed by the Commissioner to the corporation at said address on February 18, 1937, and another similar notice mailed three weeks later. He did testify that defendant's office was moved from the fifth floor of said building to number 929 on the ninth floor of the same building the "latter part of 1936." But he admitted that "a desk and furniture" belonging to the corporation remained in room number 504 of that building. We are satisfied the evidence supports the finding that the Commissioner complied with the statute in serving upon the defendant by mail the said notices of additional taxes due to the State of California.

[11] The evidence adduced at the trial supports the finding that the defendant corporation was actively engaged in business transactions in California during the years of 1935 and 1936, for financial and pecuniary profit. Section 5 of the Act defines the term "doing business" as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." We assume the defendant corporation was liable for franchise taxes for said two years under Section 4, subdivision 3, of the Act. It was not exempt from such taxes under Section 4, subdivision 4, of the Act, which provides that:

"Any corporation organized to hold the stock or bonds of any other corporation or corporations, and *not trading in such stock or bonds or other securities held, and engaging in no other activities than the receipt and disbursement of dividends from such stock or interest from such bonds*, shall not

be considered a corporation doing business in this State for the purposes of this act." (Italics added.) See *People v. Alexander Goldstein Co.*, 66 Cal.App.2d 771, 152 P.2d 1016.

Under the evidence of this case it may not be said the defendant was not engaged in trading in other stocks or bonds, or that it was not engaged in other activities for pecuniary profit. The evidence clearly shows that the defendant was authorized by its charter to engage in various industrial enterprises, the profits from which would be subject to franchise taxes. The defendant's annual returns which were filed with the Franchise Tax Commissioner show that it was engaged in loaning money for profit derived from interest thereon. The return filed December 15, 1936, Plaintiff's Exhibit 4, page one, item 7, shows income of "Interest on loans, etc. \$225.50." The return marked Plaintiff's Exhibit 2, page 5, under the caption "Schedule F—Bad Debts", item 3 shows that the defendant "charged off during the current year" the loss of \$1,450, for the following reason: "Reasons for charge off: Investment in Mica Mine, representing cash advanced in various sums from May 2, 1935 to October 30, 1935, with the understanding that same would be treated as a loan, and be returned. For the use of the money so loaned, we were to receive an interest in the Mica Mine which now appears to have become worthless, and the money loaned to have been lost." Moreover, at the bottom of the first paragraph of Section 31 of the Act it is provided that the certificates of the Commissioner, which were received in evidence, "shall be prima facie evidence of the levy of the tax, penalties, and interest, of the delinquency and of compliance by the commissioner and the State Board of Equalization with all the provisions of this act in relation to the computation and levy of the tax." The defendant failed to protest said assessments.

In spite of some conflict of evidence with relation to the defendant's business activities, we are satisfied there is ample evidence to support the finding that it was doing business in California during said two

years for financial profit, sufficient to support the finding and judgment in that regard.

[12-14] The appellant contends that the court failed to adopt findings on several specified issues in the case. We have examined each of those asserted omissions. We are of the opinion the court adopted findings adequate to support the judgment upon all material issues. Finding III is that the defendant engaged in (business) activities in California during the two years in question, "other than the receipt and disbursement of dividends from stock or interest from bonds." The last quoted language was taken from Section 4, subdivision 4, of the Act, and negatives defendant's claim that it was a mere "stock or bond holding corporation." Finding IV specifically determines that "defendant actively engaged in transactions in the State of California for the purpose of financial or pecuniary gain or profit" during said two years. The court did not specifically find that the Bank and Corporation Franchise Tax Act of California is constitutional. But it did find that the claims of the State of California mentioned in the complaint were valid "and the whole of said additional tax is now due, owing and unpaid, together with interest as provided in the Bank and Corporation Franchise Tax Act." It is apparent that a more specific finding on the constitutionality of the act would necessarily be adverse to the appellant. Numerous authorities have determined that an appellant is not prejudiced by failure to find upon issues, which, in support of the judgment, would necessarily be adverse to him. *Kramer v. Sanguinetti*, 33 Cal.App.2d 303, 311, 91 P.2d 604; *Phillips v. Stark*, 65 Cal.App. 136, 223 P. 443; *Reiniger v. Hassell*, 216 Cal. 209, 13 P.2d 737; 24 Cal.Jur. 944, sec. 188. The appellant fails to discuss the question of the constitutionality of the act. We are directed to no authority and no reason is assigned upon which we may hold that the act is unconstitutional. For the purpose of this appeal we must therefore assume that the act is constitutional.

[15] The appellant is mistaken in assuming that the court failed to find upon

the issue of the alleged estoppel of the former Federal judgment in the case of *Birch v. McColgan*, as Franchise Tax Commissioner. Finding number XII specifically determines that the former judgment "is not res judicata in this action and does not constitute an estoppel. Said judgment did not adjudicate the issues of this action. The cause of action involved in said federal court proceeding was not the same as the causes of action here involved. The parties in said federal court proceeding were not the same as the parties to this action." Plaintiff's objection to the introduction of the record in the Federal case was therefore properly sustained. The printed record of that former case is presented to this court as an appendix to appellant's brief.

[16] The chief issue on this appeal is the question as to whether the Federal judgment is res judicata of the issues of this suit. We are of the opinion the trial court correctly held that it is not res judicata of the essential issues of this case. The State of California was not a party to that suit. It was merely a suit by A. Otis Birch, against certain named officers of the State to enjoin them from interfering with the business of the Birch Securities Company, in the State of California, under Section 32 of the Bank and Corporation Franchise Tax Act, by forfeiting or suspending the corporation's charter or rights and privileges in this State acquired pursuant to Section 405 of the Civil Code. It does not purport to enjoin the State of California from levying or collecting any franchise taxes which were or might become due from said corporation to the State. The former judgment merely provides that the named defendants and their agents "are hereby permanently enjoined from maintaining, enforcing or giving effect to, or attempting to maintain, enforce or give effect to, any suspension or forfeiture, or purported suspension or forfeiture, of the corporate powers, rights or privileges of said Birch Securities Company," and from prosecuting the officers of the corporation for exercising rights or privileges of the company on the ground that the charter has been revoked or suspended.

The former Federal judgment is not res-judicata of the issues of this case nor a bar estopping the State of California from maintaining this action to recover unpaid franchise taxes. That case was not a suit to recover illegal franchise taxes paid by the corporation under protest. It was an equitable suit to restrain certain named officers of the state, as such, from suspending or revoking the foreign corporation's rights to conduct its business within this State. The State of California was not a party to that suit. The State did not authorize that injunction proceeding to be brought against it. Indeed, Section 30 of the Franchise Tax Act specifically forbids such an action. It provides in part:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the assessment or collection of any tax under this act but any taxpayer claiming that the tax computed and levied against it pursuant to Sections 24.1 and 25 of this act is void in whole or in part may bring an action against the commissioner for the recovery of the whole or any part of the amount paid."

[17] Article XX, Section 6, of the State Constitution provides that "Suits may be brought against the State in such manner and in such courts as shall be directed by law." *Rose v. State of California*, 19 Cal.2d 713, 723, 123 P.2d 505. That provision of the Constitution should be strictly construed. It has been held that a suit to recover taxes which have been illegally collected may be brought against the State only in the manner and in such courts as shall be directed by law. 2 *Cooley on Taxation*, 3d Ed., p. 1487; *Bekins Van & Storage Co. v. State of California*, 135 Cal.App. 738, 28 P.2d 61; *Brandt v. Riley*, 139 Cal.App. 250, 33 P.2d 845. If the Federal injunction case should be construed to necessarily determine the invalidity of the franchise taxes which are involved in this case it would render the limitation of the Constitution against suing the State without its consent, and the inhibition of Section 30 of the Franchise Tax Act, nugatory and ineffectual. We therefore conclude

that judgment is not binding on the State of California in this suit.

[18] In the present case the appellam alleged in its answer and urges on appeal that additional franchise taxes may not be enforced against the corporation without violating the Fourteenth Amendment to the United States Constitution, and Article I, Section 13, of the California Constitution. It will be observed the former Federal judgment, which was offered in evidence as a bar to this action, was merely against certain named officers of the State, as such, and not against the State of California, and is therefore not res judicata in this action or an estoppel against the State maintaining this action for unpaid franchise taxes. When a suit is brought only against individually named officers of a state, as such, it is ordinarily not an action against or binding upon the state. *Stone v. Interstate Natural Gas Co.*, 5 Cir., 103 F.2d 544; *Smyth v. Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819; *Prout v. Starr*, 188 U.S. 537, 23 S.Ct. 398, 47 L.Ed. 584; *Carr v. United States*, 98 U.S. 433, 25 L.Ed. 209; *Reagan v. Farmers Loan and Trust Co.*, 154 U.S. 362, 14 S.Ct. 1047, 38 L.Ed. 1014; *The Constitution of the United States*, Annotated, 1938, Amendment 11, *Suits against States*, p. 727, note. In the *Smyth* case, supra, Mr. Justice Harlan, speaking for a unanimous court, said, 169 U.S. 499, 18 S.Ct. 423, 42 L.Ed. 819:

"* * * It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that amendment. [Citing authorities.]"

The *Stone* case, supra, appears to be conclusive of that issue in the present action. In that case the United States Circuit Court reversed the District Court which enjoined the Franchise Tax Commissioner of Mississippi and other officers of that state from enforcing the collection of franchise taxes under the Mississippi statute. It was contended the corporation was engaged only in interstate commerce and therefore exempt from the state taxes. The

Circuit Court held that the State of Mississippi was not a party to that action, and therefore was not estopped by the former injunction which was issued against the officers only. It said [103 F.2d 547]:

"We conclude also that the judgment in the three-judge case of Dec. 4, 1931, is no estoppel. It does not appear to be between the same parties. The Gas Company is plaintiff in both suits but Stone, the present defendant who is sought to be bound by the former judgment, was not a party to it. This suit against him is a personal suit and the judgment rendered is a personal judgment. Execution on it would run against him. The reference to him as Commissioner is descriptio personae. *Smietanka, Collector v. Indiana Steel Co.*, 257 U.S. 1, 42 S.Ct. 1, 66 L.Ed. 99. The three-judge suit was against other individuals, who though officers were enjoined from what they were about to do on the ground that the law of their office did not justify them. The State of Mississippi for whom they tried to act was not a party, though her attorney General was among those sued. She could not under the Eleventh Amendment, U.S.C.A. Const. have been sued. How officers who act for their government under an unconstitutional authority may be sued, and yet their governments not be bound by the judgment, is fully explained in *United States v. Lee*, 106 U.S. 196, 222, 1 S.Ct. 240, 27 L.Ed. 171. See also *Sage v. United States*, 250 U.S. 33, 39 S.Ct. 415, 63 L.Ed. 828; *Hussey v. [United States]* *Crane*, 222 U.S. 88, 93, 32 S.Ct. 33, 56 L.Ed. 106; *Carr v. United States*, 98 U.S. 433, 25 L.Ed. 209; *Stanley v. Schwalby*, 162 U.S. 255, 16 S.Ct. 754, 40 L.Ed. 960. *Stone can now justify his collection of these taxes as fully as the State of Mississippi could do if she were not sued; and as she is not bound by the former judgment against her officers, he is not.*" (Italics added.)

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., concurs.

PEEK, J., deeming himself disqualified, does not participate herein.

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AAKER v. SMITH et al.

Civ. 13628.

District Court of Appeal, First District,
Division 1, California.

Aug. 2, 1948.

Hearing Denied Sept. 30, 1948.

1. Appeal and error ⇨110, 782

Order denying motion for new trial was non-appealable, and purported appeal therefrom was dismissed.

2. Landlord and tenant ⇨70, 113, 117

In determining whether an oral lease is merely one at will or at sufferance or is a tenancy from year to year, the intention of the parties is the controlling factor, and such intention must be ascertained in view of statutory presumptions, Civ.Code, §§ 1943, 1945, 1946.

3. Landlord and tenant ⇨114(1)

In action against partners operating cocktail lounge by one who operated restaurant in connection with cocktail lounge, for breach of alleged oral annual year to year lease of restaurant premises, evidence sustained finding that original term and all implied renewals were for one year periods. Civ.Code. §§ 1943, 1945, 1946.

4. Landlord and tenant ⇨114(1), 115(2)

Alleged fact that one operating restaurant in connection with cocktail lounge paid monthly rental to partners who operated cocktail lounge and who orally leased the restaurant to operator of restaurant, would not compel conclusion that tenancy was for month to month rather than from year to year. Civ.Code, § 1945.

5. Landlord and tenant ⇨113

Statute providing that a hiring of realty, for a term not specified by the parties, is deemed to be renewed at end of term implied by law unless one of the parties gives notice to the other of his intention to terminate, at least as long before expiration thereof as the term of the hiring itself, not exceeding one month, was not applicable to oral lease for a term of one year. Civ. Code, § 1946.

6. Landlord and tenant **§94(3)**

Where oral lease was entered into on September 1, 1941 for one year term, and lease was impliedly renewed from year to year, landlords, if they desired to terminate the lease as of September 1, 1945, should have given tenant notice to quit on August 1, 1945, and notice to quit given on October 10, 1945, did not affect the implied one year term, beginning Sept. 1, 1945. Civ.Code, § 1946.

7. Frauds, statute of **§44(4)**

An oral one year lease is not within the statute of frauds. Civ.Code, § 1624, subd. 4.

8. Frauds, statute of **§44(4)**

An oral agreement for a one year lease to be annually renewed for one year terms at desire of tenant is violative of the statute of frauds. Civ.Code, § 1624, subd. 4.

9. Appeal and error **§173(6)**

Frauds, statute of **§152(2)**

Where complaint in action for breach of alleged oral annual year to year lease alleged that the lease was oral, and defendants failed to demur and did not plead the statutes of frauds in their answer, and when oral testimony was introduced they made no objection, defendants were deemed to have waived defense of statute of frauds and could not raise that defense for the first time on appeal. Civ.Code, § 1624, subd. 4.

10. Frauds, statute of **§139(1)**

Where parties entered into oral agreement for one year lease, and lease was impliedly renewed from year to year, and first four years of tenant's occupancy were fully executed, the statute of fraud had no application as to those periods already executed. Civ.Code, § 1624, subd. 4.

11. Frauds, statute of **§129(2)**

Where parties entered into an oral lease for one year, and lease was impliedly renewed from year to year, and first four years of tenant's occupancy were fully executed, and landlords sought to terminate lease during the fifth year, statute of frauds had no application, even if entire agreement was considered as a unit rather than a series of yearly leases, since the four-year plus

part performance would take the case out of the statute of fraud. Civ.Code § 1624, subd. 4.

12. Appeal and error **§931(1)**

On appeal by defendants from judgment for plaintiff in action for breach of lease, District Court of Appeal was required to take the evidence most favorable to the plaintiff, together with reasonable inferences from that evidence.

13. Landlord and tenant **§172(2)**

Evidence that partners operating cocktail lounge, who had leased restaurant in connection with the cocktail lounge, commenced a course of conduct aimed at forcing restaurant operator to abandon premises, by removing restaurant sign from in front of building, by notifying customers of restaurant operator that she was no longer in business, and by failing to fill promptly orders for drinks by restaurant customers, and that restaurant operator surrendered possession, there was a "constructive eviction" so as to entitle restaurant operator to maintain action for breach of lease.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Eviction".

14. Landlord and tenant **§172(2)**

Any interference by landlord by which tenant is deprived of beneficial enjoyment of premises amounts to a "constructive eviction" if tenant so elects and surrenders possession.

15. Landlord and tenant **§48(1)**

One operating restaurant in connection with cocktail lounge, was not precluded from maintaining action against partners operating cocktail lounge for breach of oral lease of restaurant premises from the partners, on ground that partners violated the law and the terms of their state liquor license in separating the ownership and operation of the bar from that of the restaurant. Const. art. 20, § 22.

16. Landlord and tenant **§180(4)**

Where tenant whose lease was to run until September 1, 1946, was wrongfully evicted from premises on November 27, 1945, and there was evidence that her prof-

its from restaurant in leased premises had been \$500 a month, and between January and April, 1946, tenant operated a restaurant at another location and made a profit of \$450, but in April, 1946 she became ill and was thereafter unable to work, tenant was entitled to recover damages of \$4,500 for the nine months during which she was evicted, less the profit of \$450 made at the other location or \$4,050, and fact that tenant became ill in April and earned nothing thereafter did not reduce her right of recovery for breach of the lease.

Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

Action by Elma Aaker against John S. Smith and others, individually and as co-partners doing an on-sale retail liquor business under the firm name and style of Palm Gardens, to recover damages for breach by defendants of an oral annual year to year lease for certain restaurant premises and facilities located in defendants' cocktail lounge. From a judgment awarding plaintiff damages and from an order denying defendants' motion for a new trial, defendants appeal.

Appeal from order dismissed, and judgment modified, and, as modified, affirmed.

Bernard J. Abrott and Sheridan, Hoffman, & Mendel, all of Oakland, for appellants.

Frank E. Kilpatrick and Booth B. Goodman, both of Oakland, for respondent.

PETERS, Presiding Justice.

[1] The defendants, three partners operating a cocktail lounge in Albany, California, known as the "Palm Gardens," appeal from a judgment awarding plaintiff \$4,500 in damages for the breach by defendants of an oral annual year to year lease for certain restaurant premises and facilities located in the cocktail lounge. Defendants also notice an appeal from the order denying their motion for a new trial. That order is non-appealable, and the purported appeal therefrom should be dismissed.

The four basic contentions of appellants are (1) that respondent was in occupation

of the premises only as a tenant by sufferance, and that such tenancy was properly terminated by a 30 day notice to vacate; (2) that if there was an oral annual year to year lease such agreement violated the statute of frauds; (3) that the findings that the appellants had committed acts amounting to a constructive eviction in violation of the terms of a one-year lease are totally unsupported, and (4) that in any event the entire transaction was illegal, being in violation of the Alcoholic Beverage Control Act. Stats. of 1935, p. 1123, as amended.

The complaint alleged that "since the first day of September 1941, and during all the times herein mentioned up to November 27th 1945, the plaintiff herein was the lessee from defendants under a verbal annual one year lease from September 1, 1941" of the restaurant premises involved; that defendants conducted an "on sale retail liquor business in the operation of a cocktail liquor lounge or bar" in the remainder of the same premises; "that plaintiff entered into the operation of said restaurant business on said premises on September 1, 1941 with the understanding and agreement with said defendants that there would be no rental charge to plaintiff in the conduct of said restaurant business therein by plaintiff in view of and for the reason that under the rules, regulations and laws of the State of California governing, controlling and having jurisdiction to regulate the sale of intoxicating liquor it was and is a necessary requirement that food be provided for sale on premises where liquor is furnished and sold for consumption on the premises"; that for the first twelve months plaintiff operated the restaurant at a loss, but that she built the business until, for the past two years, she had been operating at a monthly profit of \$500; that on October 10, 1945, defendants served her with a notice to quit the premises, which notice is attached to the complaint as an exhibit; that plaintiff refused to quit, and told defendants that "she would insist upon her rights under said verbal annual lease which did not expire until September 1, 1946." The complaint then alleged, in substance, a constructive eviction. It sets forth a whole series of alleged acts and

representations by defendants, which plaintiff alleges compelled her to abandon the premises on November 27, 1945. It was then alleged that her business was thereby lost for the nine remaining months of her alleged verbal lease—i. e., until September 1, 1946—at the profit rate of \$500 per month. Her prayer was for \$4,500 in damages, which amount, as above indicated, was awarded her.

The court's findings followed, substantially, the allegations of the complaint. The conclusions of law are to the effect "that the plaintiff had a valid existing verbal lease upon the premises herein referred to, which did not expire until September 1, 1946"; that "the plaintiff was wrongfully evicted from said premises by the defendants through acts and conduct on the part of defendants designed by them to produce the wrongful eviction of plaintiff"; that by reason of the wrongful acts of defendants, plaintiff lost nine months' profits, or a total of \$4,500.

The findings to the effect that plaintiff had an oral lease which would not have expired until September 1, 1946, are amply supported by substantial evidence. It appears that in August, 1941, the defendants Smith and Rose operated the cocktail lounge in question. Defendant Matheson did not become a partner until April of 1945. Prior to August, 1941, the two defendant partners had had various persons operating the restaurant located on the premises, but, apparently, none of these operators could make the restaurant into a profitable business. During the last week in August, 1941, the last operator walked out, and the restaurant was not functioning. Under these circumstances, plaintiff was approached by defendant Smith as a prospective operator of the restaurant. She testified that she had a conversation with Smith; that Smith suggested that she take over the operation of the restaurant, which functioned in conjunction with the bar operated by defendants; that Smith told her that the restaurant part of the business had not been very good but that he could "work up a nice business if he could get someone in there";

that she asked Smith if she could have a written lease, but he replied that she could not because restaurants had to be run from the bar under the law; that "We talked then and agreed to have a verbal lease from year to year; that if the business picked up, the business would be good for me and good for him, and that we would if we went on—business would be better for us both"; that it was agreed at that time that she was to pay no rent other than seventy-five cents per day to pay the cost of operating the electric refrigerator; that this arrangement continued until August, 1944; that she was then told by their common bookkeeper that she was to pay \$50 per month for the utilities and her portion of the sales tax; that she paid \$50 per month for these purposes until she was evicted. She also testified that, under the above arrangement, she commenced operating the restaurant on September 2, 1941; that for about a year she operated at a loss, but that she gradually built the business up so that by 1945 she was averaging a profit of over \$500 a month, making \$6,076 profit in that year; that she operated the restaurant until November 27, 1945; that she was served with a notice to quit on October 10, 1945; that she began having trouble with defendants about the last week of October; that there was a marked decline in business after she received the notice; that thereafter the "attitude" of the defendants toward her "appreciably changed."

In discussing the nature of her tenancy, in addition to her testimony summarized above, the plaintiff stated that, subsequent to August, 1941, she talked to Smith about the continuation of her tenancy, and "Johnny told me I could be there as long as I wanted. He told me that a number of times, as long as I was happy there."

Plaintiff's witness, Cora W. Holling, testified that she had worked for plaintiff in the restaurant as a waitress; that some time between January and June of 1942 she was present at a conversation between plaintiff and Smith; that plaintiff expressed to Smith doubts about continuing to operate

the restaurant because of lack of business; that Smith urged plaintiff to continue on and "told her that if she stayed there he knew she would work up a good business and that she could stay there as long as she liked from year to year, that she would find that business would get better as she stayed there."

Smith admitted having a conversation with plaintiff in August, 1941, but claimed that the arrangement then made was that plaintiff could leave the project at any time. He admitted that the bar and the restaurant were operated separately, and that neither shared in the profits of the other. Separate books were kept, but the sales tax was paid as one operation, and then charged back against plaintiff.

Defendants contend that, as a matter of law, this evidence demonstrates that the tenancy was merely one at will or at sufferance, and that the finding that it was a year to year tenancy impliedly renewed from year to year is totally unsupported. Based upon this premise, it is urged that the October 10, 1945, notice to quit validly terminated the tenancy. In this connection reference is made to §§ 1945 and 1946 of the Civil Code. Section 1945 provides as follows: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year."

Section 1946, as it read until amended in 1947, provided as follows: "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in the last section, at the end of the term implied by law unless one of the parties gives notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month; provided, however, that as to tenancies for a period of a month or longer either of the parties may terminate the same by giving one month's notice thereof at any time and then rent shall be due and

payable to and including the date of termination. It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof."

Defendants have completely overlooked, or at least failed to mention, § 1943 of the Civil Code which reads as follows: "A hiring of real property, other than lodgings and dwelling houses, in places where there is no usage on the subject, is presumed to be for one year from its commencement, unless otherwise expressed in the hiring."

[2,3] It is quite clear that in each case the intention of the parties is the controlling factor, and that such intention must be ascertained in view of the presumptions created by the above sections. Defendants argue that, since the original arrangement was that plaintiff was to pay seventy-five cents daily as "rental" to pay for the operation of the refrigerator, the original tenancy was from day to day, and any implied renewal must, under § 1945, have been on a day to day basis. While it is true that the section presumes a renewal on the basis of the rental period, it is also quite clear that the section provides that the implied renewal, where the parties so intend, may be for the period of a year, but not in excess of that period. Here the plaintiff and Cora Holling testified that the initial term agreed upon was one year. When that evidence is weighed with the presumption created by § 1943 of the Civil Code, it is obvious that the finding that the original term and all implied renewals were for one-year periods is amply supported. (See discussion in *Brill v. Carsley*, 2 Cal.App. 331, 84 P. 57.)

[4] Defendants seek to invoke the presumption created by § 1945 that the implied renewal is only for a month where the rent is paid monthly, and point out that since August, 1944, plaintiff has been paying \$50 per month as rent. It is by no means clear that this payment was for rent. Plaintiff testified that she made the payment to pay her share for the "utilities." The accountant who kept the books for both parties testified that such \$50 payments were "al-

located to sales tax and utilities." However, even if the \$50 per month be considered as rent, such factor would not compel the conclusion that the tenancy was for month to month. Such factor would merely raise a presumption under § 1945 that the tenancy was for month to month, and would not necessarily control the evidence here present that the parties intended a yearly tenancy. In the present case the presumption created by § 1943, plus the evidence and the reasonable inferences therefrom, support the finding that the parties intended the longer term. This being so, the longer term was created by implication by the holding over.

[5, 6] Defendants contend, however, that, in any event, under the provisions of § 1946, the October 10, 1945, notice to quit terminated the lease, if one existed, one month thereafter. That would be true only if the hiring here were "for a term not specified." The section also provides that the notice shall be given "at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month." Here the term of the hiring was impliedly for one year. That means that on September 1, 1945, the term was impliedly renewed for one year. To have prevented the renewal of the term, under § 1946, the notice to quit would have had to be given on August 1, 1945. The October notice could not terminate the year tenancy already in existence.

[7-9] But, say defendants, this arrangement for an annual year to year lease violated the statute of frauds. Of course, an oral one-year lease is not within the statute. (§ 1624(4), Civil Code.) It is equally clear that an oral agreement for a one-year lease to be annually renewed for one-year terms at the desire of the tenant is violative of the statute. But defendants are in no legal position to raise the point. The complaint alleged that the agreement was oral. Defendants failed to demur, nor did they plead the statute of frauds in their answer. When the oral testimony was introduced they made no objection. They now seek to raise the defense of the statute of frauds for the first time on appeal. Under such

circumstances they must be deemed to have waived the defense. (See cases collected 12 Cal.Jur. p. 939, § 109; p. 941, § 110.)

[10, 11] In addition, it must be remembered that the first four years of plaintiff's occupancy have been fully executed. As to these periods already executed, the statute has no application. All that is before us is the period from September 1, 1945, until August 31, 1946. As already pointed out, a one-year lease is not within the statute. If the entire agreement must be considered as a unit, the four-year plus part performance would take the case out of the statute. *Schubert v. Lowe*, 193 Cal. 291, 223 P. 550; *Grant v. Long*, 33 Cal.App.2d 725, 92 P.2d 940. Thus, under any theory, the statute has no application.

This brings us to the most troublesome question on this appeal, namely, whether the findings that defendants committed certain acts amounting to a constructive eviction are supported by the evidence. In this connection the trial court found as follows:

"That plaintiff had always during the conduct of said restaurant business enjoyed the privilege of serving sandwiches at defendants' bar when ordered by customers, but on October 9, 1945, defendants refused further to permit plaintiff to do so any longer and defendants immediately thereafter entered upon a conspiracy among themselves to ruin plaintiff's said restaurant business in order to force her to abandon said restaurant business in order to force her to abandon said restaurant premises by various malicious acts of conduct and untruthful statements on their part designed to drive plaintiff's customers away from said premises and her said restaurant business, some of which are as follows:

"That on October 10, 1945, said defendants untruthfully advised one of the plaintiff's customers that plaintiff was not in business there any more;

"That on October 18, 1945, defendants forcibly removed the lock on the door to said restaurant premises after 12 P.M. of said day when said restaurant was closed for the day, and removed certain of plain-

tiff's property therefrom for use in said cocktail lounge;

"That on November 5, 1945, the defendants pried the lock of said door to said restaurant premises again and entered said restaurant premises and removed seven and one-half (7- $\frac{1}{2}$) pounds of hamburger steak from the refrigerator in said restaurant to the loss of plaintiff;

"That on November 12, 1945, defendants removed and disposed of or secreted plaintiff's sign advertising her restaurant and dining room business on said premises;

"That on November 12, 1945, John Smith, one of said defendants, in a loud and insulting manner and voice and in the presence and hearing of customers and designed to insult and embarrass plaintiff and her employees and to detrimentally affect plaintiff's business, told one of plaintiff's female employees regarding certain dishes and food equipment remaining on a table in said cocktail lounge to 'take the crap out of the bar room';

"That on November 18, 1945, defendants said to a customer of plaintiff not to eat in her restaurant any more as they 'wanted to freeze her out';

"That on November 22, 1945, defendants advised inquiring customers of plaintiff by telephone that plaintiff was not making reservations for Thanksgiving dinner at her restaurant when as a matter of fact plaintiff was taking reservations for Thanksgiving dinner on that day and always did enjoy a profitable Thanksgiving dinner business, and as a result of said untruthful statements by defendants, plaintiff served only seven (7) dinners that day;

"That on November 27, 1945, when plaintiff went to her restaurant about 11:00 o'clock A. M. of said day to open her business, she found the gas shut off so that she could not proceed with her business;

[12-14] "That defendants have since October 10, 1945, been guilty of a continuous program of harassment against plaintiff and her business by many other acts of conduct too numerous to mention here, designed to injure plaintiff and her business and the quiet enjoyment thereof." These

findings are taken almost verbatim from the allegations of the complaint. It must be conceded that, as to most of these findings, there is no evidence at all to sustain them—in fact, as to most of them, not one question was asked about them. What the record does show is this: Plaintiff had, through her own efforts, built up a profitable restaurant business operated in connection with the bar. After Matheson came in as a partner in April of 1945 some friction developed between him and plaintiff. It is a reasonable inference from the evidence that thereafter, and about October of 1945, the partners decided to force plaintiff to abandon her profitable business. They served the notice to quit on October 10, 1945, and, when plaintiff refused to abandon her business, they commenced a course of conduct aimed at forcing her to abandon the premises. The evidence most favorable to plaintiff, which we must accept, together with the reasonable inferences from that evidence, show that in the fall of 1945 the attitude of defendants towards plaintiff became definitely unfriendly. When restaurant customers ordered drinks from the bar such orders were not quickly filled. One waitress testified that when she served sandwiches at the bar the defendants rudely told her, apparently in the presence of the customers, to "get that crap out of here." Plaintiff testified as to the change in attitude on the part of defendants, and also that the outside sign advertising the restaurant was removed. While she could not say that defendants removed the sign, it is a reasonable inference that they caused it to disappear. A number of plaintiff's customers testified that prior to October and November, 1945, they had frequently telephoned the bar and restaurant to make dinner reservations and always were able to get the plaintiff, but that in October and November when they telephoned they were told by male voices that plaintiff was no longer in business there. The evidence shows that on such occasions plaintiff was not only in business, but was actually on the premises. The customers could not identify any of the defendants as the persons who told them that plaintiff was out of business, nor could

plaintiff so testify, but it is a reasonable inference that defendants or their employees thus attempted to ruin the business. The evidence shows that during the times in question there were two telephones in the bar—one on the wall, and an extension behind the bar which was usually attended by one of the defendants. The normal procedure was for the person behind the bar to answer the phone, but occasionally this was done by customers. While defendants denied ever having told customers of plaintiff that she was no longer in business, these denials were not believed by the trial judge. He saw these witnesses and undoubtedly believed that defendants were not telling the truth. Under the circumstances, and under the evidence already set forth, he could and did reasonably infer that defendants were responsible for the misrepresentations. His finding, under such circumstances, cannot be disturbed. This being so, although some of the findings are not supported, we are of the opinion that a sufficient number of the findings are supported to justify the court in finding a constructive eviction. The correct rule, supported by many cases, is thus stated in *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 670, 155 P.2d 24, 27: "Any interference by the landlord by which the tenant is deprived of the beneficial enjoyment of the premises amounts to a constructive eviction if the tenant so elects and surrenders possession * * *." (See, also, cases collected 15 Cal.Jur. p. 679, § 89, et seq.)

[15] Appellants next contend that under the state Constitution (art. XX, § 22), and under the provisions of the Alcoholic Beverage Control Act (Stats. of 1935, p. 1123, as amended), they violated the law and the terms of their state license in separating the ownership and operation of the bar from that of the restaurant, and that plaintiff was in *pari delicto* with them in thus violating the law. The problem as to whether a bar licensee has violated the terms of his state license in thus separating the ownership and operation of the bar and restaurant presents a most interesting question, but it is one that is not here involved. Plaintiff has not grounded her claim to a leasehold interest upon any intended infringement of the law by defendants, even

if she knew of the assumed violation. A leasing of premises—even of premises upon which a bar is located—for restaurant purposes is certainly legal. The restaurant could be operated whether or not a bar was also operated. The plaintiff's right to occupy such premises for restaurant purposes must be considered separate and apart from any intention on the part of defendants to violate the law in the respect that they now so cheerfully admit. The true rule applicable to this situation was stated in *Wayman Inv. Co. v. Wessinger & Wagner*, 13 Cal.App. 108, 110, 108 P. 1022, 1023, as follows: "Although there may be some illegal features indirectly connected with a transaction involved in a suit, yet the plaintiff may recover if his cause of action is otherwise legitimate, and he can make out his case without calling to his aid the illegal agreement. The test of whether the demand can be enforced at law is whether the plaintiff requires the aid of the illegal contract to establish his case." See, also, *McAllister v. Drapeau*, 14 Cal.2d 102, 112, 92 P.2d 911, 125 A.L.R. 800; *Warner v. Marchetti*, 52 Cal.App.2d 172, 177, 125 P.2d 838; *Wagner v. Worrell*, 76 Cal.App.2d 172, 179, 172 P.2d 751.

[16] The last contention of defendants is that the evidence is insufficient to support the award of \$4,500. The trial court found that plaintiff had been deprived of the leased premises for a period of nine months, and that her profits were \$500 per month. The plaintiff testified as to her profits for the year 1945, and such evidence amply supports the finding. Defendants offered no evidence on the issue. But plaintiff also testified that between January and April, 1946, she operated a restaurant in Oakland, and, during that period, made a net profit of \$450. In April, 1946, she became ill, and thereafter was unable to work. There can be no doubt at all that the \$450 made during the term of the lease should have been deducted from her total loss of \$4,500. She is entitled to recover only her net loss, and that was \$4,050 and not \$4,500, according to her own testimony. The fact that she became ill in April, and earned nothing thereafter, does not reduce her right to recover the loss caused by defendants' breach of the lease. There is no evidence that, even

though plaintiff was ill, had the lease not been breached by defendants' wrongful acts, plaintiff would not have continued to operate the restaurant through her employees and would not have made at least \$500 per month profit.

The appeal from the order denying the motion for a new trial is dismissed. So far as the appeal from the judgment is concerned, the findings are modified so as to provide that plaintiff earned the sum of \$450

between the months January to April, 1946; the conclusions of law are modified to likewise so provide and to provide that such sum should be deducted from the sum of \$4,500; and the judgment is modified by reducing the amount thereof from \$4,500 to \$4,050. As so modified, the judgment is affirmed, both sides to bear their own costs on this appeal.

WARD and BRAY, JJ., concur.

32 Cal.2d 364

**CITY AND COUNTY OF SAN FRANCISCO
v. KUCHEL, State Controller.
S. F. 17711.**Supreme Court of California.
Aug. 6, 1948.**1. States ☞131**

Appropriation legislation need not be in any particular form, but intent to appropriate funds must be clear.

2. Intoxicating liquors ☞95

The provision of 1947 amendment to Alcoholic Beverage Control Act for transfer of any balance in Alcoholic Beverage Control Fund to general fund on state controller's order authorized such transfers at controller's discretion either before or after due dates of payments to cities and counties of moneys collected by state as liquor license fees, so that 1947 appropriation of such moneys applied only to amount paid into fund after effective date of amendment and only half of amounts received before such time under original act from licensees within city and county of San Francisco were payable thereto. Gen.Laws, Act 3796, § 37.

Proceeding by the City and County of San Francisco for a writ of mandate to compel Thomas H. Kuchel, as Controller of the State of California, to pay petitioner its proportionate amount of liquor license fees collected by respondent.

Petition for peremptory writ denied, and alternative writ discharged.

John J. O'Toole, City Atty., and C. Wesley Davis, Deputy City Atty., both of San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., and Robert E. Reed, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

For many years, the Alcoholic Beverage Control Act, Stats.1935, p. 1123, Deering's Gen.Laws, Act 3796, required that one-half of the amount collected by the State as fees for liquor licenses be paid to the cities

and counties. In 1947, the Legislature amended the statute, Stats. 1947, Ch. 712, p. 1766, to provide that the cities and the counties shall receive all of the amounts so collected. The present controversy concerns the right of the State to one-half of the fees collected in 1947 to September 19th, the effective date of the new enactment.

The amendment was made by striking from the act the italicized words of section 37, which now reads as follows: "Sec. 37. All moneys collected as license fees and under the excise tax provisions of this act shall be deposited in the State Treasury to the credit of the Alcohol Beverage Control Fund, which fund is hereby created. Moneys in said fund are hereby appropriated as follows:

"(a) *Fifty per cent of* All moneys collected from fees, to be paid semiannually to the counties, cities and counties, and cities of this State in the proportion that the amount of the fees collected in the particular county, city and county, or city bears to the total amount so collected throughout the State, and the State Controller shall during the months of April and October of the year, draw his warrants upon said fund in favor of the treasurer of each county, city and county, and city for the amount to which each is entitled hereunder;

"(b) Such amount as is necessary for the allowance of the refunds provided for in this act;

"(c) *From the remainder of said moneys such amounts as may be made available pursuant to Section 661 of the Political Code for expenditure by the board in carrying out the provisions of this act;*

"(d) Any remaining balance to be transferred to the General Fund on the order of the Controller."

As the basis for the present proceeding, the City and County of San Francisco takes the position that the amendment to the act is an appropriation measure which provides for a payment to the cities and the counties in October, 1947, without regard to the time of the collection of the fees. The Legislature was aware that the change would be effective before October, says

the petitioner, and there is nothing to indicate an intention to give the law retroactive effect. The controller asserts that the money paid into the Alcohol Beverage Control Fund is continually appropriated for the purposes provided by section 37 of the act, which provides for transfers to the general fund of all balances in the fund "on the order of the Controller." The specification of the dates for the making of payments, he contends, does not freeze the money, other than the fifty per cent to be paid to the cities and the counties, in the fund. The transfers of money from the Alcohol Beverage Control Fund into the general fund made prior to September 19, 1947, were authorized by law, and, therefore, only the receipts from license fees paid into the fund after September 19, 1947, are subject to the amendment.

[1] Section 37 of the act is an appropriation measure. No particular form is required for such legislation (*Riley v. Johnson*, 219 Cal. 513, 519, 27 P.2d 760, 92 A.L.R. 1292), but the intent to appropriate funds must be clear. However, the petitioner confuses "appropriated" and "paid" and concludes that the appropriation by the State is made during April and October of each year at the time of the settlement with the cities and the counties. From this premise, apparently, the petitioner also concludes that all moneys collected during the period between settlements must remain in the Alcohol Beverage Control Fund until a semiannual payment is made because there is no appropriation and without an appropriation there cannot be a balance transferable "on the order of the Controller" to the general fund.

[2] The position of the controller is the more reasonable construction of the section, and it is supported by the legislative history of the enactment. Originally, the payment to the cities and the counties was required to be made annually, in March of each year. At that time, 1935, there was no money in the general fund of the State and all warrants issued against that fund were registered. When the State received sufficient revenue to redeem these warrants, they were paid with interest. By provid-

ing for a transfer to the general fund "on the order of the Controller" of amounts not appropriated to the cities and the counties, the Legislature, by this and other revenue raising legislation, made money available for the needs of the State as quickly as possible and kept the amount of outstanding registered warrants to a minimum. This policy also reduced the interest charge to the State. To allow money paid into the Alcohol Beverage Control Fund to lie dormant until March of each year would have been contrary to the best interest of the State and its creditors.

Earlier legislation expressly established the system of handling the State's revenues which the petitioner argues should be followed in making payments from the Alcohol Beverage Control Fund. For example, the Real Estate Act, Stats.1919, p. 1252, as amended, Deering's Gen.Laws, Act 112, now included in sec. 10451-10455, Bus. & Prof. Code, provided: "All moneys which shall be paid into the state treasury and credited to the 'real estate commissioner's fund' are hereby appropriated to be used by the commissioner in carrying out the provisions of this act * * *. All moneys remaining in the state treasury to the credit of the 'real estate commissioner's fund' at noon on the thirty-first day of December of each year shall on or before the fifteenth day of the succeeding January be transferred from said 'real estate commissioner's fund' to the general fund of the state." Sec. 5. When, therefore, the Legislature provided that the transfer may occur "on the order of the Controller" rather than at a specified time, it clearly authorized such transfers to be made at the discretion of the controller and either before or after the time when payments are due to the cities and counties.

It follows, therefore, that the 1947 appropriation of all moneys collected from license fees applies only to the amount of fees paid into the Alcohol Beverage Control Fund on and after September 19, 1947, the effective date of the amendment. Accordingly, only fifty per cent of the amounts received prior to that time from licensees within the City and County of San Francisco are payable to the petitioner.

The petition for a peremptory writ of mandate is denied and the alternative writ is discharged.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



32 Cal.2d 400

KNIGHT v. BOARD OF ADMINISTRATION OF STATE EMPLOYEES' RETIREMENT SYSTEM et al.

Sac. 5900.

Supreme Court of California.

Aug. 13, 1948.

1. Master and servant ⇐1

Term "employees" has no fixed meaning that must control in every instance.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

2. Pensions ⇐1

Statutory provisions for pensions must be liberally construed to end that their beneficial purposes are broadened rather than narrowed.

3. States ⇐57

Word "employees", as used in constitutional provision authorizing Legislature to provide retirement systems for employees of state, was broad enough to include officers elected or appointed, including legislators, and, as so construed, authorizes legislation establishing a retirement system for members of state Legislature. Gov.Code, §§ 9350 et seq., 9353, 20000 et seq.; Const. art. 4, §§ 22a, 23, 23b.

4. Constitutional law ⇐19

Failure of Legislature to enact retirement act for its members for a considerable time after adoption of constitutional provision authorizing Legislature to provide retirement system for employees of state did not constitute a contemporary construction of the constitutional provision to effect

that they had no such power. Const. art. 4, § 22a.

5. States ⇐59

Where act establishing retirement system for members of state Legislature makes it wholly voluntary with members of Legislature whether they should avail themselves of benefits and assume burdens of the system, that part of retirement act calling for a deduction from compensation to supply retirement fund does not render act invalid as violative of constitutional provision fixing compensation for members of Legislature at \$100 per month. Gov.Code, §§ 9350 et seq., 9355-9355.3; Const. art. 4, §§ 22a, 23, 23b.

Original mandamus proceeding by T. Fenton Knight against Board of Administration of the State Employees' Retirement System and others, involving validity of legislation establishing a retirement system for members of the State Legislature.

Peremptory writ of mandate issued as prayed for by petitioner.

Fred B. Wood, of San Francisco, and Joseph L. Knowles and Bernard Czesla, both of Sacramento, for petitioner.

Fred N. Howser, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents.

CARTER, Justice.

The controversy here presented involves the validity of the 1947 legislation establishing a retirement system for members of the State Legislature. Gov.Code, secs. 9350 et seq., as added by Stats., 1947, ch. 879. There is a state employee's retirement administered by a state agency (Gov. Code, secs. 20,000 et seq.) and it is provided that the legislator's retirement system be administered by the same agency. Gov.Code, sec. 9353.

Various constitutional provisions are invoked by respondents as invalidating the legislation: First, "The members of the Legislature shall receive for their services the sum of one hundred dollars each for each month of the term for which they are

elected, to be paid monthly in the even numbered years and to be paid during the regular legislative session in the odd numbered years at such times as may be provided by law and mileage to be fixed by law, all paid out of the State Treasury, such mileage not to exceed five cents per mile." Cal.Const., Art. IV, sec. 23. Second, "Members of the Legislature shall receive no compensation for their services other than that fixed by the Constitution but each member shall be allowed and reimbursed expenses necessarily incurred by him while attending regular, special and extraordinary sessions of the Legislature. The amount of the expenses necessarily incurred by the respective members, while attending any such sessions, shall be determined and payment thereof provided for by joint rules of the Senate and Assembly. Such expense allowances may equal but shall not exceed the expense allowances now authorized for other elected State officers." Cal. Const., Art. IV, sec. 23b. It is reasoned by respondents that payments made under a retirement system, that is, pensions to employees or officers, are, in effect compensation for services; that the compensation allowable to legislators is limited by the above quoted provisions of the constitution; and that hence, pensions cannot be given to members of the Legislature.

On the other hand those constitutional provisions, argues petitioner, do not control or are modified by a third provision of the constitution reading: "The Legislature shall have power to provide for the payment of retirement salaries to employees of the State who shall qualify therefor by service in the work of the State as provided by law. The Legislature shall have power to fix and from time to time change the requirements and conditions for retirement which shall include a minimum period of service, a minimum attained age and minimum contribution of funds by such employees and such other conditions as the Legislature may prescribe, subject to the power of the Legislature to prescribe lesser requirements for retirement because of disability. * * *" (Cal.Const., Art. IV, sec. 22a); that the phrase "employees of the State" as used therein, properly interpreted, is suffi-

ciently broad to embrace members of the Legislature; that thus the first and second constitutional provisions with reference to compensation above quoted, are modified to the extent of permitting a retirement system for legislators. We believe those contentions are sound.

[1-3] The term "employees" has no fixed meaning that must control in every instance. *State ex rel. Maryland Casualty Co. v. Hughes*, 349 Mo. 1142, 164 S.W.2d 274; 30 C.J.S., *Employee*, page 226; 14 *Words & Phrases*, Perm.Ed., page 357. The flexibility of the term "employee" is of special significance when considered in connection with the rule that statutory provisions for pensions must be liberally construed to the end that their beneficial purposes are broadened rather than narrowed. *Gibson v. City of San Diego*, 25 Cal.2d 930, 156 P.2d 737; *McKeag v. Board of Pension Com'rs*, 21 Cal.2d 386, 132 P.2d 198; *Dillard v. City of Los Angeles*, 20 Cal.2d 599, 127 P.2d 917, 128 P.2d 537; *Casserly v. City of Oakland*, 215 Cal. 600, 12 P.2d 425; *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366. For illustration, in *McKeag v. Board of Pension Commissioners*, supra, 21 Cal.2d at page 390, 132 P.2d 198, 200, where the issue concerned the classes of the persons covered by the pension statute, this Court said: "Defendants attribute a very restricted meaning to the language which specifies those employees who shall constitute members of the fire department * * * The language of section 185 ought not to be interpreted narrowly. Rather, a liberal construction is to be given, in accordance with the rule ordinarily used in construing pension legislation. *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366; *Casserly v. City of Oakland*, 215 Cal. 600, 12 P.2d 425; *Dillard v. City of Los Angeles*, 20 Cal.2d 599, 127 P. 2d 917 [128 P.2d 537]. As was said in *Hurley v. Sykes*, supra, 69 Cal.App. [310] page 316, 231 P. [748], 751, 'In ascertaining the intent and meaning of the charter provision, a liberal construction should be indulged in to carry out the beneficial purposes aimed at. [Citing cases.] The spirit of these provisions is to protect all members of the fire department in the benefits which the fund insures, and they should not be narrowed

by any strict or technical construction, but should be interpreted on broad principles. Any other construction would result in a limitation of the beneficial provisions of the act, and render nugatory the manifest intention of the law-making power, and do violence to its apparent purpose.' " Thus "employee" should be given a comprehensive meaning to include officers elected or appointed including legislators.

The concept that the word "employee" may have a sweeping connotation has been considered by the Legislature in the statute establishing a retirement system for county employees which was adopted before the adoption of the third constitutional provision above quoted. It defined "employees" as including "both appointive officers and employees" of the county. Stats.1919, ch. 373, Gen.Laws, Act 5841, § 1(d). The act following the last cited act defined the term as any officer or employee whose compensation is fixed by the supervisors. Stats.1937, ch. 677. The workmen's compensation laws define an employee as including "all elected and appointed paid public officers." Labor Code, sec. 3351. In dealing with the subject of a retirement system for state employees (above referred to, as distinguished from the legislator's retirement act, supra), the Legislature created a commission to study the subject in 1927 (Stats.1927, ch. 431) whose duty was to inquire into "the subject of retirement pensions * * * for state officers and employees." The report of that commission contained advice from the Attorney General to the effect that it was not necessary for the commission to go into the question of the line of demarcation between officers and employees. In 1929 a bill was introduced in the Legislature, which, in defining state employees excluded "elective officers," intimating that otherwise they would be embraced within the term. At that same session of the Legislature the assembly constitutional amendment which became the third provision of the constitution above quoted was introduced. In the state employee's retirement act as later adopted in 1931, it was found necessary in defining "employees" to exclude elective officers. Stats.1931, ch. 700, Gen.Laws, Act. 5847, § 4.

It is true that the argument to the voters when the third constitutional provision above quoted was adopted, discussed matters more appropriate to a strict definition of employees; that the limitation on the compensation of legislators is clearly expressed in the first and second provisions above quoted; and that the voters have defeated a constitutional amendment to increase the compensation of the legislators, yet the main and controlling feature of the third provision above quoted is the authorization of a *retirement system for persons rendering service for and being paid by the state*. The arguments in favor of a retirement plan are equally applicable to all persons who are servants of the state, whether they are elected or appointed officers in the strict sense, or the lowliest workmen. One of the purposes of a retirement system is an inducement which will enable the government to secure and retain a more qualified government personnel. That purpose is more important in the case of officers than ordinary employees when we consider the more important functions they perform. It must be recognized that among the state officers there are none whose duties are more vital to the state than those imposed upon the members of the Legislature. We believe, therefore, that the purpose of the third constitutional provision above quoted will be more fully served if it embraces legislators. See, *Talbott v. Public Service Commission*, 291 Ky. 109, 163 S.W.2d 33. Inasmuch as the third provision above quoted is not necessary to authorize the establishment of a retirement system for those whose remuneration is fixed by the Legislature, it may well be that the adoption of that provision was to authorize the establishment of a retirement system for officers whose compensation is fixed by the constitution (legislators are such officers). There are many kinds and types of officers, quasi officers, in name only. A policeman or patrolman is called an officer but he is completely subject to the direction of his superior officers. If one word is chosen to embrace all persons serving and paid by the state, "employee" would come the nearest to being an all inclusive term. When we speak of compensation for those persons in a broad sense, pensions

are included. The references to compensation in the first and second constitutional provisions above quoted are more directly concerned with current pay rather than deferred compensation—pension payments.

[4] We are not convinced that the failure of the Legislature to enact the retirement act for its members for a considerable time after the adoption of the third provision above quoted in 1930 constitutes a contemporary construction thereof to the effect that they had no such power. Said provision is merely an enabling one and there may have been many reasons other than a thought of lack of power for the inaction. We believe the reasons heretofore discussed are more compelling.

It clearly follows that giving the term "employees" a meaning sufficiently broad, the third provision modifies the first and second provisions above quoted. The first constitutional provision above quoted has been as it now reads since 1924. The third provision was adopted in 1930. The second provision was adopted in 1944. The phrase in the latter provision that the members of the Legislature shall receive no compensation "other than that fixed by the constitution" fits into the picture. "Fixed by the constitution" includes the deferred compensation—retirement pay—embraced in the third provision. While the latter provision does not by itself name a certain compensation it authorizes the Legislature to adopt a pension system which has often been called deferred compensation. That is tantamount to the constitution fixing it, inasmuch as the Legislature is authorized by the constitution to state it precisely. The compensation is fixed or settled as the power to ascertain deferred compensation is fixed—it is given to the Legislature. *San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166.

[5] It is urged that the members of the Legislature are entitled to receive \$100 per month by virtue of the first constitutional provision above quoted and therefore the Legislature had no power in the retirement act to call for a deduction from the compensation to supply the retirement fund. The obvious answer to that is that it is wholly voluntary with the members of the

Legislature whether they shall avail themselves of the benefits and assume the burdens of the system. Gov.Code, secs. 9355-9355.3.

It is ordered that a peremptory writ of mandate issue as prayed for by petitioner.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



32 Cal.2d 280

ROEHM v. ORANGE COUNTY et al.

L. A. 20171.

Supreme Court of California, in Bank.

July 30, 1948.

Dissenting Opinion Aug. 2, 1948.

Rehearing Denied Aug. 26, 1948.

1. Taxation ⚡347

In determining the value of property, assessing authorities may consider earnings derived therefrom, which may depend upon the possession of intangible rights and privileges that are not themselves regarded as a separate class of taxable property.

2. Taxation ⚡117

Franchises for purposes of taxation are regarded as a class of property separate from all other classes of property. Const. art. 13, § 16.

3. Taxation ⚡117

A license to engage in business activities is not a "franchise" for purposes of taxation. Const. art. 13, § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Franchise".

4. Intoxicating liquors ⚡90(1)

The constitutional and statutory provisions relating to the taxation of franchises are not applicable to liquor licenses. Const. art. 13, § 16.

5. Taxation ⚡74, 75

Under constitutional provision authorizing legislature to provide for assessment

of taxes upon all forms of tangible personal property, notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages, and any legal or equitable interest therein, not exempt by constitution from taxation, and statute defining intangible personal property for purpose of taxation to be only the items enumerated in the constitutional provision, only the intangibles enumerated are "personal property" for purposes of taxation, and an on-sale general liquor license was not subject to an ad valorem city and county tax as personal property. Revenue and Taxation Code, § 111; Const. art. 13, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Property".

6. Intoxicating Liquors ⇨90(1)

Under the constitutional provision giving state exclusive right and power to control, license and regulate the manufacture, sale, etc., of intoxicating liquor within state, liquor licensees are not subject to local license or occupation tax for the selling of intoxicating liquor. Const. art. 20, § 22.

SHENK and CARTER, JJ., dissenting.

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Action by E. L. Roehm, individually, and doing business as Marquis Cafe, against County of Orange, a political subdivision of the state of California, and City of Santa Ana, a municipal corporation of the fifth class, to recover county and city property taxes levied on plaintiff's on-sale general liquor license. From judgment dismissing action, plaintiff appeals.

Reversed.

Prior opinion, 187 P.2d 49.

Head, Wellington & Jacobs, Arthur M. Bradley and Otto A. Jacobs, all of Santa Ana, for appellant.

Fred N. Howser, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., and Irwin M. Fulop, Landon Morris, Albert E. Isenberg, Holbrook & Tarr and W. Sumner Holbrook, Jr., all of Los Angeles, amici curiae, on behalf of appellant.

Joel Ogle, County Counsel, George F. Holden and Royal E. Hubbard, Deputy County Counsel, and John K. Colwell, City Atty., all of Santa Ana, for respondents.

Harold W. Kennedy, County Counsel, and Loton Wells Deputy County Counsel, both of Los Angeles, amici curiae, on behalf of respondents.

TRAYNOR, Justice.

The county assessor of Orange County in 1946 assessed as personal property plaintiff's on-sale general liquor license issued by the State Board of Equalization. Ad valorem county and city property taxes levied thereon in the sum of \$432.62 were paid by plaintiff under protest, and he brought this action to recover them. He appeals from a judgment dismissing his action upon the sustaining of a general demurrer to his complaint.

Plaintiff contends that liquor licenses, like many other intangible assets, are not taxable. He asks that the court be mindful of the practice for almost a hundred years in this state not to levy property taxes on liquor licenses and other licenses or on many other intangible assets such as patents, copyrights, trademarks, judgments, causes of action, the goodwill of businesses, insurance policies, stock exchange seats, press association memberships, and memberships in social, professional, and fraternal clubs. He contends that this practice was based on the conviction of taxing authorities as well as taxpayers that such intangibles are not property within the meaning of the constitutional and statutory provisions imposing a uniform property tax on all non-exempt property in the state, and that this conviction was sustained by this court in holding that the right to a stock exchange seat is "too impalpable to go into any category of taxable property." *San Francisco v. Anderson*, 103 Cal. 69, 70, 36 P. 1034, 42 Am.St.Rep. 98. He also contends that section 1 of Article XIII of the California Constitution and statutory provisions enacted pursuant thereto must be read, not alone, but in conjunction with the various amendments adopted to the property tax provisions of the Constitution; that these amendments made substantial changes with respect to personal property by estab-

lishing the policy of eliminating altogether property taxation of all intangibles except solvent credits and substituting therefor taxation of the income derived from such intangibles; that in implementing this policy the Legislature enacted the Personal Income Tax Act and eliminated property taxation of intangibles except for a minimal tax on solvent credits; and that in any event counties and cities cannot impose property taxes on liquor licenses without encroaching upon the exclusive power of the State Board of Equalization under section 22 of Article XX of the California Constitution to issue such licenses and to collect license fees and occupation taxes on the manufacture and sale of liquor.

Defendants contend on the other hand that a liquor license is property within the meaning of section 1 of Article XIII of the California Constitution and sections 201 and 103 of the Revenue and Taxation Code¹, under which all property in this state must be uniformly taxed unless it is exempt from taxation and that there is no exemption of liquor licenses; and that since the tax in question is a property tax and not an excise tax on an occupation, it does not encroach upon the exclusive power of the State Board of Equalization under section 22 of Article XX to issue liquor licenses or collect license fees and occupation taxes on the manufacture and sale of liquor. Defendants' reasoning is as follows: The attributes of property in a liquor license are the exclusive right granted by the state to a small group of licensees in each county to enjoy the benefits of the business of engaging in the sales of distilled spirits and the transferability of the right by ordinary sale. Under section 38f of the act, Gen.Laws, Act 3796, licensees receive valuable rights and privileges not available to others, since the number of general liquor licenses is limited in proportion to the population in each of the counties of the state. Others who wish to enter the business can do so only by acquiring the privilege from one who has been previously licensed. Consequently, the

license itself has become as valuable as the stock in trade or the other tangible assets of a liquor establishment. Although a liquor license is merely a privilege so far as the relations between the licensee and the state are concerned, it is property in any relationship between the licensee and third persons, because the license has value and may be sold. *Deggender v. Seattle Brewing and Malting Co.*, 41 Wash. 385, 83 P. 898, 4 L.R.A.,N.S., 626, 628; 148 A.L.R. 492; *Jaffe v. Pacific Brewing and Malting Co.*, 69 Wash. 308, 124 P. 1122. A liquor license that is transferable has been held to be property subject to execution and attachment if local law provides a statutory procedure therefor (*Rowe v. Colpoys*, 78 U.S. App.D.C. 75, 137 F.2d 249, 148 A.L.R. 488, 492; *In re Fuetl*, D.C., 247 F. 829, 40 Am. Bankr.Rep. 570; *Sayer's Appeal*, 89 Conn. 315, 94 A. 358), and under the Bankruptcy Act such a license is usually regarded as property that passes to the trustee in bankruptcy. *Fisher v. Cushman*, 1 Cir., 103 F. 860, 51 L.R.A. 292. These decisions recognize the principle that since such a license has a transferable value to the debtor it is property that in fairness ought to be within the reach of his creditors. Since by statute a liquor license in this state has in effect been given a transferable value, it has assumed the characteristics of property. If a system of ad valorem taxation is to reach all property in the community, tenuous distinctions should not be indulged in to exclude a liquor license from taxation. Virtually the same reasoning could be advanced for the taxation of other forms of governmental permits, stock exchange seats, press association memberships, memberships in social, professional, and fraternal clubs, patents, copyrights, good will, judgments, causes of action, and insurance policies, which have never been taxed as property in this state during its entire existence. These contentions therefore raise questions of public importance that involve numerous rights and privileges other than liquor licenses, for the characteristics that it is claimed make liquor licenses taxable as

¹ "All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code." Sec. 201."

"'Property' includes all matters and things, real, personal, and mixed, capable of private ownership." Sec. 103.

property would likewise make numerous other rights and privileges taxable as property.

Article XIII of the California Constitution as first adopted provided for a uniform property tax upon real and personal property alike. This requirement of uniform taxation of real and personal property, however, has been abandoned by subsequent amendments. Under these amendments the Legislature may classify personal property for purposes of taxation or exempt all personal property or any form, type, or class thereof. In the light of these amendments and the legislation pursuant thereto, it is unnecessary to determine whether liquor licenses and other intangible rights and privileges, which under settled practice were not taxed as property when the constitution made uniform taxation of all property in the state mandatory, should have been taxed. The controlling question is whether under present constitutional and statutory provisions such licenses can now be regarded as personal property for the purposes of taxation.

The constitutional amendments relating to the taxation of personal property, particularly intangibles, as adopted in 1933 as part of section 14 of Article XIII, read in part as follows:

"The Legislature shall have the power to provide for the assessment, levy and collection of taxes upon all forms of tangible personal property, all notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages, and any legal or equitable interest therein, not exempt from taxation under the provisions of this Constitution, in such manner, and at such rates, as may be provided by law, and in pursuance of the exercise of such power the Legislature, two-thirds of all of the members elected to each of the two Houses voting in favor thereof, may classify any and all kinds of personal property for the purposes of assessment and taxation in a manner and at a rate or rates in proportion to value different from any other property in this State subject to taxation and may exempt entirely from taxation any or all forms, types or classes of personal property.

"The total tax imposed on notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages and any legal or equitable interest therein in pursuance of the provisions of this section shall not be at a rate in excess of four-tenths of 1 per cent of the actual value of such property and no tax burden shall be imposed upon any personal property either tangible or intangible which shall exceed the tax burden on real property in the same taxing jurisdiction in proportion to the actual value of such property."

The distinction in the first clause of this amendment between "all forms of tangible personal property" and "all notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages, and any legal or equitable interest therein" and the reference in the second clause to "any and all kinds of personal property" and to "any or all forms, types or classes of personal property" indicate that the framers of the amendment, following the practice established for generations and sustained by this court in *San Francisco v. Anderson*, 103 Cal. 69, 70, 36 P.1034, 42 Am.St.Rep. 98, were of the view that the intangibles listed covered all the forms of taxable intangible property, just as the phrase "all forms of tangible personal property" covered all forms of such property. The first clause is a grant of power to the Legislature to provide for the assessment, levy, and collection of taxes, but it does not grant power to provide for the taxation of intangible assets other than those listed. Moreover, it cannot reasonably be assumed that the provision authorizing classifications and exemptions, which is all inclusive, was intended to be broader in scope than the provision granting power to provide for assessment, levy, and collection, for it is in "pursuance of the exercise of such power" that the classifications and exemptions may be made.

[1] What appears from the constitutional provisions by clear implication is expressly stated in section 111 of the Revenue and Taxation Code, which defines intangibles and intangible personal property for purposes of taxation: "'Intangibles' means intangible personal property of a type not

exempt from taxation and any interest therein. 'Intangible personal property' means *only* notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, and mortgages." (Italics added.) It is clear that it is the purpose of section 111 to confine the meaning of intangible personal property to the intangibles listed, not to establish the fiction that intangible assets other than those therein specified are tangible personal property. Emanating from a Legislature vested with the power to exempt from taxation all kinds of personal property, it makes immune from taxation all intangibles not included in the statutory definition. Intangible values, however, that cannot be separately taxed as property may be reflected in the valuation of taxable property. Thus, in determining the value of property, assessing authorities may take into consideration earnings derived therefrom, which may depend upon the possession of intangible rights and privileges that are not themselves regarded as a separate class of taxable property. *Los Angeles Gas & Electric Co. v. Los Angeles County*, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277; *Eastern-Columbia, Inc., v. County of Los Angeles*, 61 Cal.App.2d 734, 745, 143 P.2d 992; *Birch v. County of Orange*, 59 Cal. App. 133, 136, 138, 210 P. 57; *Ewert v. Taylor*, 38 S.D. 124, 160 N.W. 797; *South Utah Mines v. Beaver County*, 262 U.S. 325, 330, 43 S.Ct. 577, 67 L.Ed. 1004; *Stein v. Mobile*, 17 Ala. 234; see 3 *Cooley, Taxation*, 4th Ed., sec. 1145; 51 *Am.Jur.* 649.

[2] It should be noted that franchises are not governed by the foregoing provisions of section 14 of Article XIII of the California Constitution or of section 111 of the Revenue and Taxation Code. They are made a separate subject of taxation by section 16 of Article XIII: "The Legislature may provide by law for the taxation of corporations, their franchises, or any other franchises, by any method not prohibited by this Constitution or the Constitution or laws of the United States." Franchises have long been regarded in this state as a class of property separate from all other classes of property. *San Jose Gas Co. v. January*, 57 Cal. 614; *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *Stockton*

Gas & Electric Co. v. San Joaquin County, 148 Cal. 313, 83 P. 54, 5 L.R.A.,N.S., 174, 7 Ann.Cas. 511; *Kern River Co. v. Los Angeles County*, 164 Cal. 751, 130 P. 714; *Western Union Telegraph Co. v. Hopkins*, 160 Cal. 106, 116 P. 557; *Postal Telegraph-Cable Co. v. City of Los Angeles*, 164 Cal. 156, 128 P. 19. The tax imposed by the Bank and Corporation Franchise Tax Act (Stats.1929, p. 19, as amended, Gen.Laws, Act 8488) on corporations for the privilege of exercising their corporate franchises in this state according to or measured by their net income is "in lieu of all ad valorem taxes and assessments of every kind and nature upon the general corporate franchises of the corporations taxable hereunder but shall not be in lieu of any taxes or assessments upon the special franchises owned, held or used by said corporations. All such special franchises shall be assessed annually by the State Board of Equalization (at their actual value) in the same manner as is provided for the assessment of other property to be assessed by said board under Section 14 of Article XIII of the Constitution of this State, and shall be subject to taxation to the same extent and in the same manner as other property so assessed by said board." Sec. 4(7).

[3,4] The constitutional and statutory provisions relating to the taxation of franchises are not applicable, however, to liquor licenses and have never been applied to such licenses, for under the decision of this court in *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 107, licenses to engage in business activities are not franchises for purposes of taxation.

The construction of section 14 of Article XIII of the California Constitution and section 111 of the Revenue and Taxation Code as specifying the intangible assets (except franchises, for which specific provision is made elsewhere) that are subject to property taxation is clearly supported by the considerations of policy underlying the amendments to the constitution and the legislation pursuant thereto. It has long been recognized that concealment of intangible assets inescapably follows from the imposition of high property taxes thereon, and that the question of releasing intangibles from property taxation or reducing tax

rates involves a consideration of all intangibles. Seligman, *Essays in Taxation*, 10th Ed., pp. 17-32, 61, 62; *Ibid.* 641-659 (Reprint of Presidential Address at the Ninth Ann. Conf. of the Nat. Tax. Assn. San Francisco, Aug. 11, 1915); Leland, *The Classified Property Tax in the United States*, 27-30, 117-130; 178-221; 401-419; Jensen, *Property Taxation in the United States*, 54-56, 172-203; James, *Taxation of Intangibles*, 58 *Annals of the Amer. Acad. for Pol. and Soc. Science*, 95-104. In determining the validity of a statute concerning taxation of intangibles enacted under the 1924 amendments to section 12½ of Article XIII of the California Constitution, this court declared in *Arnold v. Hopkins*, 203 Cal. 553, 559, 265 P. 223, 226: " * * * Experience had shown that whatever the difficulties, obstacles, and inequalities encountered by tax officials in the assessment, levy, and collection of taxes upon property in proportion to its value, these were accentuated in the endeavor of these officials to discover and adequately subject to taxation certain kinds of personal property which, from its nature, was susceptible of being sequestered and concealed by the owners thereof with a view to escaping taxation, or of which the assessable value, also, from the nature thereof, was difficult of ascertainment. These forms of elusive property were, generally speaking, notes, solvent credits, bonds, debentures, shares of stock, and like properties sometimes characterized as 'intangibles.' Of recent years, the amount and variety of forms of these so-called intangible properties has vastly increased, with the result that the extent to which properties of the foregoing classes were either evading taxation or, when found, were being subjected to inordinate and unjust burdens, had grown to be a real evil in the structure and operation of our state laws affecting and providing for local taxation. It was precisely this evil which required remedial legislation, but it was an evil which legislation could not fully reach and remedy without a change in the state Constitution, and in those provisions thereof * * * which provided for the uniform taxation of all property in proportion to its value."

Similarly, the California Tax Commission, under a mandate from the Legislature to investigate and report on matters of revenue and taxation (Stats. 1927, ch. 455, p. 781), was guided in its proposal concerning taxation of intangibles by the experience demonstrating that intangible personal property should be taxed differently from all other kinds of property as a whole. In its report to the Governor on August 10, 1928, the Commission proposed that the intangibles that were subsequently specified in section 14 of Article XIII of the Constitution should be subject to no higher tax rates than four-tenths of one per cent on their actual values. This proposal was adopted in the 1933 amendments to section 14 of Article XIII. The report (p. 50) designated the proposal of the Commission as a "Proposed Plan For The Taxation of Intangibles." The necessity for a constitutional provision with respect to the taxation of intangibles is explained in detail. "The Commission is convinced that the taxation of such property at full valuation and at the full rate is an administrative impossibility and an ethical monstrosity. To extend special treatment to such property is, in its opinion, a practical necessity." The fact that the proposal of the Commission, incorporated into the Constitution in 1933 was concerned with all intangible personal property appears not only from the heading of the proposal in the report and the considerations set forth therein, but with particular clarity from Table XIII in the report, which showed the methods of "Taxation of Intangibles in Certain States." The information included in this table is given under such column headings as "Intangibles subject to special rate," "Intangibles Exempt from Ad Valorem Tax," "Substitute for Ad Valorem Tax on Intangibles." By comparing its proposed maximum rate with the taxation of all kinds of intangibles, the Commission made it clear beyond possibility of doubt that its proposal was directed at all intangibles subject to property taxation.

The only intangibles (except franchises, which are in a class by themselves) subject to taxation under the present sys-

tem of property taxation in this state are solvent credits, which are taxed at the minimal rate of one per mill on their actual value. Sections 1059 and 2153 of the Revenue and Taxation Code. All other types of intangible assets specified in section 14 of Article XIII of the Constitution, as amended, and section 111 of the Revenue and Taxation Code are exempted from taxation by section 212 of that code and are therefore not part of the taxable personal property in this state. This system of taxation is supplemented, however, by taxes imposed upon or measured by net income including income derived from all kinds of intangible rights and privileges. Such taxes were regarded by the Legislature and the framers of the constitutional amendments to Article XIII of the California Constitution as a sufficient burden on the benefits derived from the ownership of such rights and privileges.

Acting under the authority of section 14 of Article XIII of the Constitution, as amended, the Legislature provided that the intangibles specified in section 14, except solvent credits, were no longer taxable "if and when a net income tax shall be passed or adopted in this State." Section 3627a of the Political Code, as amended, also provided: "Upon the passage or adoption of such tax and from the time such income tax becomes effective such net income tax shall be in lieu of the tax herein provided for upon notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages and any legal or equitable interest therein. Provided, however, that any and all taxes imposed herein on such property prior to the passage or adoption of such net income tax and the effective date thereof shall remain fully collectible and distributable hereunder." See *Pacific Co. of California v. Board of Supervisors*, 8 Cal.2d 611, 67 P.2d 335; *Weber v. County of Santa Barbara*, 15 Cal.2d 82, 85, 98 P.2d 492. The same amendment to section 3627a of the Political Code reduced the rate on solvent credits to one-tenth of one per cent. It cannot reasonably be assumed that the Legislature intended to replace by income taxation all property taxes on intangible assets theretofore taxed, but to impose on

taxpayers whose intangible rights and privileges were theretofore not considered taxable property, not only the new income tax burden but also property taxes at ordinary rates. Among the absurdities that would ensue from such property taxation would be the taxation of life insurance policies at rates exceeding in some instances 4 or 5 percent of the value of such policies. Intangible assets are often interchangeable so that exemption of some and taxation of others at high rates would induce taxpayers to convert highly taxable intangibles into tax-free intangibles or to conceal them. Thus, subjection of patents or copyrights to such taxes would lead to the transfer of such rights to foreign corporations in exchange for corporate stock specifically exempted from property taxation by section 212 of the Revenue and Taxation Code.

[5] It follows from the foregoing construction of the 1933 amendments to the Constitution and section 111 of the Revenue and Taxation Code that only the intangibles therein specified are to be regarded as personal property for purposes of taxation. Liquor licenses as well as other intangible values not included in the list of intangibles specified in that constitutional provision and in section 111 are therefore not subject to ad valorem taxation as personal property.

[6] Although liquor licenses are not taxable as property and the licensees are not subject to local license or occupation taxes for the selling of intoxicating liquor (Cal.Const. Article XX, section 22; *Los Angeles Brewing Co. v. Los Angeles*, 8 Cal.App.2d 391, 48 P.2d 71), cities, counties, and cities and counties receive substantial revenue from the fees imposed for such licenses. Section 22 of Article XX of the California Constitution, in recognition of the fact that the centralization in the state government of liquor control and the collection of license fees and occupation taxes from liquor licensees would deprive local subdivisions of the state of a potential source of revenue, provides: "The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provi-

sions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper." Pursuant to this provision section 37 of the Alcoholic Beverage Control Act as enacted in 1935 gave cities, counties, and cities and counties 50 percent of the license fees collected. Stats.1935, pp. 1123, 1142, Gen.Laws, Act 3796. Under the 1947 amendment to this section all the revenue from such fees is distributed to the cities, counties, and cities and counties of the state. Stats. 1947, p. 1766. If this revenue is not adequate or commensurate with the value of the licenses, the remedy lies in the augmentation thereof by the Legislature pursuant to the power vested in it, not in the imposition by the local subdivisions of the state of an additional tax on the privileges for which the license fees are paid.

The judgment is reversed.

GIBSON, C. J., and SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

SHENK, Justice (dissenting).

The conclusion in this case is neither required nor justified by the law of this state. It is contrary to the constitutional mandate that all property be taxed except such as is specifically exempt from taxation. Here there is no exemption of this and like property rights, enormous in value in the aggregate, except the exemption by judicial fiat.

It is the fact of which there is no denial that a liquor license issued pursuant to the Alcoholic Beverage Control Act is a valuable property right, owned privately as property is owned although subject to appropriate regulatory provisions in the exercise of the police power, is transferable for a cash consideration and therefore has an ascertainable valuation, is subject to levy of execution for the benefit of creditors, and may become an item of property in the estate of a deceased holder. The majority nevertheless conclude that this valuable property right is not within the category of ad valorem taxation, because, so it is stated,

only the intangibles specified in section 111 of the Revenue and Taxation Code are to be regarded as personal property for purposes of taxation. The conclusion is conceived by implication from a statutory definition in turn based on a conceded implication from constitutional provisions, and the breath of life attempted to be given the exemption by the statement of a policy of expediency or practicality which cannot be invoked to enlarge statutory provisions for exemption.

The majority opinion alludes only in passing to section 1, Article XIII, of the State Constitution which provides: "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership * * *."

The subsequent provision in section 14 of Article XIII quoted in the opinion, as granting power to provide for the assessment, levy and collection of taxes upon all forms of tangible personal property, all notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages not exempt from taxation, in the absence of express limitation should not be read to exclude the existing constitutional power to tax items not listed, inasmuch as the obvious purpose of so enumerating the specific items was to place thereon the limitation as to the amount of tax appearing in the paragraph following. That this is so also appears from the language in the latter paragraph following the specified limitation reading "and no tax burden shall be imposed upon any personal property either tangible or intangible which shall exceed the tax burden on real property in the same taxing jurisdiction in proportion to the actual value of such property." Far from being the clear implication stated by the majority, there is here no implication at all that the taxing power on intangibles was limited to the specified items. The

limitation in respect to those items was only as to the amount of the tax. The inclusion of items for the purpose of that limitation furnishes no reason for implying the exclusion of unspecified intangible property from the taxing power. There is therefore no limitation of the taxing power to the specified items by implication or otherwise. The statement that there is no grant of power to provide for taxation of intangible items other than those listed is beside the point and an erroneous basis for the conclusion, since the Constitution is deemed not to be a grant of power but a restriction upon the powers of the Legislature. *People v. Coleman*, 4 Cal. 46, 49, 50, 60 Am.Dec. 581. As noted the fundamental law demands the exercise of the power to tax all property tangible or intangible capable of private ownership, not exempt under the laws of the United States, and the express limitation of the amount of the tax on specified items is not a contradiction thereof.

The Legislature has the power to provide for exemptions, but such exemptions must be express. They will not be inferred or implied. The majority read definitions of "Intangibles" and "Intangible Personal Property" contained in section 111 as an intention to include as exempt under section 212 an item of property not mentioned therein. Section 111 is contained in a chapter (secs. 101-134) entitled "Construction". Section 101 provides: "Unless the context otherwise requires, the general provisions hereinafter set forth govern the construction of this division." Division 1, Property Taxation, secs. 101-5143. Section 103 reads: "'Property' includes all matters and things, real, personal, and mixed, capable of private ownership". This is the all-inclusive definition of the constitution. Section 106 provides: "'Personal property' includes all property except real estate." Section 111: "'Intangibles' means intangible personal property of a type not exempt from taxation and any interest therein. 'Intangible personal property' means only notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, and mortgages." The purpose of statutory definitions is to indicate the meaning to be ascribed to certain words when used in the

statute. The definition was desirable in order to follow the constitutional mandate regarding the limitation on the taxing power of specified intangible items. Therefore the word "intangibles" as so defined means only the specified items when that word is used in the Code. Section 201 which begins Article 1 (Ch. 1, Part 2, secs. 201-213), entitled, "Taxable and Exempt Property", provides that all property in the state, not exempt under the laws of the United States or of this State, is subject to taxation under this code. This is a restatement of the constitutional provision in section 1, Article XIII. Section 212 reads: "Notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages, and any interest in such property are exempt from taxation."

The lack of relationship between section 111 defining "Intangibles" and section 212 enumerating exempt items must be obvious. But the majority purport to vitalize the unrelated conclusion by seeking support in considerations of policy which may underlie distinctions in personal property taxation due to a tendency to conceal intangible assets or minimize the value thereof for the purpose of avoiding high taxes. Such distinctions, if any are to be made, are of legislative cognizance. In the absence of legislative direction, the problem becomes one primarily for the local assessment authorities in determining whether a specified class of intangible property not exempt has a sufficient ascertainable valuation to be included in the assessment rolls. In this connection the majority appears to be of the opinion that there is an evil which requires a remedy. If that be so, then it is also a matter of legislative rather than judicial responsibility. But the factual situation indicates that the Legislature is not greatly concerned in granting such an exemption. After the trial court entered judgment in this case (Jan. 3, 1947) upholding the tax, and during the 1947 session of the Legislature, the interests favoring exemption from ad valorem taxation of liquor licenses sought an amendment of the Revenue and Taxation Code to that effect (Assembly Bill No. 1839). The bill failed of passage, and the proper assumption is that the Legislature was satisfied that the exercise of authority by the local taxing

officials in the present case was in accord with the Constitution and the statute and that an exemption was undesirable.

It also follows from the foregoing that the "in lieu" (income) tax discussed by the majority applies only to the items specified in section 3627a Political Code, as amended, namely, notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages and any legal or equitable interest therein. These are the same items exempted by section 212 of the Revenue and Taxation Code. To say that it is absurd to include in ad valorem taxation valuable intangible assets not specifically exempt, and particularly the valuable asset here sought to be taxed, will come as a comforting surprise to those abundantly able to bear their just share of the burden of taxation.

The majority opinion implicitly concedes that the tax involved, since it has strictly a revenue raising purpose as distinct from one that is regulatory or restrictive, is not an occupational tax or license fee the imposition and collection of which is reposed exclusively in the State Board of Equalization (Sec. 22, Art. XX, Constitution) with provision for apportionment thereof among local governmental bodies. See *Los Angeles v. Los Angeles etc. Co.*, 152 Cal. 765, 93 P. 1006; *Ingels v. Riley*, 5 Cal.2d 154, 53 P.2d 939, 103 A.L.R. 1; *Flynn v. San Francisco*, 18 Cal.2d 210, 215, 115 P.2d 3, citing *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 292, 41 S.Ct. 272, 65 L.Ed. 638. Occupational taxes and license fees, therefore, are not involved in the problem, nor are they affected by a decision in this case.

Certainly the *Anderson* case (*San Francisco v. Anderson*, 103 Cal. 69, 36 P. 1034, 42 Am.St.Rep. 98) decided in 1894, holding that the ownership of a seat on the stock exchange was a personal privilege and the value thereof too uncertain to be included in any category of taxable property, should not here be accorded any controlling effect. The force of the decision in that case has vanished in view of the great weight of authority to the contrary since that time. Such privileges, inasmuch as they have large ascertainable market values, are now

held to be property subject to ad valorem taxation unless expressly specified to be exempt. See *Citizens National Bank of Cincinnati v. Durr*, 257 U.S. 99, 108, 42 S.Ct. 15, 66 L.Ed. 149; In the matter of *Hellman*, 174 N.Y. 254, 66 N.E. 809, 95 Am.St.Rep. 582; *State v. McPhail*, 124 Minn. 398, 145 N.W. 108, 50 L.R.A., N.S., 255, Ann.Cas. 1915C, 538, referring to the "personal privilege" basis of California and Pennsylvania cases as unsound; 61 Cor.Jur. 203, sec. 179; 51 Am.Jur. p. 442, sec. 421 and additional cases cited note 11.

In my opinion our constitutional and statutory provisions require a conclusion that the ad valorem tax on the property here involved should be upheld, and that the judgment of the trial court should be affirmed.

CARTER, J., concurs.

Rehearing denied; SHENK and CARTER, JJ., dissenting.



32 Cal.2d 367

In re KESSLER'S ESTATE.

LINTON v. WALKER et al.

L. A. 20413.

Supreme Court of California.

Aug. 10, 1948.

1. Courts ⇨202(5)

Order directing allowance of attorney's fees to guardian ad litem for infant daughter of testatrix for services for benefit of infant in settlement of will contest was an appealable order. Probate Code, § 1240.

2. Appeal and error ⇨151(3)

Generally, an executor or administrator, acting in his representative capacity, is an indifferent person as between real parties in interest, and consequently cannot litigate conflicting claims of heirs or legatees at expense of estate, and hence cannot be an "aggrieved party" entitled to appeal from a decree determining share of

each of the various claimants in estate of decedent. Code Civ.Proc. § 938.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

3. Executors and administrators ⇨315(5)

After decree of distribution, administration has served its purpose, claims of creditors have been protected, and beneficiaries must then protect their own rights, and it is not duty of executor or administrator to litigate claims of one against another.

4. Executors and administrators ⇨438(5)

Prior to distribution, an executor or administrator is a trustee of an express trust and is authorized to sue or to be sued without joining with beneficiaries of trust, but such suits are suits affecting the trust and not those in which he is individually interested.

5. Executors and administrators ⇨75

Executor or administrator must defend estate from all unjust and illegal attacks made upon it which affect interest of heirs, devisees, legatees, or creditors.

6. Appeal and error ⇨151(3)

Where a claim may diminish estate to be finally distributed or may make fund from which creditors are to be paid insufficient for that purpose, administrator or executor is interested, and, in event of an adverse ruling, is an "aggrieved party" who may appeal. Code Civ.Proc. § 938; Probate Code, § 1240.

7. Appeal and error ⇨151(3)

Where payment of attorney's fees to guardian ad litem for infant beneficiary of will for services rendered in connection with settlement of will contest would clearly diminish assets of estate and might embarrass proper administration thereof, executors were "aggrieved parties" with respect to order for payment of such fees and were entitled to appeal therefrom. Code Civ.Proc. § 938; Probate Code, § 1240.

8. Appeal and error ⇨151(3)

In determining right of an executor or administrator to appeal as an aggrieved party, fundamental consideration is duty

of executor or administrator to protect estate confided to his care from claims that he deems unwarranted and that may adversely affect estate during its administration. Code Civ.Proc. § 938; Probate Code, § 1240.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of Dorothy Walker Kessler, also known as Dorothy A. Kessler, deceased, by C. M. Linton, guardian ad litem for Karen Dee Kessler, a minor, for payment of guardian ad litem fees, contested by Fred Walker and Lulu Walker, executors and trustees of decedent's estate. From an order allowing the fees, contestants appeal. On motion to dismiss the appeal.

Motion denied.

Prior opinion 189 P.2d 79.

Boller, Suttner & Boller and Thomas R. Suttner, all of Arcadia, for appellants.

C. M. Linton, in pro. per., and Leon W. Delbridge, of Pasadena, for respondent.

TRAYNOR, Justice.

Dorothy W. Kessler died on April 16, 1946, leaving a will in which she named her father and mother, Fred and Lulu Walker, executors and trustees of her estate. The sole beneficiary of the will and testamentary trust was Karen Dee Kessler, the infant daughter of the testatrix. The admission of the will to probate was contested by the husband of the testatrix. Respondent, an attorney at law, was appointed guardian ad litem of the infant and participated in the settlement of the contest. The will was admitted to probate, and Mr. and Mrs. Walker were appointed executors of the estate. Respondent petitioned the probate court for attorney's fees to be paid out of the estate for his services for the benefit of the infant in the settlement of the will contest and the court entered an order directing the executors to pay him \$3500. The executors appeal from this order.

Respondent contends that the appeal should be dismissed on the grounds that

the order directing the payment of fees is not an appealable order, and that the appellants are not "aggrieved" parties entitled to maintain an appeal under section 938 of the Code of Civil Procedure, which provides: "Any party aggrieved may appeal in the cases prescribed in this title."

[1] Section 1240 of the Probate Code provides: "An appeal may be taken to the supreme court from an order * * * instructing or directing an executor or administrator; directing or allowing the payment of a debt, claim, legacy or attorney's fee * * *." The order directing the allowance of attorney's fees to respondent is clearly an appealable order within the meaning of this section. See *Estate of Mitchell*, 20 Cal.2d 48, 50, 123 P.2d 503; *Howaldt v. Superior Court*, 18 Cal.2d 114, 116, 114 P.2d 333.

[2, 3] The remaining question is whether the executors are entitled as "aggrieved" parties to maintain the appeal. It is generally recognized that executors and administrators acting in their representative capacities are indifferent persons as between the real parties in interest and consequently cannot litigate the conflicting claims of heirs or legatees at the expense of the estate. *Bates v. Ryberg*, 40 Cal. 463, 465; *Roach v. Coffey*, 73 Cal.281, 282, 14 P. 840; *Estate of Ross*, 179 Cal. 358, 360, 182 P. 303; *McCabe v. Healy*, 138 Cal. 81, 90, 70 P. 1008. Thus, an executor or administrator is not an "aggrieved" party entitled to appeal from a decree of distribution determining the share of each of the various claimants in the estate of a decedent. *Bates v. Ryberg*, *supra*; *Estate of Marrey*, 65 Cal. 287, 3 P. 896; *Estate of Williams*, 122 Cal. 76, 77, 54 P. 386; *Estate of Ayers*, 175 Cal. 187, 188, 165 P. 528; *Estate of Babb*, 200 Cal. 252, 255, 252 P. 1039; *Estate of Murphey*, 7 Cal.2d 712, 716, 62 P.2d 374; see cases collected in *In re Maher*, 195 Wash. 126, 79 P.2d 984, 117 A. L.R. 91, 99, 100. After the decree the administration has served its purpose and the claims of the creditors have been protected. The beneficiaries must then protect their own rights, and it is not the duty of the executor or administrator to litigate the claims of one against another.

[4-6] This rule, however, is not applicable here. "An administrator or an executor is a trustee of an express trust. He is authorized to sue or to be sued without joining with him the beneficiaries of the trust, but the suits which may thus be brought are suits affecting the trust, and not those in which he is individually interested. Among his beneficiaries are creditors. He not only may, but it is his duty, to defend the estate from all unjust and illegal attacks made upon it which affect the interests of heirs, devisees, legatees or creditors." *In re Heydenfeldt*, 117 Cal. 551, 553, 49 P. 713; see *Estate of Freud*, 131 Cal. 667, 671, 63 P. 1080, 82 Am.St.Rep. 407; *Estate of Smith*, 118 Cal. 462, 466, 50 P. 701. Consequently, if a claim "may diminish the estate to be finally distributed, or may make the fund from which the creditors are to be paid insufficient for that purpose, the administrator is interested, and, in the event of an adverse ruling, is a party aggrieved." *In re Heydenfeldt*, *supra*, 117 Cal. at 553, 49 P. at page 713; *Denison v. Jerome*, 43 Colo. 456, 463, 96 P. 166; *Packer v. Overton*, 200 Iowa 620, 622, 203 N.W. 307; *Herman v. Beck*, 68 Neb. 566, 94 N.W. 512. "To say that an administrator is not aggrieved and therefore has no right of appeal from a decree which he deems to be unjust, unwarranted, and detrimental to the estate which has been confided to his care, would be to deny him the performance of a plain duty devolving upon him through his appointment and his acceptance of the trust." *Hall v. Burgess*, 40 R.I. 314, 319, 100 A. 1013, 1015.

It has accordingly been held that an executor or administrator may appeal from a decree of partial distribution, because the assets of the estate may not be sufficient to discharge the claims of creditors (*Estate of Murphy*, 145 Cal. 464, 465, 78 P. 960; see also *Estate of Mitchell*, 121 Cal. 391, 53 P. 810; *Estate of Kelley*, 63 Cal. 106, 107), or because the status of the assets may be so highly uncertain that such an order may be embarrassing to the proper administration of the estate. *Estate of Colton*, 164 Cal. 1, 5, 127 P. 643. An executor or administrator may appeal from an order awarding a family allowance to

the widow or children of the decedent, since he is an aggrieved party by virtue of his duty to protect the estate from depletion from an extravagant family allowance (Estate of Snowball, 156 Cal. 235, 237, 104 P. 446; In re Welch, 106 Cal. 427, 429, 39 P. 805; Agnew v. Agnew, 52 S.D. 472, 218 N.W. 633, 59 A.L.R. 1549; Sturtevant v. Wentworth, 226 Mass. 459, 115 N.E. 927; Rhode Island Hospital Trust Co. v. Hopkins, 38 R.I. 59, 71, 94 A. 724); and an executor may also appeal from an order setting aside a probate homestead for the use of the surviving wife of the decedent. Estate of Levy, 141 Cal. 646, 647, 75 P. 301, 79 Am.St.Rep. 92.

Goldtree v. Thompson, 83 Cal. 420, 422, 23 P. 383, on which respondent relies, is inconsistent with the foregoing California cases and must be regarded as overruled by them. In that case after the distribution of the property to the trustees of a testamentary trust by a decree of the proper court, the trustees brought an action to determine whether the children of certain parties named in the will were entitled to the corpus of the property left in trust or only to the income therefrom. In that action the minors were represented by a guardian ad litem. Thereafter the trial court entered an order awarding fees to the guardian ad litem for services rendered in behalf of the minors and directed that such fees be paid out of the trust estate. The appeal by the trustees from this order was dismissed on the ground that the trustees were not aggrieved by the order. The court in that case relied primarily on the decisions relating solely to appeals by executors or administrators from decrees of final distribution. No mention was made of the principle later articulated in *Re Heydenfeldt*, supra, as to the fiduciary duty of a trustee to defend the trust estate against attacks upon it that he deems unjust or unwarranted.

[7,8] The payment of attorney's fees to the respondent will clearly diminish the assets of the estate, and may embarrass the proper administration of the estate. Such an allowance made during the course of administration and before the entry of a decree of final distribution may be ex-

travagant or otherwise improper, and therefore improperly reduce the funds necessary for the payment of the claims of creditors, the usual costs of administration, or state inheritance and federal estate taxes. The order for the payment of attorney's fees to a guardian ad litem does not differ essentially from the order of a family allowance involved in *Estate of Snowball*, supra, or from the order setting aside a probate homestead considered in *Estate of Levy*, supra. The fundamental consideration in each case is the duty of the executor or administrator to protect the estate confided to his care from claims that he deems unwarranted and that may adversely affect the estate during its administration.

The motion to dismiss the appeal is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.



32 Cal.2d 351

HOLLMAN v. WARREN, Governor.

S. F. 17709.

Supreme Court of California, in Bank.

Aug. 4, 1948.

1. Mandamus ⇨64

Generally in an appropriate case a writ of mandate will issue against the governor.

2. Mandamus ⇨76

Where duty is imposed upon an officer or board to make an appointment to office or fill a position, mandamus will lie to compel the making of the appointment.

3. Notaries ⇨2

The statute relating to the appointment of notaries public, except as it applies to counties of the second class, discloses legislative intent that notaries should be appointed in accordance with

the need therefor. Government Code, § 8200. were necessary parties. Rules on Appeal, rule 56.

4. Mandamus ⇨76

While Governor has discretion as to number of notaries to appoint and discretion as to whom he shall select and mandamus is not available to compel him to exercise such discretion in a particular manner or to reach a particular result, mandamus does lie to compel him to exercise discretion, that is to compel some action upon the subject involved. Government Code, § 8200.

5. Constitutional law ⇨68(1)

Notaries do not exercise any executive power and are not agents selected by Governor to carry out his political views or to form policies of his administration, hence, mandamus will lie to compel Governor to appoint notaries as against contention that such appointments are an exercise of Governor's political power and beyond the power of mandamus. Government Code, § 8200.

6. Statutes ⇨227

Ordinarily the word "may" as used in a statute is permissive but if provision or context otherwise requires it the permissive meaning is not required. Government Code, §§ 5, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

7. Notaries ⇨2

The statute providing that the Governor "may" appoint notaries in such number as he deems necessary imposes upon Governor a mandatory duty to appoint notaries in view of the multitude of duties notaries perform. Government Code, § 8200.

8. Mandamus ⇨151(2)

In madamus to compel Governor to exercise his discretion to appoint notaries public in the City and County of San Francisco on the ground that provision of statute limiting number of notaries in that county was invalid, the notaries commissioned for the City and County of San Francisco were not so interested that they

9. Mandamus ⇨148

Petitioner for mandamus to compel Governor to exercise his discretion to appoint additional notaries public in the City and County of San Francisco notwithstanding statutory restriction on the number of notaries therein, who, aside from her character as an applicant for appointment as a notary, was a resident and taxpayer of City and County of San Francisco, as such, was interested in having a sufficient number of notaries commissioned to act therein and hence was a properly interested party. Government Code, § 8200. ;

10. Courts ⇨207(4)

Proceeding in mandamus to compel Governor to exercise discretion to appoint additional notaries in the City and County of San Francisco was a proper case for Supreme Court to exercise its original jurisdiction since it affected entire City and County of San Francisco, a populous county, the writ ran to highest executive of state, and an important constitutional question was involved. Government Code, § 8200.

11. Constitutional law ⇨205(1)

Notaries ⇨2

Statutes ⇨101(1)

The statute relating to the appointment of notaries, in so far as it limits the number of notaries only in the City and County of San Francisco, is arbitrary and without any reasonable basis and is violative of constitutional provisions against special privileges and against special or local laws. Government Code, § 8200; Const. art. 1, §§ 11, 21; art. 4, § 25, subds. 19, 33.

EDMONDS, J., dissenting.

Original proceeding on the petition of Edith B. Hollman for a writ of mandate against Earl Warren, Governor of California, to compel respondent to exercise his discretion with reference to appoint-

ment of notaries public in the City and County of San Francisco.

Writ granted.

Macklin Fleming and H. Ward Dawson, Jr., both of San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., and E. G. Benard, Deputy Atty. Gen., for respondent.

CARTER, Justice.

In this original proceeding a writ of mandate is sought to compel respondent Earl Warren, Governor of California, to exercise his discretion with reference to the appointment of notaries public in the City and County of San Francisco.

The uncontroverted petition for the writ shows that petitioner is a citizen of the United States and a resident and taxpayer of said City and County. Petitioner filed an application with respondent "for appointment as Notary Public in and for the City and County of San Francisco, showing her eligibility for appointment, her good moral character and integrity, and previous service as a Notary Public in the County of Monterey from 1932 until her resignation in 1947." Although respondent is under a duty to commission notaries public in the several counties of the state in such numbers as he deems necessary for the public convenience "he has refused to consider the merits of the application, or petitioner's fitness for the position of Notary Public in and for the City and County of San Francisco, or to consider whether the public convenience necessitated the appointment of an additional Notary Public in the City and County of San Francisco, alleging as the sole ground for his refusal that he was limited by law to the issuance of 222 Notaryships for the City and County of San Francisco." Appointments are made without regard to number in counties other than San Francisco and it is the Governor's "custom and practice * * * to appoint all qualified applicants to the position of Notary Public in every County of the State of California except qualified applicants who reside in and seek appointment as a Notary Public in and for the City and County of San Francisco." Pe-

titioner prays that respondent be required "to determine whether the public convenience necessitates the appointment of another Notary Public in the City and County of San Francisco and, if he finds it does so necessitates, to consider petitioner's fitness and qualifications for appointment to the position of Notary Public in the City and County of San Francisco."

The controversy concerns the validity of the exception (that portion in italics) in section 8200 of the Government Code, reading: "The Governor may appoint and commission notaries public for the several counties of the State in such number as he deems necessary for the public convenience, *except that in the counties of the second class the number shall not exceed 222.*" But before considering the merits attention must be given to the claim that mandamus is not the proper remedy in the instant case; that there is no express duty imposed upon the Governor to appoint notaries public or any particular person to the office of notary public; and that it is matter entirely within his discretion.

[1,2] Generally speaking, it is settled in this state that in an appropriate case a writ of mandate will issue against the Governor of the state. *Elliott v. Pardee*, 149 Cal. 516, 86 P. 1087; *Stuart v. Haight*, 39 Cal. 87; *Harpending v. Haight*, 39 Cal. 189, 2 Am.Rep. 432; *Middleton v. Low*, 30 Cal. 596; *McCauley v. Brooks*, 16 Cal. 11, overruled on other grounds in *Stratton v. Green*, 45 Cal. 149; *O'Brien v. Olson*, 42 Cal.App.2d 449, 109 P.2d 8. It has been repeatedly held that where the duty is imposed upon an officer or board to make an appointment to office or fill a position mandamus will lie to compel the making of the appointment. *Elliott v. Pardee*, supra; *La Mar v. City Council of City of South San Francisco*, 53 Cal.App.2d 387, 127 P.2d 1022; *Platnauer v. Board of Supervisors*, 65 Cal.App. 666, 225 P. 12; *City of San Diego v. Capps*, 32 Cal.App. 461, 163 P. 235; see, *Independence League v. Taylor*, 154 Cal. 179, 97 P. 303; 105 A.L.R. 1124; 38 Corpus Juris 700; 55 C. J.S., Mandamus, § 195; 35 Am.Jur., Mandamus, §§ 137, 226. For illustration it is said in *Elliott v. Pardee*, supra, at page 520,

of 149 Cal., at page 1089 of 86 P., where the statute "authorized and empowered" the Governor upon petition of the electors, to appoint election commissioners to conduct an election where a city had failed to elect officers: "The Governor must be satisfied of the truth of the matters set forth in the petition, and this means that he has the right to decide that question for himself. But, if he is not satisfied by the verified petition, he should give the petitioners a reasonable opportunity to supply the additional evidence which the case demands, and then make his decision. If the essential facts are not proved to his satisfaction, he may, and ought to, refuse to appoint the commissioners; but, if they are proved, it is his duty to appoint. Power and authority conferred upon a public officer to perform an act not discretionary, in which the public or third parties have an interest, make the exercise of the power obligatory whenever a proper case for its exercise is presented, and mandamus will issue even to the chief executive of the state to compel the exercise of a ministerial function defined by statute."

[3,4] The statute here involved (Gov. Code, sec. 8200, *supra*) authorizes the Governor to appoint notaries public for the counties of the state in such numbers as he "deems necessary for the public convenience." In view of the many duties and services rendered by notaries the Legislature clearly contemplated that they should be appointed in accordance with the need therefor. It is true, that discretion is vested in the Governor as to the number to appoint and the discretion rests with him as to whom he shall select. If the statutory provision limiting the number of notaries that may be appointed for the City and County of San Francisco is invalid, he still may not find that public convenience requires any more notaries for that city and county. While ordinarily, mandamus may not be available to compel the exercise by a court or officer of the discretion possessed by them in a particular manner, or to reach a particular result, it does lie to command the exercise of discretion—to compel some action upon the subject involved. *Lissner v. Superior Court*, 23

Cal.2d 711, 146 P.2d 232; *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 144 P.2d 4; *Lincoln v. Superior Court*, 22 Cal.2d 304, 139 P.2d 13; *Miller v. Municipal Court*, 22 Cal.2d 818, 142 P.2d 297; *Katenkamp v. Superior Court*, 16 Cal.2d 696, 108 P.2d 1; *Bank of Italy v. Johnson*, 200 Cal. 1, 251 P. 784; *Cohen v. Melrose*, 167 Cal. 792, 141 P. 374; *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 474, 114 P. 978; *Walker v. Superior Court*, 139 Cal. 108, 72 P. 829; *Jacobs v. Board of Supervisors*, 100 Cal. 121, 34 P. 630; *Francisco v. Manhattan Ins. Co.*, 36 Cal. 283; *Allen v. Bowron*, 64 Cal.App.2d 311, 148 P.2d 673; *County of Los Angeles v. Superior Court*, 128 Cal.App. 522, 18 P.2d 112; *First National Bank v. Superior Court*, 71 Cal. App. 64, 234 P. 420; *Browning v. Dow*, 60 Cal.App. 680, 213 P. 707; *Gammon v. McKevitt*, 50 Cal.App. 656, 195 P. 726. The application of that rule to the use of mandamus in compelling the making of appointments to office is illustrated in *Davison v. Supervisors of Solano Co.*, 70 Cal. 612, 11 P. 680, and *Harrington v. Pardee*, 1 Cal.App. 278, 82 P. 83, where it is pointed out that the one possessing the appointing power cannot be required to appoint a particular person to the office. The choice of the person rests in the discretion of the appointing power. In the instant case, as plainly appears from the petition, the Governor has refused to exercise his discretion feeling that he cannot appoint more notaries for San Francisco because of the limitation in section 8200 of the Government Code, *supra*.

[5] The availability of mandamus to compel the exercise of the appointing power by the Governor in making appointments involving purely the executive and political power of the Governor as distinguished from those in a different category has been discussed in several cases. See cases collected 105 A.L.R. 1124; 35 Am.Jur., Mandamus, §§ 136, 137. Whatever may be the merits of such a distinction it is manifest that notaries public do not exercise any executive power. They are not agents selected by the Governor to carry out his political views—to form the policies of his administration.

[6, 7] Section 8200 of the Government Code provides that the Governor "may" appoint notaries in such number as he deems necessary. Ordinarily, "may" is permissive (Gov.Code, § 14), but if the provision or context otherwise requires it that meaning is not required (Gov.Code, § 5). It is clear that a mandatory duty to appoint notaries public is imposed. That is evident from the multitude of duties they perform, such as the administration of oaths, taking depositions, acknowledgments and other functions. It is not to be supposed that the Legislature intended to leave it to the whim or caprice of the Governor as to whether there should be any notaries appointed. The place in the social order of their functions and the necessity that the public have their services are not to be lightly considered. The position of notaries public reaches back to antiquity and is found in practically all nations. See Proffatt on Notaries, secs. 1-9; 39 Am.Jur., Notary Public, secs. 2, 3.

[8] It is urged that the real parties in interest are not named, that is, the 222 notaries now commissioned for the City and County of San Francisco, citing Rule 56 of Rules on Appeal. Those notaries are not so interested that they are necessary parties. The issuance of a writ will not result in ousting any of them from office or replacing any of them. See Independence League v. Taylor, *supra*. Indeed as before seen, the Governor may decide not to appoint additional notaries for said City and County.

[9] Nor is there any merit to the contention that petitioner is not a properly interested party. Aside from her character as an applicant for appointment as a notary it is alleged that she is a resident and taxpayer of the City and County of San Francisco. As such she is interested in having a sufficient number of notaries commissioned to act therein. The rule applicable here is stated thus in 35 American Jurisprudence 73, section 320: "By the preponderance of authority * * * where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is suffi-

cient that he is interested as a citizen in having the laws executed and the duty in question enforced. * * * Generally, when a power or duty is imposed by law upon a public board or officer, and in order to execute such power or perform such duty, it becomes necessary to obtain a writ of mandamus, it or he may apply for the same." See Board of Social Welfare v. County of Los Angeles, 27 Cal.2d 98, 100, 101, 162 P.2d 627, 628; also, Platnauer v. Board of Supervisors, *supra*.

[10] The case is a proper one for this Court to exercise its original jurisdiction. It affects the entire City and County of San Francisco, a populous county, the writ runs to the highest executive of the state, and an important constitutional question is involved.

Turning to the question of the validity of the provision in section 8200 of the Government Code, which limits the number of notaries for the City and County of San Francisco, but for no other county, petitioner invokes provisions of the constitution. "All laws of a general nature shall have a uniform operation." Cal.Const. Art. I, sec. 11. "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Cal.Const. Art. I, sec. 21. "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Nineteenth—Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity. * * * Thirty-third—In all other cases where a general law can be made applicable." Cal.Const. Art. IV, sec. 25. The essence of the contention is that the provision creating the limitation is a special and local law and that there is no rational basis for setting San Francisco County apart from other counties.

The number of notaries public that each county in the state should have and the method of fixing that number has been the subject of considerable legislation with varying patterns since 1850. The first act

adopted by the Legislature authorized the Governor to appoint notaries in each county "in proportion to the population and business thereof" (Stats. 1850, p. 114, sec. 1), thus establishing a uniform basis for the number for each county. But that lasted only until 1853 when the Legislature commenced to make its wishes felt in regard to the number. That year it stated that the Governor should appoint a specified number for named counties (San Francisco 20, 15 for each of 10 named counties, and 5 for each of all others). Stats. 1853, p. 125, sec. 1. That practice was thereafter followed for a considerable period of time, the matter being the subject of legislative action nearly every session. The number for San Francisco was gradually increased. See Stats. 1857, p. 358, sec. 1; Stats. 1859, p. 108, sec. 1; Stats. 1861, p. 577, sec. 1; Stats. 1861, p. 497, sec. 1; Stats. 1862, p. 443, sec. 1; Stats. 1869-70, p. 802, sec. 1. For a period following 1865 the notary public act was not directly amended but a certain number of notaries were added for named counties. See Index to the Laws of California, John W. Davis, pp. 536, 537. The notary public law was codified in the original Political Code in 1872. Pol.Code, sec. 791 et seq. In 1887 the practice of stating a fixed number of notaries for a specified county was discontinued and it was provided that specified counties should have *not exceeding a stated number*. Stats. 1887, Ext.Sess., p. 79; Pol.Code, sec. 791, as it then read. That method (of not exceeding a certain number) was pursued for a time (Gov.Code, sec. 8200) but in 1889, a significant departure occurred, in that instead of naming most of the counties in the state and the number not exceeding which each should have, as had theretofore been done, it was provided that the Governor should appoint such as he shall deem necessary for the public convenience except in the counties of San Francisco, Los Angeles, and Solano where not exceeding a stated number was provided for. Stats. 1889, p. 377, § 1. In 1893 (Stats. 1893, p. 289; Pol.Code, § 791 as then amended) Los Angeles and Solano Counties were dropped from the statute, leaving San Francisco the sole exception in which the Governor did not have discre-

tion to fix the maximum number for such county, and at that time the reference was not to San Francisco but to counties of the *first* class (those having a population of over 200,000 [Stats. 1893, p. 346, § 162]). The only county of that class at that time was San Francisco. The statute remained substantially the same until 1911 when the only change was to make the exception apply to counties of the *second* class. Stats. 1911, p. 941; Pol.Code, § 791 as then amended. At that time San Francisco was the *sole* county in that class, the first class counties at that time embracing those with 500,000 or more population and the *statutes fixed the population of each and every county in the state* with the result that each county automatically fell into a single classification. Stats. 1911, p. 96, amending Pol. Code, §§ 4005c and 4006. The statutes remained substantially the same up to the present time except that from time to time the maximum number of notaries for the City and County of San Francisco was increased until at the present time it stands at 222. Gov.Code, § 8200. At this date counties are classified according to population but the statute fixes the population, and as so fixed, each county is in a class by itself (Gov.Code, §§ 28020-28079, as added Stats. 1947, ch. 424), and San Francisco is still a county of the second class. Gov. Code, §§ 28020(2), 28023.

[11] The foregoing history of the legislation demonstrates that the limitation here involved is arbitrary and without any reasonable basis. The legislation on its face expressly chooses without reason to limit the number of notaries for one county, and one county only, thus leaving no room for the presumption of constitutionality or for the presumption that the Legislature had a conceivably rational basis for the limitation on the number of notaries for San Francisco, or the presumption of constitutionality from the long existence of the statute without attack. No attempt is made to classify the counties for the purpose of ascertaining the number of notaries according to the requirements of those counties or the effect of the population thereof on the needs. A county with a population and business less than that of San Francisco

could have more notaries than San Francisco, or one with a population and business greater than San Francisco could have less than San Francisco. There is no reason why the number of notaries for all the counties except San Francisco should be subject to the public needs as determined by the Governor, while San Francisco's needs are determined by the Legislature as to the maximum but not the minimum. The area of the City and County of San Francisco as compared with other counties furnishes no satisfactory basis for the Legislature to limit the number of notaries, while the Governor decides on the basis of need for all other counties, giving consideration to both the business requirements as well as the distribution of that business in the county. Moreover the exception contained in the statute purports to be based upon population not area.

The most recent expression by this Court in regard to special and local laws, and what constitutes a proper basis for the classification of counties, is contained in *Consolidated Printing & Publishing Company v. Allen*, 18 Cal.2d 63, 112 P.2d 884. There the statute provided a method for the publication of delinquent tax lists for counties of the first class (Los Angeles is the only county of that class) different than that for all other counties. In holding the statute invalid this Court said: "We can find no natural, intrinsic, or constitutional ground of distinction between the county of Los Angeles and other counties which would justify the application of a special procedure with reference to the sale of delinquent property." At page 71 of 18 Cal.2d., at page 888 of 112 P.2d. While there is discussion in that case concerning the existence of a general statute for all counties prior to the special statute for Los Angeles County, we believe it is controlling in the instant case on the lack of rational foundation for the classification and makes unnecessary the discussion of other cases.

For the foregoing reasons we hold that the provision for the limitation on the number of notaries for the City and County of San Francisco contained in the italicized portion of the above quoted section (Gov. Code, sec. 8200) is invalid.

It is therefore ordered that a peremptory writ of mandate issue as prayed for by petitioner.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE JJ., concur.

EDMONDS, Justice (dissenting).

In my opinion, the petition for a writ of mandate does not state a cause of action. The petitioner pleads that she filed an application with the Governor for appointment as Notary Public in and for the County of San Francisco; that the Governor refused to "consider the merits of the application, or petitioner's fitness for the position of Notary Public * * * or to consider whether the public convenience necessitated the appointment of an additional Notary Public in the City and County of San Francisco, alleging as the sole ground for his refusal that he was limited by law to the issuance of 222 Notaryships for the City and County of San Francisco". It is then alleged that the limitation upon the number of such offices in the City and County of San Francisco is prescribed by an act of the Legislature. Govt.Code, sec. 8200. This limitation, the petitioner asserts, is unconstitutional, and she basis her demand for relief upon that construction of the statute. However, the allegation that the limitation is unconstitutional is a conclusion of law. *Callahan v. Broderick*, 124 Cal. 80, 56 P. 782; 21 Cal.Jur. 31. "A conclusion of law tenders no issue, and a complaint which depends upon such allegations is insufficient and demurrable." *Burlingame v. Traeger*, 101 Cal.App. 365, 368, 281 P. 1051, 1052; and see cases cited 21 Cal.Jur. 26.

"Mandamus is an extraordinary remedy, which can only be invoked to enforce a clear legal right of the plaintiff. If the right is doubtful, it must be first established in some other form of action. Mandamus will not lie to establish as well as enforce a claim of uncertain merit." *S. F. Bowser & Co. v. State ex rel.*, 192 Ind. 462, 137 N.E. 57, 59; *State ex rel. v. Winterrowd*, 174 Ind. 592, 91 N.E. 956, 92 N.E. 650, 30 L.R.A.,N.S., 886; *State ex rel. v.*

Board of Com'rs, 162 Ind. 580, 68 N.E. 295, 70 N.E. 373, 984. Here petitioner seeks the adjudication of the validity of the statute, whereas the office of mandamus is merely to execute. Ferris, Extraordinary Legal Remedies (1926), sec. 194, p. 229.

The asserted invalidity of the statute relied upon by one who refuses to perform a particular act or duty may be the basis of a suit brought to compel such performance, and in that situation mandamus is a proper remedy. For example, in *Mansur v. City of Sacramento*, 39 Cal.App.2d 426, 103 P.2d 221, the petitioner had obtained a position by appointment from a civil service eligibility list. His wife was then employed by the State board of equalization. The civil service board, at the close of the first payroll period, declined to certify the payment of salary to him because of a provision of the municipal charter prohibiting the employment of one whose spouse was employed by the State or any governmental or municipal subdivision. It was held that the charter provision was invalid.

The legality of a statute may also be considered where the respondent relies upon the unconstitutionality of the enactment upon which the petitioner bases his asserted right to compel performance. The case of *Allied Architects' Ass'n v. Payne*, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029, is one of that kind. The application was for a writ of mandate directing the county auditor of Los Angeles County to approve the claim of the petitioner for services rendered in the preparation of certain architectural plans for a memorial hall. The county auditor refused to approve the claims upon the ground that the statute under which the debts were incurred was unconstitutional. The court decided adversely to him, upholding the validity of the legislation.

But a petitioner may not found his right upon the very statute which he alleges to be void. In *Hall v. Supervisors of San Francisco*, 20 Cal. 591, the petitioner sought to compel the Board of Supervisors of San Francisco to issue a license to him to conduct an intelligence office. It was also

charged that the act regulating such business was unconstitutional because it did not set any standard of qualifications. The court held that the question of constitutionality could not be raised by the petitioner. "The relator cannot have a mandamus to compel the granting of a license under the law for a reason which, if valid, shows the law to be void." *supra*, 20 Cal. at page 593.

Hall was asserting his claim of right under the provisions of the statute providing that the board of supervisors could license and regulate intelligence officers. In the present proceeding, the petitioner seeks to compel the Governor to consider her qualifications for an office in which there is no vacancy unless the statute under attack is unconstitutional. Hall's case rested upon inconsistent claims; here an even stronger case is made against the petitioner's position, for the procedural question depends upon the substantive determination. She is not seeking to have the Governor do anything required by law unless it is first declared invalid; but her pleading demands that he perform an act which is in plain disregard of statutory limitation. The petitioner may not use mandamus for the purpose of securing an adjudication in regard to the validity of the statute as the basis for determining her right procedurally to relief in this form, because in these circumstances the propriety of the proceeding is made to depend upon a decision of the question of constitutionality. Otherwise stated, the procedural right to the relief demanded, if one exists, is contingent upon a decision favorable to the petitioner of the merits of the controversy.

Mandamus issues "to compel the performance of an act which the law specially enjoins". Sec. 1085, Code Civ.Proc. But, to be entitled to the writ, one must assert a clear legal right to the performance of the particular duty sought to be enforced. *Ferris*, Extraordinary Legal Remedies, (1926) sec. 194, p. 228; *Irvine v. Gibson*, 19 Cal.2d 14, 118 P.2d 812; *Stevens v. Truman*, 127 Cal. 155, 59 P. 397; *Dobyns v. Cheshire*, 9 Cal.App.2d 77, 48 P.2d 743.

In the case of public officers, the duty must be one which is clearly defined, imposed or enjoined by law as a duty resulting from the office. In the absence of any clear legal right in the petitioner which it is the duty of the respondent to grant, there is no basis for the issuance of the writ for there is no showing of "an act which the law specially enjoins" and under section 1085 of the Code of Civil Procedure, this is a jurisdictional prerequisite for the exercise of the writ of mandate. *Sherman v. Quinn*, 31 Cal.2d 661, 192 P.2d 17; *City of Napa v. Rainey*, 59 Cal. 275, 278; *Albion v. Smith*, 18 Cal.App.2d 615, 618, 65 P.2d 81; *Potomac Oil Co. v. Dye*, 10 Cal.App. 534, 537, 102 P. 677; see 16 Cal.Jur. 808.

Furthermore, regardless of the question concerning the constitutionality of the statute which is challenged by the petitioner, she is not entitled to the remedy of mandamus. The writ granted by the Court's decision requires the Governor "to determine whether the public convenience necessitates the appointment of another Notary Public in the City and County of San Francisco and, if he finds it does so necessitate, to consider petitioner's fitness and qualifications for appointment to the position of Notary Public in the City and County of San Francisco". Even if it be conceded that the limitation upon the number of notaries public in the City and County of San Francisco is unconstitutional, the Governor should not be required by mandamus to consider the qualifications of any particular person for appointment to office. Perhaps mandamus would be appropriate to compel the Governor to determine whether the public convenience necessitates the appointment of additional notaries public (See Govt. Code sec. 8200) but there is no basis for that proceeding in the absence of an allegation that he has refused to consider the requirements of the public in the particular locality for the services of such officers, and there is no law making it his duty to consider the application of anyone desiring an appointment.

For these reasons, I would sustain the demurrer to the petition.

**PEOPLE v. OCEAN SHORE R. R.,
Inc., et al.
S. F. 17603.**

Supreme Court of California.
Aug. 13, 1948.

1. Boundaries ⇨37(4)

In proceeding by state to condemn for highway purposes a strip of realty formerly used as part of railroad's right of way, trial court was not bound to accept state's claim that realty occupied by railroad as a right of way was not that described in certain deed where, though state's witness who had made survey in 1935 testified that description in deed had a tie to county road and ocean, and that in using such ties description did not connect with railroad's road bed, the witness admitted that he did not know location of county road or shore line of ocean in 1905 when deed was executed, and he admitted that both might have changed in the meantime.

2. Deeds ⇨101

A deed indefinite in its terms may be made certain by the conduct of the parties acting under it.

3. Railroads ⇨69

Where for many years grantor and grantee and their successors interpreted deed as conveying realty used by railroad as a right of way, trial court, in proceeding by the state to condemn for highway purposes a strip of land formerly used as part of right of way by railroad, was justified in following the practical construction placed on the deed by the parties.

4. Eminent domain ⇨158

In proceeding by the state to condemn for highway purposes a strip of land formerly used as part of railroad's right of way, evidence sustained trial court's finding that railroad was owner of certain disputed parcels of realty.

5. Adverse possession ⇨106(1)
Railroads ⇨63

Railroads, like individuals, may acquire fee title by adverse possession, but generally a railroad, which enters without

color of title and uses a right of way, ordinarily gains a prescriptive right to an easement and does not acquire title to the fee.

6. Adverse possession ⇨106(1)
Easements ⇨10(1)

If sole use of realty is as a right of way, whether as a footpath, wagon road, or railroad, the user will ripen into an easement, and it is only where there is some additional type of user or other action that will give notice that the claim is to more than a right of way that the use and permission may ripen into a fee title.

7. Adverse possession ⇨106(1)

Deeds from railroad to trustees of railroad's realty and from trustees reconveying realty to railroad were not "color of title" to fee in parcel of realty which railroad had used adversely as a right of way, and which was not specifically mentioned in deeds, and railroad could not successfully claim title in fee to parcel, on ground of adverse possession, rather than a mere easement in the parcel.

See Words and Phrases. Permanent Edition, for all other definitions of "Color of Title".

8. Adverse possession ⇨88

Fact that railroad and its predecessor railroad paid gross receipts tax to the state, and thereby discharged the duty to pay any taxes levied and assessed against parcel of realty which railroad had used adversely as a right of way, was not sufficient by itself to establish adverse possession, since payment of taxes is merely one of the elements which must be proved to establish adverse possession. Code of Civ.Proc. § 325.

9. Easements ⇨30(1), 37

An easement acquired by a utility for a public purpose is terminated by abandonment of that purpose, and whether there has been such abandonment is ordinarily a fact question. Civ.Code, § 811.

10. Easements ⇨30(1)

An act which will constitute an abandonment of an easement must be material and permanent, as distinguished from

something that is occasional and temporary. Civ.Code, § 811.

11. Railroads ⇨82(2)

Where railroad stopped running its trains, removed its tracks, and sold its rails, rolling stock, and other equipment, and represented to Corporation Commissioner on a number of occasions, some of which were ten years after railroad stopped running its trains, that it was no longer a public utility and did not propose to engage in any business other than that incidental to liquidation, court was justified in finding that there had been an "abandonment" of right of way easement by railroad. Civ.Code, § 811.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

12. Judgment ⇨576(1)

Fact that a prior decision is erroneous will not prevent application of doctrine of res judicata.

13. Judgment ⇨585(5)

The doctrine of res judicata does not apply where there are changed conditions and new facts which did not exist at time of prior judgment.

14. Judgment ⇨585(5)

Decision, in action 2 years after discontinuance by railroad of railroad operations that there was no abandonment of railroad's easement for right of way, was not res judicata of issue of abandonment in condemnation proceedings by state against railroad more than 14 years after railroad operation was discontinued.

15. Easements ⇨30(1)

An intent to abandon need not be shown in order to prove loss of an easement acquired by prescription. Civ.Code, § 811, subd. 4.

16. Railroads ⇨82(2)

In proceeding by state to condemn for highway purposes a strip of realty formerly used as part of railroad's right of way, evidence authorized finding that railroad's nonuser of certain parcel of realty for right of way, which state claimed constituted abandonment of railroad's easement,

was voluntary and not due to any highway litigation.

17. Dedication ⇨14

The common-law doctrine of "dedication" applies only between the owner and the public, and the public must be a party to every dedication, and it is not a mode of conferring a private property right in land.

See Words and Phrases, Permanent Edition, for all other definitions of "Dedication".

18. Dedication ⇨20(2)

Generally, there cannot be an implied or common-law dedication of land to a railroad company by virtue of user with consent or acquiescence of the owner.

19. Dedication ⇨1

Rule that where property is devoted to a public use by a railroad or other public utility, with owner's consent or acquiescence, use is thereafter in interests of public, and owner cannot maintain ejectment or interfere with utility's possession, but will be limited to action for damages for taking of the property, is not a rule of true dedication, but is a rule of public policy designed to protect the public interest in the continuance of the service.

20. Dedication ⇨20(1)

Where railroad tracks had been removed and railroad service had been terminated for over 14 years, and railroad was no longer a utility, railroad could not claim title to right of way through certain parcel of realty by implied dedication by reason of user with consent or acquiescence of owner, in proceeding by state to condemn for highway purposes a strip of realty formerly used as part of railroad's right of way.

21. Estoppel ⇨95

An estoppel may arise from silence, but only where there is a duty to speak, and where the party on whom such duty rests has an opportunity to speak, and, knowing that the circumstances require him to speak, remains silent.

22. Estoppel ⇨93(4), 94(1)

Fact that owner of realty and her successors stood silently by while railroad

was built and operated over owner's realty, and while conveyances were made by railroad transferring the railroad's property to successor railroad, did not entitle successor railroad, under doctrine of estoppel, to claim a fee or any right greater than an easement over owner's realty.

23. Railroads ⇨75(5), 93

Code section providing that every railroad shall have power to construct its roads across, along, or on any street, avenue, or highway which the route of its road intersects, crosses, or runs along, does not grant franchise rights and is at most a mere offer which must be accepted by user, and, until such acceptance by user, no right vests under it. Civ.Code, § 465, subd. 5.

24. Railroads ⇨75(5)

Railroad had no existing franchise to use road because of provisions of code section that every railroad shall have power to construct its roads across, along, or on any street, avenue, or highway which the route of its road intersects, crosses, or runs along, where there was not acceptance of the offer by railroad by user of road. Civ.Code, § 465, subd. 5.

25. Railroads ⇨82(4), 99(12)

Any right which railroad might have had under code section providing that every railroad shall have power to construct its roads across, along, or on any street, avenue, or highway which the route of its road intersects, crosses, or runs along, was lost when railroad took up its tracks and ceased to be a public utility. Civ.Code, § 465, subd. 5.

26. Eminent domain ⇨136

Rule, that prospect of joining separate parcels of realty for a particular use may be a proper element in determining value, did not entitle railroad to severance damages in proceeding by the state to condemn for highway purposes a strip of realty formerly used as part of railroad's right of way, where there was no existing unity of use by railroad and merely a prospect of such a joinder.

27. Eminent domain ⇨96

Though there may be a right to an award of severance damages in some cases

Where property, though not physically contiguous, is being devoted to an existing unity of use, such damages are ordinarily limited to contiguous property, and mere fact that there is a possible or prospective use of separate properties as a unit, or that they are susceptible to a common use, will not justify the allowance of severance damages. Code of Civ.Proc. § 1248.

28. Eminent domain ⇨136

Rule that, where highest and best use of separate parcels will involve their integrated unitary use, such prospective use may be considered in fixing the value of property taken if a joinder of the parcels is reasonably practicable and the nature of the case does not preclude the possibility of a union without the exercise of eminent domain, has no application to allowance of severance damages. Code of Civ.Proc. § 1248.

29. Eminent domain ⇨96

Where railroad's right of way to north of park was cut off, not by the taking of property by the state for highway purpose, but rather by termination by railroad of the railroad use and resulting loss of any right of way by railroad through park, railroad had no right to consequential damages to property south of the park. Code of Civ.Proc. § 1248.

30. Eminent domain ⇨131

The measure of compensation for property taken is its market value, which is to be determined by a consideration of all the uses to which it is adapted and for which it is available. Code of Civ.Proc. § 1249.

31. Eminent domain ⇨134

In determining the measure of compensation for property taken, the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not as the measure of value, but to the extent that the prospect of such use affects the market value of the land, and elements affecting value which, though possible, are not reasonably probable, should be excluded. Code of Civ.Proc. § 1249.

32. Eminent domain ⇨134

Where it is not shown that a suggested use of realty would be profitable, or where it appears that operations cannot be carried on except at a loss, the prospect of use for such a purpose is not a proper element of value in determining the measure of compensation for realty taken in condemnation proceedings. Code of Civ.Proc. § 1249.

33. Eminent domain ⇨202(4)

Though there was little doubt, in proceeding by state to condemn for highway purposes a strip of realty formerly used as part of railroad's right of way, as to the physical adaptability of the realty for railroad use, state's witnesses, who testified as to value of realty taken, were also entitled to consider whether use of realty for railroad purposes was economically feasible. Code of Civ.Proc. § 1249.

34. Evidence ⇨555

In proceeding by state to condemn for highway purposes a strip of realty formerly used as part of railroad's right of way, state's witnesses, who testified as to value of realty taken, were authorized to treat the realty as without value for railroad purposes, where tracks had been taken up and no trains had been operated for more than 14 years, neither railroad nor its predecessor had been able to operate the railroad profitably though they had attempted to do so for about fifteen years, and state's experts testified that because of increased motortruck competition and other factors it would be impossible to operate a railroad on such line at a profit. Code of Civ.Proc. § 1249.

35. Evidence ⇨543(3)

In proceeding by state to condemn for highway purposes a strip of realty formerly used as part of railroad's right of way, state's witnesses, who testified as to value of realty taken, were not incompetent because they were allegedly not familiar with the physical condition of the realty taken until after it had been altered by construction of highway. Code of Civ. Proc. § 1249.

36. Eminent domain ⇨224

On state's motion for a new trial of condemnation proceeding as to damages on ground that evidence was insufficient to sustain verdict, it was for trial court to determine the weight to be given the testimony, and trial court was not required to accept the opinion of any witness as to value.

37. Eminent domain ⇨128(1)

In proceeding by state to condemn for highway purposes a strip of realty formerly used as part of railroad's right of way, reproduction cost less depreciation was not the proper measure of compensation, where state's witnesses testified that roadbed and improvements had no market value for railroad purposes. Code of Civ. Proc. § 1249.

38. Eminent domain ⇨133

Generally, the proper measure of damages in a condemnation proceeding is not the market value of the land plus the reproduction cost of the improvements, but the market value of the property as improved, in view of all the uses to which it is adaptable and available. Code of Civ. Proc. § 1249.

39. Eminent domain ⇨224

In action to condemn land for state highway purposes, new trial was properly granted to state on ground that damages awarded by jury were excessive under the evidence.

40. Appeal and error ⇨837(8)

The exclusion of competent or relevant evidence may be a good ground for reversing an erroneous judgment, but it should not be considered for purpose of restoring a judgment after it has been set aside by the trial court on motion for a new trial.

41. Eminent domain ⇨224

Fact that trial judge did not accompany jury, when it visited realty sought to be condemned by the state for highway purposes, did not preclude the trial judge from granting a new trial on ground of insufficiency of the evidence to sustain damage award.

42. Eminent domain ⇨224

Where counsel for parties in condemnation proceeding agreed that trial judge should not be required to visit the realty to be condemned, defendant waived right to claim that trial judge was precluded from granting a new trial on ground of insufficiency of the evidence because he did not visit the realty.

43. Eminent domain ⇨265(4)

Where parties in condemnation proceeding stipulated in District Court of Appeal that, if a hearing should be granted by the Supreme Court, judgment on appeal should be modified to provide that each party should assume its own costs and that plaintiff should pay to defendants in addition the sum of \$1,250 on account of defendants' costs, and such seemed to be a fair apportionment of costs under the circumstances, each party was required by Supreme Court to bear its own costs of appeal, and in addition plaintiff was required to pay \$1,250 on account of defendants' costs.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action in eminent domain by the People of the State of California, acting by and through the Department of Public Works, against Ocean Shore Railroad, Inc., a corporation, and the Ocean Shore Railroad, as successor in interest to the rights of Ocean Shore Railroad, Inc., to condemn for highway purposes a strip of land formerly used as part of railroad right of way. From the judgment, the plaintiff and the defendants appeal, and, from an order granting a new trial, the defendants appeal.

Judgment and order affirmed.

Prior opinion, 181 P.2d 705.

Robert W. Kenny, Atty. Gen., Everett W. Mattoon, Deputy Atty. Gen., C. C. Carleton, of Sacramento, and Holloway Jones, George C. Hadley, Lincoln V. Johnson, and Jack M. Howard, all of San Francisco, for plaintiff and appellant.

Erskine & Erskine, of San Francisco, Nichols & Richard, of Oakland, Edwin

H. Williams, of San Jose, and A. P. Black, of San Francisco, for defendants and appellants.

GIBSON, Chief Justice.

The state is condemning for highway purposes a strip of land a little more than three miles long, lying north of Sharp Park in San Mateo County and formerly used as part of the right of way of a railroad. The defendant Ocean Shore Railroad Company is the successor in interest to the rights of defendant Ocean Shore Railroad, Inc., and, hereafter, will be referred to as the sole defendant.

The trial court found that defendant owned the land in question and was also entitled to severance damages to the portion of the right of way running from San Francisco south for about seven and one-half miles to Sharp Park, but it denied damages to that portion of the right of way running south from Sharp Park.

The jury awarded \$485,190 damages for the land condemned and \$30,000 severance damages, and a new trial was granted on the sole issue of damages. Both parties have appealed from the judgment, and defendant has also appealed from the order granting a new trial.

The appeals present three principal questions: (1) Did the evidence support the conclusion that defendant owned four of the parcels of land north of Sharp Park? (2) Was defendant entitled to severance damages for the right of way south of Sharp Park? (3) Was the trial court justified in granting a new trial on the sole issue of compensation on the ground of insufficiency of the evidence to sustain the verdict?

Each question involves different factual issues and contentions, and, in order to avoid repetition and facilitate understanding of the various claims, the facts bearing upon each question will be presented under the appropriate heading.

Ownership of Property North of Sharp Park

The trial court found that defendant was the owner of the portion of the right of way lying north of Sharp Park and was entitled to severance damages by reason of

the taking of part of that right of way. Plaintiff attacks this determination, claiming that it is not supported as to three sections of the property taken or as to a fourth parcel lying between the condemned property and Sharp Park.

As to the first parcel, plaintiff relies on a survey made by its witness, Poss, in 1935, which assertedly shows that the right of way described in defendant's deeds overlapped into and included part of the Gillogley property, which was not owned by defendant's grantors. The disputed area was at most a small "sliver" extending along the edge of the right of way, and there was evidence which supports defendant's claim that at the point in question the right of way curved and formed a tangent with the boundary line of the Gillogley property and that there was no overlapping.

The next parcel is referred to as the Globe Wireless property. The prior owner, Hooper, promised to give a deed for the right of way, and in reliance thereon defendant's predecessor took possession and constructed the roadbed. In 1929 Hooper's successor gave a deed to the predecessor of Globe Wireless which excepted "the right of way of the Ocean Shore Railroad Company." Thereafter, in 1934, Hooper's successor gave a quitclaim deed to one Chamberlain, who, in turn, quitclaimed to defendant. This deed did not accurately describe the right of way used by defendant, but in 1937 Hooper's successor gave another deed with the correct description. The third parcel, called the Edgemar property, involves a similar situation. The property was conveyed by Hooper and others in 1906 to one Lawlor, by deed, which excepted "the right of way of the Ocean Shore Railroad Company." The defendant subsequently obtained quitclaim deeds from the successor of Hooper as well as the successor of Lawlor, which accurately described the right of way used and occupied by the railroad. This evidence clearly establishes the ownership of these two parcels in the defendant.

[1-3] The fourth parcel in dispute is known as the Mary Tobin property. In support of its contention that the property occupied by the railroad as a right of way

is not the same as that described in the Tobin deed, plaintiff again relies on the survey made by Mr. Poss in 1935. He testified that the description in the deed has a tie to the county road on the north and to the ocean on the south, and in using these ties the description does not connect with the roadbed where it enters the Tobin property on the north and south. The witness, however, stated that he did not know the location of the county road or the shore line of the ocean in 1905 when the Tobin deed was executed, and he admitted that both might have been changed in the meantime. He testified that the shore line "might vary by several hundred feet." Under this state of the record the trial court was not bound to accept plaintiff's claim that the property occupied by the railroad company as a right of way was not that described in the Tobin deed. Moreover, Mr. Poss testified that because the starting point in the description was uncertain, the deed was indefinite. It is well settled that a deed indefinite in its terms may be made certain by the conduct of the parties acting under it. *Gramer v. City of Sacramento*, 2 Cal.2d 432, 440, 41 P.2d 543; *Blume v. MacGregor*, 64 Cal. App.2d 244, 251, 148 P.2d 656; *Fresno Irr. Dist. v. Smith*, 58 Cal.App.2d 48, 58, 136 P.2d 382. For many years the grantor and the grantee and their successors interpreted the Tobin deed as conveying the property used by the railroad as a right of way, and the trial court was justified in following the practical construction placed on the instrument by the parties.

[4] The determination of the trial court with respect to the ownership of these four parcels is supported by the evidence, and there is no merit in plaintiff's appeal.

Severance Damages to Property South of Sharp Park

Defendant has appealed from the judgment insofar as it denied severance and consequential damages to the right of way running south from Sharp Park. Section 1248 of the Code of Civil Procedure provides that if the property sought to be condemned constitutes only a part of a larger parcel the court or jury shall assess the damages which will accrue to the portion not sought to be condemned by reason of

its severance from the portion sought to be taken. As we have seen, the part of the right of way condemned by the state was located north of Sharp Park, and it is not disputed that defendant would be entitled to severance damages if the roadbed were contiguous, as would be the case if defendant had a fee title or an existing easement to a right of way through the park. Defendant claims that it acquired title to a right of way across Sharp Park by adverse possession, prescription, dedication and estoppel. It also claims that it has a right to a franchise across the park, under section 465 of the Civil Code, and that it is entitled to consequential damages because of loss of access to the property south of the park by reason of the taking of the property condemned. Although there is some inconsistency with respect to these claims, we shall consider each separately and determine whether on any theory defendant has such an interest in the Sharp Park property as would entitle it to severance or consequential damages to the property south of the park.

The property in question was owned by Honora Sharp when in 1904 defendant's predecessor entered upon the land and constructed the railroad. No conveyance of any kind was ever received by defendant or its predecessors from Honora Sharp or her successors. In 1916 the ranch was conveyed to the City and County of San Francisco for use as a public park. Operation of the railroad was discontinued in 1920 with the permission of the Railroad Commission, and defendant then removed all tracks from the right of way and sold the rails, rolling stock, and equipment. Thereafter defendant represented in numerous documents filed with the Corporation Commissioner that it was no longer a public utility and that it was not engaged in and did not propose to carry on any business other than that incidental to liquidation.

[5,6] Railroads, like individuals, may acquire fee title by adverse possession. See *Churchill v. Kellstrom*, 58 Cal.App.2d 84, 136 P.2d 602 [depot property claimed under deed]; *Hill v. Barner*, 8 Cal.App. 58, 96 P. 111 [land used as stock corral]; *Smith v. Southern Pac. R. Co.*, 1 Cal.2d

272, 34 P.2d 713 [land leased for farming]. The general rule, however, is that a railroad which enters without color of title and uses a right of way ordinarily gains merely a prescriptive right to an easement and does not acquire title to the fee. See cases cited in annotation 127 A.L.R. 517. The reasons advanced for this rule are that a railroad is authorized to condemn only an easement and not the fee, that usually there is no user beyond the purposes of a right of way and no notice to the owner that any greater right is claimed, and that the right acquired cannot be broader than the claims which the user evidence. If there is no color of title, and only use and possession of the property, the right acquired depends on the extent and character of the use and possession. If the sole use is as a right of way, whether as a footpath, wagon road, or railroad, the user will ripen into an easement, and it is only where there is some additional type of user or other action which will give notice that the claim is to more than a right of way that the use and permission may ripen into a fee title. See 127 A.L.R. 517, 518-520. In the present case, defendant's activities and improvements were consistent with the claim of a mere easement, and there was no additional user or other acts which could be construed as notice to the owner that defendant was claiming a right to the fee.

The cases of *Daniels v. Gualala Mill Co.*, 77 Cal. 300, 19 P. 519, and *Smith v. Southern Pac. R. Co.*, 1 Cal.2d 272, 34 P. 2d 713, do not compel a contrary conclusion. In the *Daniels* case, the property was sold to the mill company, which constructed a railroad. Subsequently, the seller obtained a patent from the United States under the mistaken belief that his prior title from the state was invalid, and then, more than five years after the sale, he attempted to recover possession. Clearly the company held adversely by virtue of the sale to it. In the *Smith* case, there was no showing of a deed or other color of title, but the right of way was fenced so as to include land which the railroad for a number of years had leased to others for agricultural purposes. The user was not limited to a railroad right of way, and the use for other

purposes was sufficient to give ample notice of a claim to the fee. Neither case, therefore, holds that fee title to a right of way may be acquired by adverse possession where there is no color of title and merely user consistent with an easement for a right of way.

Defendant claims, however, that it was in possession under color of title to the fee. It relies on conveyances made in 1911 by which, after foreclosure of a deed of trust and sale to trustees, defendant's predecessor, the Ocean Shore Railroad Company, conveyed its interest in the corporate property and franchises to the trustees, who thereafter reconveyed to defendant. These conveyances purported to transfer all "right, title and interest" of the Ocean Shore Railway Company in the "real property, rights of way and terminals within the City and County of San Francisco and the counties of San Mateo and Santa Cruz, in the State of California, and all of the railroads and railroad lines at any time owned by the Ocean Shore Railroad Company * * * also all the franchises, rights of way, leases, licenses, consents, easements, rights, privileges and immunities relating to or appertaining to said railroads or railroad lines * * * it being the intention * * * to grant, transfer and convey * * * all the property and franchises now belonging to [the grantors] * * * and which are now held, owned and possessed by" them.

[7] There was no specific description of the Sharp Park property in the deeds, nor was there any specification of the nature or extent of the interest sought to be conveyed in any parcel of property. Where, as here, the railroad would ordinarily acquire by adverse user only an easement, and the deeds clearly show that the intent was to convey only the interests actually owned by the predecessor company, it cannot be said that they purported to transfer a fee in the Sharp Park property. Although the deeds were sufficient to transfer to defendant whatever interest, if any, the predecessor had in the right of way across Sharp Park, they did not constitute color of title to a fee in that parcel.

[8] The asserted fact that defendant and its predecessor paid a gross receipts tax to the state and thereby discharged the duty to pay any taxes levied and assessed against the property is not sufficient by itself to establish adverse possession, since the payment of taxes is merely one of the elements which must be proved. See Code Civ.Proc. § 325.

Defendant also claims that its predecessor acquired an easement by prescription across Sharp Park for railroad purposes, and it is not disputed that the record would support a finding to this effect. There is evidence, however, that any such right of way was lost by abandonment or nonuser. In 1920 the company stopped running its trains, removed its tracks and sold its rails, rolling stock, and other equipment. It represented to the Corporation Commissioner on a number of occasions, some as late as 1930, that it was no longer a public utility and did not propose to engage in any business other than that incidental to liquidation.

[9,10] An easement acquired by a utility for a public purpose is terminated by abandonment of that purpose, and whether or not there has been such an abandonment is ordinarily a question of fact. *Slater v. Shell Oil Co.*, 39 Cal.App. 2d 535, 549, 550, 103 P.2d 1043, and cases there cited. Section 811 of the Civil Code provides that "a servitude is extinguished: * * * 3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise * * *." The inconsistent act, of course, must be material and permanent, as distinguished from something that is occasional and temporary. See *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674, 28 C.J.S., Easements, § 53 pages 716, 717.

[11] It was for the trier of fact to determine whether there was a bona fide intent to preserve the right of way for actual railroad use, and the court could properly conclude that the acts and conduct of defendant were incompatible with the continued exercise of the easement, that the discontinuance of the line was not merely temporary, and that the right of way was

abandoned and the easement terminated. Cf. *Home Real Estate Co. v. Los Angeles Pac. Co.*, 163 Cal. 710, 126 P. 972; *Tamalpais Land & Water Co. v. Northwestern Pac. R. Co.*, 73 Cal.App.2d 917, 931, 932, 167 P.2d 825; *Norton v. Duluth Transfer Ry. Co.*, 129 Minn. 126, 151 N.W. 907, Ann.Cas. 1916E, 760; *Jones v. Van Bochove*, 103 Mich. 98, 61 N.W. 342; see *California & N. Railroad Co. v. McCartney*, 104 Cal. 616, 623, 38 P. 448.

Defendant contends, however, that it was decided in *Ocean Shore Railroad Co. v. Spring Valley Water Co.*, 87 Cal.App. 188, 262 P. 53, that there was no intent to abandon the right of way and that this decision is *res judicata* of the issue. Cf. *Ocean Shore R. Co. v. Spring Valley Water Co.*, 218 Cal. 86, 21 P.2d 588; *Midstate Oil Co. v. Ocean Shore R. Co.*, 93 Cal.App. 704, 270 P. 216. In the *Spring Valley* case, commenced approximately two years after discontinuance of service, defendant was seeking to quiet its title to a portion of the right of way which it had acquired "by grant in perpetuity upon payment of full value of the land to be occupied * * *" 87 Cal.App. at page 191, 262 P. at page 55. The court held that, in view of the character of the right and the manner of acquisition, it could not be said that an intent to abandon had been established because "the whole course of dealing by [Ocean Shore] with the right of way as shown by its uncontroverted evidence negatives the inference that might be drawn from its public acts, and is not inconsistent with those acts." 87 Cal.App. at page 192, 262 P. at page 55.

[12-14] It is unnecessary for us to determine the correctness of the decision because even though it is erroneous, that fact alone will not prevent the application of *res judicata*. See *Greenfield v. Mather*, 32 Cal. 2d 23, 194 P.2d 1. The doctrine does not apply, however, where there are changed conditions and new facts which did not exist at the time of the prior judgment. See *Guardianship of Snowball*, 156 Cal. 240, 242, 104 P. 444; *Timm v. McCartney*, 9 Cal.App.2d 230, 235, 49 P.2d 315; 15 Cal. Jur. §§ 201, 214, pp. 154, 179. In the present case the facts are not the same, and the

Spring Valley decision is not *res judicata*. Here the railroad operation was discontinued more than fourteen years prior to the commencement of the action, there has been no resumption of service, and there was evidence that increased motor travel and other factors had made it economically infeasible to operate a railroad. Moreover, there were continued representations that the company was not a public utility, that it was in liquidation, and that it did not intend to engage in business other than that incidental to liquidation. We thus have evidence of subsequent facts which, when considered with the prior circumstances, would support a finding of intent to abandon even though we accept as controlling the determination of that case that there had been no abandonment when that action was commenced in 1922.

[15] Moreover, it is not necessary to show an intent to abandon in order to prove loss of an easement acquired by prescription. Civil Code section 811, subdivision 4, provides that a servitude is extinguished "when the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment." The decisions interpreting this subdivision have without discussion applied it as operating to terminate such an easement by nonuser alone. *Garbarino v. Noce*, 181 Cal. 125, 130, 183 P. 532, 6 A.L.R. 1433; *City of Los Angeles v. Pomeroy*, 125 Cal. 420, 425, 58 P. 69; *Drake v. Russian River Land Co.*, 10 Cal.App. 654, 666, 103 P. 167; cf. *McRose v. Bottyer*, 81 Cal. 122, 125, 22 P. 393. In a number of cases involving easements by grant, where an intent to abandon is necessary, the rule that an easement gained by user may be lost by mere disuse has been recognized but held not applicable. *People v. Southern Pacific Co.*, 172 Cal. 692, 700, 701, 158 P. 177; *Copeland v. Fairview Land & Water Co.*, 165 Cal. 148, 166, 167, 131 P. 119; *Storrow v. Green*, 39 Cal.App. 123, 126, 178 P. 339; *Gardner v. San Gabriel Valley Bank*, 7 Cal.App. 106, 111, 93 P. 900; cf. *Glatts v. Henson*, 31 Cal.2d 368, 188 P.2d 745.

[16] The record does not support defendant's position that the nonuser was not

due to any voluntary action on its part but was compelled by the Spring Valley and Joint Highway litigation, which lasted from 1922 until 1933. See *Ocean Shore R. Co. v. Spring Valley W. Co.*, 87 Cal.App. 188, 262 P. 53; *Joint Highway Dist. No. 9 v. Ocean Shore R. Co.*, 128 Cal.App. 743, 18 P.2d 413. The tracks were removed, and the operation of trains was discontinued more than a year prior to institution of the Spring Valley action, and it does not appear that defendant was prevented by that litigation from using the right of way. The Joint Highway action was not commenced until 1930, and its pendency could not have prevented the use of the right of way prior to that date. Under all the circumstances, including the facts that defendant, after terminating its railroad service in 1920, sold its rails, rolling stock, and equipment, and publicly represented on numerous occasions that it was not a public utility but was engaged solely in liquidation, the trial court could properly have concluded that the nonuser was voluntary.

[17, 18] It is next contended that defendant acquired title to a right of way through Sharp Park by implied dedication by reason of user with the consent or acquiescence of the owner. The common law doctrine of dedication, however, applies only between the owner and the public, and the public must be a party to every dedication. 9 Cal.Jur. 7. It is not a mode of conferring a private property right in land, and the general rule is that there cannot be an implied or common law dedication of land to a railroad company by virtue of user with the consent or acquiescence of the owner. *Watson v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 321, 48 N.W. 1129; *Elyton Land Co. v. South & North Ala. R. Co.*, 95 Ala. 631, 10 So. 270, 271; *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514, 40 N.E. 1014, 1018, 28 L.R.A. 612, 46 Am.St. Rep. 355; *Pittsburgh C. C. & St. L. Ry. Co. v. Warrum*, 42 Ind.App. 179, 82 N.E. 934, 937; *Quinn v. Pere Marquette Ry. Co.*, 256 Mich. 143, 239 N.W. 376; *Minneapolis St. P. & S. S. M. Ry. v. Marble*, 112 Mich. 4, 70 N.W. 319; *Louisville St. L. & T. Ry. Co. v. Stephens*, 96 Ky. 401, 29 S.W. 14; *Todd v. Pittsburg, Ft. W. & C. R. Co.*, 19 Ohio St. 514; 4 *Tiffany, Real Property*,

3d Ed. [1939], § 1098, p. 333; 2 Elliott on Railroads, 3d Ed. [1921], § 1172, pp. 650, 654; cf. *Morgan v. Railroad Co.*, 96 U.S. 716, 24 L.Ed. 743 (dedication by plat under statute); *Texas & N. O. Ry. v. Sutor*, 56 Tex. 496.

[19,20] The defendant, however, relies on cases which hold that where property is devoted to a public use by a railroad or other public utility, with the consent or acquiescence of the owner, the use is thereafter in the interests of the public, and the owner will not be allowed to maintain ejectment or to interfere with the possession by the utility, but will be limited to an action for damages for the taking of the property. See *Southern Cal. Ry. Co. v. Slauson*, 138 Cal. 342, 345, 71 P. 352, 94 Am.St.Rep. 58; *Fresno St. R. Co. v. Southern Pac. R. Co.*, 135 Cal. 202, 67 P. 773; *Miller & Lux v. Enterprise Canal & Land Co.*, 169 Cal. 415, 424-428, 147 P. 567; *Gurnsey v. Northern Cal. Power Co.*, 160 Cal. 699, 709, 117 P. 906, 36 L.R.A.,N.S., 185. While it has been stated that such conduct will be regarded as a dedication to the particular public use (see *Miller & Lux v. Enterprise Canal & Land Co.*, supra, 169 Cal. at page 430, 147 P. 567; *Southern Cal. Ry. Co. v. Slauson*, supra, 138 Cal. at page 345, 71 P. 352, 94 Am.St.Rep. 58; *Conaway v. Yolo Water & Power Co.*, 204 Cal. 125, 131, 266 P. 944, 58 A.L.R. 674), the cases are not based on the theory of a gift or donation, and the rule is not one of true dedication. Instead, it is a rule of public policy designed to protect the public interest in the continuance of the service. *Gurnsey v. Northern Cal. Power Co.*, supra, 160 Cal. 699, 712, 117 P. 906, 36 L.R.A.,N.S., 185. When that interest has intervened, upon the establishment of the utility service, public policy requires that the owner be denied the right to disrupt the service or to interfere with the right of the public to have the service continued. Any right of the utility to be free from interference from the owner, however, having been acquired for the protection of the public interest, is conditioned upon the continuance of service. Where, as here, the tracks have been removed and the service terminated for over

fourteen years, and the company is no longer a utility, it cannot claim the benefit of a rule which is based solely upon user of the property for railroad purposes for the benefit of the public.

[21,22] Claim is also made that defendant has title to a right of way by estoppel. It is asserted that Honora Sharp and her successors stood silently by while the railroad was being built and operated, and while the conveyances were made which transferred the railroad to defendant, that such conduct induced defendant to believe in and rely on the existence of an agreement, license, interest or title of some kind in its predecessor. Defendant is not entitled, under the doctrine of estoppel, to claim a fee or any right greater than an easement. An estoppel may arise from silence, but only where there is a duty to speak, and where the party upon whom such duty rests has an opportunity to speak and, knowing that the circumstances require him to speak, remains silent. *Merry v. Garibaldi*, 48 Cal.App.2d 397, 401, 119 P.2d 768. The present case does not come within this rule so as to entitle defendant to claim that it had anything greater than an easement across Sharp Park. It does not appear that defendant was entitled to believe that it had a fee title to the right of way, or that Honora Sharp or her successors had any knowledge or notice of any such claim or belief on the part of defendant or its predecessor. Any claim to an interest less than a freehold was lost when the tracks were torn up and the roadbed abandoned for railroad purposes.

[23] As a further ground for the allowance of severance damages, defendant asserts that it has a right to a franchise across Sharp Park under section 465 of the Civil Code and hence that the portions of the roadbed north and south of the park should be regarded as contiguous. Two public roads ran through the park, one of which paralleled the roadbed, but there is no suggestion that either road was ever used for the operation of trains. Subdivision 5 of section 465 provides that every railroad shall have power "to construct their roads across, along or upon

any * * * street, avenue or highway * * * which the route of its road intersects, crosses or runs along * * *." This section does not grant franchise rights and is at most a mere offer which must be accepted by user. Until such acceptance by user, no right vests under it. *San Pedro L. A. & S. L. R. Co. v. Long Beach*, 172 Cal. 631, 636, 158 P. 204; see *Santa Cruz v. Southern Pac. R. Co.*, 163 Cal. 538, 548, 126 P. 362; cf. *Los Angeles v. Southern Pac. R. Co.*, 157 Cal. 363, 369, 108 P. 65; *Simons Brick Co. v. City of Los Angeles*, 182 Cal. 230, 235, 187 P. 1066; *City of Oakland v. Hogan*, 41 Cal. App.2d 333, 358, 106 P.2d 987.

[24-26] In the present case there was no acceptance of the offer by user of the road, and hence there was no existing franchise to use the road. Moreover, any right to accept the offer was lost when defendant took up its tracks and ceased to be a public utility. See *County of Los Angeles v. Southern Cal. Tel. Co.*, Cal. Sup., 196 P.2d 773. Defendant therefore cannot rely on cases such as *Russell v. Sebastian*, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912, Ann.Cas.1914A, 152, and *Postal Telegraph-Cable Co. v. Railroad Comm.*, 200 Cal. 463, 254 P. 258, in which the public utilities were going concerns and were under a duty to extend their services. Nor does a contrary conclusion follow from the statement in *Joint Highway Dist. No. 9 v. Ocean Shore R. Co.*, 128 Cal.App. 743, 762, 18 P.2d 413, 420, that "such railroad could have been run over the portion of the property previously granted for highway purposes as contemplated by subdivision 5 of section 465 of the Civil Code." That case did not involve severance damages, but the value of the land taken, and the court was following the rule that the prospect of joining separate parcels for a particular use may be a proper element in determining that value. As we shall see, this rule does not apply to severance damages, and an award therefor is not proper where there is no existing unity of use and merely a prospect of such a joinder. Under the circumstances, therefore, defendant did not have any existing franchise right which

would permit an award of severance damages.

[27] It is next urged that the whole roadbed is susceptible to a common use which is inherent in its nature, that the parcels north and south of Sharp Park were inseparable in use, that there was a unity of use and that the whole roadbed, although not physically contiguous, should be considered in the nature of a single parcel for purposes of severance damages. Under section 1248 of the Code of Civil Procedure, however, contiguity is ordinarily essential, and the owner is not entitled to severance damages for injury to other separate and independent parcels. See *City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 398, 153 P. 705; *Atchison T. & S. F. Ry. Co. v. Southern Pac. Co.*, 13 Cal.App.2d 505, 520, 57 P.2d 575; *City of Stockton v. Ellingwood*, 96 Cal.App. 708, 745, 746, 275 P. 228. There may be a right to an award of severance damages in some cases where the property, though not physically contiguous, is being devoted to an existing unity of use. See *Southern California Edison Co. v. Railroad Comm.*, 6 Cal.2d 737, 59 P.2d 808; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463. But such damages are ordinarily limited to contiguous property, and the mere fact that there is a possible or prospective use of separate properties as a unit, or that they are susceptible to a common use, will not justify the allowance of severance damages. See *East Bay Municipal Utility Dist. v. Kieffer*, 99 Cal.App. 240, 248, 278 P. 476, 279 P. 178; 2 *Lewis on Eminent Domain*, 3d Ed. [1909], § 697, p. 1207; 2 *Nichols on Eminent Domain*, 2d Ed. [1917], § 241, p. 740.

[28] There are cases which hold that, where the highest and best use of separate parcels will involve their integrated unitary use, such prospective use may be considered in fixing the value of the property taken if a joinder of the parcels is reasonably practicable, and the nature of the case does not preclude the possibility of a union without the exercise of eminent domain.

City of Pasadena v. Union Trust Co., 138 Cal.App. 2d, 25-27, 31 P.2d 463; *City of Stockton v. Ellingwood*, 96 Cal.App. 708, 728 et seq., 275 P. 228; *City of Stockton v. Vote*, 76 Cal.App. 369, 405-407, 244 P. 609. That rule, however, has no application to the allowance of severance damages. The possibility of joinder of parcels for a specified use is a factor that might be weighed by a prospective purchaser, if the joinder were reasonably practicable, and hence is an element to be considered in determining the value of the property taken, but it has no bearing on the allowance of severance damages. Under section 1248 of the Code of Civil Procedure, the primary test for severance damages is contiguity, and while an existing unity of use may warrant an award, none can be allowed where, as here, the property is not contiguous, and there is merely a possible or prospective, and not a presently existing, unity of use. See *City of Oakland v. Pacific Coast Lumber & Mill Co.*, supra, 171 Cal. 392, 398, 153 P. 705; *Atchison T. & S. F. Ry. Co. v. Southern Pac. Co.*, 13 Cal.App.2d 505, 520, 57 P.2d 575; *East Bay Municipal Utility Dist. v. Kieffer*, 99 Cal.App. 240, 248, 260, 278 P. 476, 279 P. 178.

[29] There is no merit in the contention that defendant had a right to consequential damages to the property south of the park. It is asserted that a railroad is like a highway, and that the taking of the property to the north cut off access to the roadbed to the south because the part taken furnished the only route for a railroad from San Francisco along the coast, and it is argued that the right to consequential damages is not limited by section 1248 of the Code of Civil Procedure and that such damages should have been allowed under the decisions in *Rose v. State of California*, 19 Cal.2d 713, 123 P.2d 505; *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818; *Beals v. City of Los Angeles*, 23 Cal. 2d 381, 144 P.2d 839, and *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799. Those cases, however, involved interference with an abutter's easement of access by reason of the taking or obstruction of the means of access. In the present case the situation is quite different, and there was no such interference by the state. Defendant

was not an abutting owner, and as we have seen, its right of way to the north was cut off, not by the taking of the property by the state, but rather by the termination of the railroad use and the resulting loss of any right of way through Sharp Park.

It follows that the judgment must be affirmed insofar as it defines the right to recover severance or consequential damages for the property south of Sharp Park.

Order Granting New Trial as to Damages

The trial court granted plaintiff's motion for a new trial as to damages on the ground that the evidence was insufficient to sustain the verdict. On appeal from that order defendant's principal contention is that there was no real conflict in the evidence and no competent evidence which would have supported a lower verdict than the one given. It is also claimed that evidence which would have supported the award was erroneously excluded and that it was improper for the judge to grant the motion because he did not view the property, whereas the jury did.

The jury awarded defendant \$485,190 as compensation for the taking of the property and \$30,000 as severance damages to the roadbed north of Sharp Park. There was widely divergent testimony as to market value. Plaintiff's witnesses gave opinions ranging from \$3,228.50 to \$5,190, while defendant's witnesses testified that the value was between \$800,000 and \$1,376,000. It is claimed that the apparent conflict in the evidence is not one in fact, because plaintiff's witnesses assertedly disregarded its value for its highest and best use which, defendant says, was for railroad purposes.

[30-32] Under section 1249 of the Code of Civil Procedure the measure of compensation for property taken is its market value, which is to be determined by a consideration of all the uses to which it is adapted and for which it is available. *Long Beach City H. S. Dist. v. Stewart*, 30 Cal.2d 763, 185 P.2d 585, 173 A.L.R. 249; *Sacramento Southern R. Co. v. Heilbron*, 156 Cal. 408, 412, 104 P. 979; *Joint Highway Dist. No. 9 v. Ocean Shore R. Co.*, 128 Cal. App. 743, 755, 18 P.2d 413. *City of Stockton v. Ellingwood*, 96 Cal.App. 708, 275 P.

228. In this connection, the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not as the measure of value, but to the extent that the prospect of such use affects the market value of the land; however, elements affecting value which, while possible, are not reasonably probable, should be excluded. *Olson v. United States*, 292 U.S. 246, 255-257, 54 S.Ct. 704, 78 L. Ed. 1236; *Cameron Development Co. v. United States*, 5 Cir., 145 F.2d 209, 210. Accordingly, where it is not shown that a suggested use would be profitable, or where it appears that the operations cannot be carried on except at a loss, the prospect of use for such a purpose is not a proper element of value. See *In re Elevated Railroad Structures*, 229 App.Div. 617, 243 N.Y.S. 665, 672; *In re Elevated Structures in Forty-Second St.* 265 N.Y., 170 192 N.E. 188, 191; *Roberts v. New York City*, 295 U.S. 264, 284, 55 S.Ct. 689, 79 L.Ed. 1429; *Cameron Development Co. v. United States*, 5 Cir., 145 F.2d 209, 210.

[33, 34] In the present case there seems to be little doubt as to the physical adaptability of the property for railroad use, but plaintiff's witnesses were also entitled to consider whether its use for such purposes was economically feasible. Any prospective purchaser, in estimating the value of the property for railroad purposes, would consider the economic feasibility of that use, and it is therefore a factor which has an important bearing on the market value of the property. In this connection, it appears that neither defendant nor its predecessor had been able to operate the railroad profitably, although they attempted to do so for about 15 years. Plaintiff's experts testified that because of increased motor truck competition and other factors it would be impossible to operate a railroad on this line at a profit. Moreover, although there was some evidence to the effect that certain parties had obtained an option to purchase the railroad with a view to reestablishing service, it did not appear that any attempted rehabilitation would be successful, and plaintiff's evidence as to lack of economic feasibility indicated that it would not. In

view of the testimony that the tracks had been taken up, that no trains had been operated since 1920, that parts of the roadbed had been washed out and eroded, and that the railroad would not be economically feasible, it cannot be said as a matter of law that the evidence of these witnesses was incompetent because they treated the property as without value for railroad purposes.

[35] Defendant also claims that the testimony of plaintiff's witnesses was incompetent because they had not seen the property and were not familiar with its physical condition until after it had been altered by construction of the highway. It is argued that their opinions should have been founded on a personal knowledge of the property rather than upon hearsay or hypothetical reconstruction of the railroad right of way. Two of plaintiff's expert witnesses, however, had seen the property both before and after it was taken and changed by the state, and the fact that their personal knowledge of the property as it previously existed was not based on a detailed examination merely affected the weight of their testimony. Moreover, it clearly was not necessary that the witnesses testifying as to economic feasibility of operating a railroad should have had personal knowledge of the physical condition of the property prior to its taking.

[36] It thus appears that there was a conflict in the evidence. On the motion for a new trial it was for the trial court to determine the weight to be given the testimony, and it was not required to accept the opinion of any witness as to value. *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 307, 163 P.2d 689; *Estate of Green*, 25 Cal.2d 535, 542, 154 P.2d 692, see *Zimmer v. Kilborn*, 165 Cal. 523, 525, 132 P. 1026, Ann.Cas.1914D, 368; *Joint Highway Dist. No. 9 v. Ocean Shore R. Co.*, 128 Cal.App. 743, 762, 18 P.2d 413.

[37] Defendant next contends that, accepting the testimony of plaintiff's witnesses that the roadbed and improvements had no market value for railroad purposes, the proper measure of value was reproduction cost less depreciation. It argues that there was no substantial conflict in the

evidence as to reproduction cost, which was about three times what was allowed by the jury, and that, accordingly, it was error to grant a new trial. We cannot agree, however, that reproduction cost is the proper measure of compensation.

[38] In a number of cases it has been held proper to admit evidence of reproduction cost as an aid to determining value, especially when the property is adapted to a particular enterprise and there are ordinarily no willing buyers and hence no market for that type of property. See Orgel, *Valuation Under Eminent Domain*, pp. 586-588. It has also been held that reproduction cost is a proper test where there is a taking of a going concern with a view to continuing the operation. See *In re United States Commission*, 54 App. D.C. 129, 295 F. 950. The general rule, however, is that the proper measure of damages is not the market value of the land plus the reproduction cost of the improvements, but the market value of the property as improved, in view of all the uses to which it is adaptable and available. *Joint Highway Dist. No. 9 v. Ocean Shore R. Co.*, 128 Cal.App. 743, 759, 18 P.2d 413; see 2 Nichols on *Eminent Domain*, 2d Ed. [1917], § 447, p. 1174; 2 Lewis, *Eminent Domain*, 3d Ed. [1909], § 706, p. 1227 et seq.; Orgel on *Valuation Under Eminent Domain* [1936], § 187, p. 586; *Cohen v. St. Louis, Ft. S. & W. R. Co.*, 34 Kan. 158, 8 P. 138, 142, 55 Am.Rep. 242; *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253; *Orleans & J. Ry. Co. v. Jefferson & L. P. Ry. Co.*, 51 La. Ann. 1605, 26 So. 278; *De Boul v. Freeport & M. R. Ry. Co.*, 111 Ill. 499.

Defendant relies on a statement in *City of Los Angeles v. Klinker*, 219 Cal. 198, 211, 212, 25 P.2d 826, 90 A.L.R. 148, to the effect that the case of *Joint Highway Dist. No. 9 v. Ocean Shore R. Co.*, seems to be an illustration of the exception to the general rule that market value is the proper measure of compensation. The court in the *Joint Highway* case, however, did not adopt the test of reproduction cost, but proceeded on the basis of market value. See 128 Cal.App. at pages 756, 759, 760, 18 P.2d 413.

[39] The mere fact that a structure or improvement may have cost a certain amount, or that it would cost that amount to reproduce it, is not conclusive proof of its value in the market, or that a purchaser would be willing to pay that sum. Moreover, a structure or improvement may add little or nothing to the value unless it is of such a character that it is adapted to some prospective use which affects the market value of the land. In the present case, in view of all the various factors which the court was under a duty to consider in passing on the sufficiency of the evidence, including the conflict in testimony as to probability and economic feasibility of use for railroad purposes, it clearly appears that the granting of the motion was a matter within the proper exercise of the trial court's discretion.

[40] There is no merit in defendant's contention that the court erred in granting a new trial because evidence which would have supported the judgment was erroneously excluded. "The exclusion of competent or relevant evidence might be a good ground for reversing an erroneous judgment, but it should not be considered for the purpose of restoring a judgment after it has been set aside by the trial court on motion for a new trial." *Estate of Green*, 25 Cal.2d 535, 544, 154 P.2d 692, 697.

[41, 42] The fact that the trial judge did not accompany the jury when it visited the property did not preclude him from granting a new trial on the ground of insufficiency of the evidence. *Southern Cal. Edison Co. v. Gemmill*, 30 Cal.App.2d 23, 27, 28, 85 P.2d 500. Moreover, it appears that defendant is in no position to raise the point on appeal. The trial judge stated that he did not wish to visit the property but that he would do so unless the parties waived his absence, and counsel for the parties then agreed that the judge should not be required to make the trip. Defendant thus acquiesced in this procedure and must be deemed to have waived the right to claim error because of the absence of the trial judge. Cf. *County of San Luis Obispo v. Simas*, 1 Cal.App. 175, 182, 81 P. 972.

Costs on Appeal

[43] The final question relates to the allowance of costs on appeal. When this cause was pending in the District Court of Appeal, the parties stipulated, without prejudice to the right of defendant to reopen the matter if a hearing should be granted by this court, that the judgment on appeal should be modified to provide that each party should assume its own costs and that plaintiff should pay to defendant in addition the sum of \$1250 on account of defendant's costs. This seems to be a fair apportionment of costs under the circumstances, and, the matter not having been reopened, no reason appears why the same apportionment should not be made at this time.

The judgment and the order granting a new trial on the issue of damages are affirmed. Each party shall bear its own costs of appeal, and in addition plaintiff shall pay the sum of \$1250 on account of defendant's costs.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



87 Cal.App.2d 233

CASH v. BLACKETT et al.
Civ. 3922.

District Court of Appeal, Fourth District,
California.

Aug. 17, 1948.

Rehearing Denied Aug. 31, 1948.

Hearing Denied Oct. 15, 1948.

1. Trial ☞109

In action to foreclose mechanic's lien and recover money judgment on three counts for reasonable value of services and for materials bought, and for either in the alternative, and on a fourth count based on written agreement reciting that plaintiff was not a licensed architect but authorizing him to construct buildings and prepare sketches, where pleadings, contract and provable facts showed that all acts were performed pursuant to the agreement which

was unenforceable, nonsuit on opening statement of counsel on all counts was properly granted. Code Civ.Proc. § 581; Business and Professions Code, §§ 5536, 5537, 7026, 7028, 7030, 7031.

2. Licenses ☞39

Where action for foreclosure of mechanic's lien and recovery of money judgment was based on written agreement reciting that plaintiff was not a licensed architect but authorizing him to construct building and prepare sketches, plaintiff's claim thereunder for compensation as a contractor was barred by statute forbidding recovery by unlicensed contractors and architects. Business and Professions Code, §§ 5536, 5537, 7026, 7028, 7030, 7031.

3. Licenses ☞39

An unlicensed contractor is without right to foreclose a mechanic's lien. Business and Professions Code, §§ 7026, 7028, 7030, 7031.

4. Constitutional law ☞70(3)

Public policy preventing recovery in an action on contract by an unlicensed contractor or architect is determined by the legislature and is not a subject of debate in the courts. Business and Professions Code, § 7026 et seq.

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

Action by Virgil W. Cash against John R. Blackett and others to foreclose a mechanic's lien, and to recover a money judgment. From the judgment, plaintiff appeals.

Affirmed.

Ruel Liggett and Harry C. Clark, both of San Diego, for appellant.

Thomas M. Hamilton, of San Diego, for respondents.

GRIFFIN, Justice.

Action to foreclose mechanic's lien and to recover money judgment. Under written agreement plaintiff agreed to build and construct a building or night club for defendants, which building was completed. He filed a complaint in four counts. Count 1 was for the fair and reasonable value of

his services performed and for the material bought for defendants; Counts 2 and 3 are alternative statements of his claim for his own services and an alternative statement for material bought for defendants: Count 4 is an alternative statement of his claim for the total amount in which he pleads the written contract between the parties which specifically sets forth the nature of the contract and the duties and liabilities of the parties.

The contract provides, in substance, that in consideration of ten per cent of the total cost of the buildings and operations plaintiff would build the building, prepare preliminary sketches, detailed drawings and specifications, and give general supervision of all building operations; that plaintiff would segregate the various items of labor and material going into the building and award them as individual contracts according to his own judgment. It provides then for an audit, twice a month, of all labor, material paid or payable, sub-contracts performed, and that defendants then would pay plaintiff that amount and plaintiff would then pay all bills to date. The method of paying plaintiff's compensation was under a graduated scale. The ten per cent basic fee included all architectural services and is computed on the total cost of construction. In case defendants discontinued the work plaintiff was to recover ten per cent of the estimated cost of the completed building, and should the building not be completed, then defendants were to pay plaintiff for the balance, four per cent of that total estimated cost. It then provided that it was agreed and understood that plaintiff was not a registered architect. Plaintiff seeks a judgment for \$7,959.43, and foreclosure of his lien.

Defendants answered the complaint, denied all allegations but admitted the due execution of the written instrument; alleged that plaintiff, at no time mentioned in his complaint, was a duly licensed contractor; and that the building was completed on February 21, 1946. By way of cross-complaint defendants alleged that they paid plaintiff \$42,307.10, at which time he was not a licensed contractor, and they ask judgment against him in that amount.

In answer to the cross-complaint plaintiff alleges that the money was paid to him by defendants, not as an independent contractor, but as defendants' employee and that at all times defendants well knew that plaintiff was not a licensed contractor nor a licensed architect.

A jury was impaneled to try the issues thus presented. Counsel for plaintiff made an opening statement to the jury, in substance as follows: He told them that his statement was not evidence "but simply to outline to you in a general way what the parties expect to prove"; "* * * Now I think the evidence will show * * * that Mr. Cash * * * has had considerable skill and experience in the preparations of plans and specifications for the building of structures. However, he is not a contractor and does not have a license as such, and neither is he what we would call a licensed architect. * * * He is what we might call an unlicensed architect"; that in 1940, defendants started using Mr. Cash's advice and supervision in the remodeling of various places for them; that he believed the evidence would show that one contractor who started on the matter, sort of a general contractor, was not able to go through with it and another one was engaged; and "I believe the man who did most of the work, the general contractor on the place, will be shown to be a man by the name of Hutchinson, who was a licensed contractor"; that Mr. Cash's duties were confined to those of preparing plans and specifications and supervising the work and finding materials; that as the work progressed Cash would present bills from material people, presented his plans, and was paid, from time to time by defendants; that defendants are defending themselves by saying that plaintiff did not have a license; and that "those are the issues".

Defendants' counsel then moved for a nonsuit under sec. 581, C.C.P., and then argued that the pleadings, contract, and statement of counsel conclusively showed that plaintiff violated secs. 5536 and 5537, and secs. 7026, 28, 30, 31 of the Business and Professions Code, and by reason thereof was barred from a recovery. The mo-

tion was granted and judgment of nonsuit followed.

[1,2] Plaintiff states in his brief that the sole issue or question of law presented is that since the complaint states four separate counts and that it is only in the fourth count that the contract is referred to, the court erred in granting the nonsuit upon the ground that plaintiff had no contractor's license or certificate to practice architecture, because, under his statement of the evidence sought to be proved and the pleadings, he may be able to establish that plaintiff was entitled to recover under some one or more particular counts if not under the count setting forth the contract or agreement; that even though the written agreement may be illegal or unenforceable he may enforce his demand or some portion of it without resorting to the contract, the bad being severable from the good. Citing *Wayman Investment Co. v. Wessinger & Wagner*, 13 Cal.App. 108, 108 P. 1022.

From a reading of the written agreement and from counsel's own statement to the jury as to the transaction here involved, it affirmatively appears that plaintiff's right of recovery upon any count must be based upon the written agreement pleaded. There is no other agreement suggested or referred to in the pleadings or statement to the jury. Therefore, the trial court was called upon to construe the written agreement according to its terms. Such is our duty too. The pleadings, the contract and statement of facts which counsel could rightfully prove affirmatively show that all the acts for which compensation is sought were performed pursuant to that agreement and by the terms of it plaintiff was to receive costs plus 10 per cent.

Counsel's argument that he might establish by the evidence that plaintiff was not in fact the principal contractor is dispelled by the holding in *Payne v. De Vaughn*, 77 Cal.App. 399, 246 P. 1069; where it was held that "An unlicensed architect cannot avoid the effect of the statute upon the theory that, although he was a contracting party, prepared the plans and specifications, and agreed to supervise the construction, the contract was legal because in reality he was not the principal

architect, where the latter was not a party to the contract."

It therefore does not appear that plaintiff's claim for compensation as an agent of defendants or as an architect, as distinguished from that of a contractor, was severable, or if severable, that he was an unlicensed architect whose acts would permit him to recover as one coming within the exception set forth in sec. 5537 of the Business and Professions Code. 17 *Corpus Juris Secundum*, Contractor, page 291; *Kirman v. Borzage*, 65 Cal.App.2d 156, 150 P.2d 3; *Moon a. Goldstein*, 69 Cal.App.2d Supp. 800, 158 P.2d 1004.

In *Phillips v. McIntosh*, 51 Cal.App.2d 340, 124 P.2d 835, plaintiff sought to recover for work performed and material furnished. At the close of plaintiff's case the court granted a nonsuit for failure of plaintiff to comply with section 7031, *supra*. There the evidence showed that the plaintiff charged defendant 15 per cent upon all materials and labor furnished by her. It was held that in an action for work performed and materials furnished, evidence showing that plaintiff made a profit upon the labor of others, that she charged a certain percentage over and above the cost of materials, and that she performed no labor herself brought the case within the purview of the Business and Professions Code sec. 7031, precluding a contractor from maintaining an action for services contracted for unless she proves that she has a contractor's license.

[3] *Alvarado v. Davis*, 115 Cal.App. Supp. 782, 6 P.2d 121, specifically denies to an unlicensed contractor the right to foreclose his mechanic's lien.

Plaintiff cites such cases as *Payne v. De Vaughn*, *supra*; *Jones v. Wickstrom*, 92 Cal.App. 292, 268 P. 449, and *People v. Allied Architects' Ass'n*, 201 Cal. 428, 257 P. 511. These cases do not support the proposition that one may gain immunity from Business and Professions Code secs. 7026, 7028 and 7031, simply by stating that he has no architect's license, if in fact he performs or contracts to perform acts, as the plaintiff here has done, which bring him within the definition of "contractor", as defined in section 7026, *supra*.

[4] The Public policy involved here has been determined by the legislature; it is not a subject of debate in the courts. *Howard v. State of California*, 85 Cal.App. 2d 361, 193 P.2d 11.

Judgment affirmed.

BARNARD, P. J., concurs.

Hearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.



87 Cal.App.2d 238

BOLDEN v. DAVIES.

Civ. 13748.

District Court of Appeal, First District,
Division 1, California.

Aug. 18, 1948.

Divorce ◀312

In action by mother to recover under divorce judgment, which decreed that father should make certain payments to mother for support and maintenance of minor child, those payments which had accrued within limitation period and prior to the adoption of child by mother's present husband, conflicting evidence as to whether mother agreed to waive right to demand back payments in consideration of father's consent to the adoption was for trier of fact. Code Civ.Proc. § 336, subd. 1.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Ruth Stickney Bolden, formerly Ruth Stickney Davies, against Phillip Sherwood Davies to recover on a former judgment in a divorce action wherein it was decreed that the defendant should make certain monthly payments to plaintiff for support and maintenance of a minor child. Judgment for plaintiff and defendant appeals.

Affirmed.

Young, Hudson & Rabinowitz and R. G. Hudson, all of San Francisco, for appellant.

McAllister & Johnson and A. B. Reynolds, all of Sacramento, for respondent.

WARD, Justice.

This is an appeal from a judgment entered in the superior court of the City and County of San Francisco awarding Ruth Stickney Bolden, formerly Ruth Stickney Davies, the sum of \$3,675.85 together with interest and costs. The judgment was based upon a previous judgment in a divorce action in favor of plaintiff and against defendant wherein it was decreed that defendant should make certain monthly payments to plaintiff for the support and maintenance of a minor child, the issue of the marriage.

The complaint alleges that the minor child was adopted by the present husband of plaintiff. It is conceded that as of the day of the adoption defendant's responsibility for the support of the minor terminated. The amounts involved herein became due prior to that time. The answer alleges that the minor was "supported by its Grandparents without cost or expense to said plaintiff." Defendant admits the adoption but alleges that when he consented thereto "it was agreed between defendant and plaintiff that plaintiff would make no further demand upon defendant for payments for the support and maintenance of said minor child then accrued or thereafter to accrue." Both by demurrer and by answer defendant pleaded the statute of limitations. (Code Civ.Proc. sec. 336(1).) It was subsequently stipulated that all sums claimed to have become due prior to April 15, 1941, were waived.

Plaintiff's case consists of her testimony and a certified copy of the final decree of divorce. Although a copy of the decree is not included in the record on appeal, the pleadings make up for this deficiency since the answer does not deny the existence of the judgment nor the provision requiring defendant to make certain payments until the child's majority, which had not been reached at the commencement of the present suit. Plaintiff testified that of the payments falling due from April 15, 1941 to December 7, 1945, defendant paid \$50 and \$20 only—"That was last April, or in May of

1945." She also received \$20 before the divorce became final to "call of" his obligation to pay \$400. The 1945 payments were credited "on the oldest amount due on the judgment." The answer merely denied that payments of \$35 on October 15, 1942 and on the 15th of every month thereafter to and including October 15, 1945 were required. Defendant's case, and the evidence upon which he relies, consists of his own testimony and that of another witness, also the Consent to Adoption and the affidavit of defendant's attorney. Defendant testified that in the last part of November 1945 his former wife's attorney "assured me if I would agree to the adoption, to consent to the adoption, which he thought was for the best interest of everybody concerned, there would be no attempt on the part of the people who were attempting—my ex-wife and her new husband, or certainly not on his part, to in any way attempt to collect the back payments." He further added that the boy lived with his grandparents, "and it was not until I found that the grandmother had died, or was very ill, and I went up to Sacramento and offered to assume the obligation I had for the support of this boy, and I told the former Mrs. Davies I wanted to assume this obligation, and make payments every month, and that was why these adoption proceedings were brought, because I offered and wanted to assume these obligations, and made the first two payments. If I had not offered, there would not have been any adoption proceedings, in my belief * * * I was persuaded to sign [the consent] on the belief that it would be for the best interests of the boy and the mother." Defendant admitted that he never procured a written promise from either plaintiff or her attorney that there would be no attempt to collect back payments, because "I assumed his [the attorney's] word would be binding on her * * * I didn't require it, didn't think it was necessary." There was some corroboration of defendant's testimony, and his attorney's affidavit was admitted to the extent that if the attorney should be called he would testify in substance as averred in the affidavit. The affidavit in many respects corroborated the defendant's testimony.

Defendant states the problem presented to this court: "The sole question involved in this appeal is whether the evidence adduced at the trial is sufficient to sustain the judgment of the trial Court in favor of plaintiff and respondent." Defendant argues that the evidence is undisputed that the respective attorneys in the divorce proceeding entered into an agreement that in consideration of defendant's consent to the adoption no claim would be made for any sums by way of support for the minor children. An analysis of defendant's attorney's affidavit does not indicate that the attorney for plaintiff did agree not to request the back or future payments, and to that end would never attempt to enforce the 1932 judgment. The affidavit sets forth that the attorney for plaintiff "did not want any back payments or future payments made for or on behalf of said minor, Frederick Stickney Davies, and to that end would cooperate with said defendant in seeking to obtain from said Superior Court of Mendocino County a dismissal of the contempt charge then on file and a modification of the decree of divorce theretofore entered in said Mendocino County between Phillip Sherwood Davies and Ruth Stickney Bolden, formerly Ruth Stickney Davies."

The record indicates that defendant's consent facilitated the adoption proceedings. His claim is that he consented to the adoption for the good of all concerned and to avoid a "mess." Whether there was an agreement that no further claim would be made by the mother against the father of the minor does not appear in a written instrument between the father and the mother or their legal representatives or in any order made in Mendocino County which was introduced in evidence in this case. The main question on this appeal resolves itself into a question of fact—depending primarily on the credibility of the witnesses. If the trial court had found for defendant instead of plaintiff this court would have been bound to affirm such a judgment. Under the circumstances it does not appear necessary to discuss additional points presented by plaintiff.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

87 Cal.App.2d 175

**WHITLOW et al. v. SUPERIOR COURT
OF CALIFORNIA, IN AND FOR
VENTURA COUNTY.**
Civ. 16577.

District Court of Appeal, Second District,
Division 2, California.

Aug. 6, 1948.

Hearing Denied Sept. 30, 1948.

1. Criminal law ⇨211(1)

Where judge of Superior Court received letter from private citizen charging that testimony given by physician at a trial in that court had been altered in the reporter's transcript, court had jurisdiction to investigate complaint to ascertain whether offenses suggested had been committed. Code. Civ.Proc. § 128, subs. 5, 6; § 177, subd. 3; § 1963, subd. 16; Pol.Code, § 4153; Pen.Code, § 811.

2. Criminal law ⇨207(2)

Although ordinarily complaints charging crime are filed in a justice or municipal court, that is unnecessary in case of a court reporter who is an adjunct of Superior Court, or in case of counsel who have conducted a trial or other hearing before the Superior Court. Pen.Code, § 811.

3. Witnesses ⇨1

A witness has no right to question form of complaint in proceeding in which witness has been subpoenaed.

4. Criminal law ⇨211(1, 2)

A letter from private citizen received by judge of Superior Court charging that testimony given by physician in a trial in that court had been altered in the reporter's transcript, and whereby physician's suspected perjury had been effaced, was sufficient as basis for investigation by superior court as to whether a crime had been committed, and absence of a verification was not fatal. Pen.Code, § 806.

5. Criminal law ⇨212

The judge of Superior Court upon receipt of letter from private citizen charging that testimony given by physician in a case in that court had been altered in the reporter's transcript had duty to take evidence to determine whether one or more offenses had been committed. Pen.Code, §§ 808, 811.

6. Criminal law ⇨212

Where petitioner had addressed letter to state bar association charging that an attorney had solicited employment to prosecute personal injury action and that testimony of a physician in the action had been altered in the reporter's transcript, and had then sent letter to judge charging alteration in the reporter's transcript, state bar's exoneration of attorney was not an adjudication of the state's interest in the offenses suggested such as would preclude Superior Court from investigating the charges. Pen.Code, §§ 132, 134, 153, 182, 808, 811; Code Civ.Proc. § 128, subs. 5, 6; § 177, subd. 3; Government Code, § 6200.

7. Criminal law ⇨211(1)

A written complaint to judge of Superior Court and testimony of witness to effect that he had made charge against an attorney to the state bar based upon conduct of a stranger in falsely personating the attorney and soliciting employment to handle a law suit suggested a violation of the law which Superior Court as a magistrate was authorized to investigate. Pen. Code, § 650½.

8. Contempt ⇨54(2)

Where letter to judge of Superior Court suggested that various persons had committed certain crimes in connection with a trial in that court, court was under obligation to ascertain whether any of the parties specified was guilty of a contempt of court.

9. Witnesses ⇨224, 292

A witness must testify frankly in any proceeding in which he is not a defendant until question is propounded the answer to which might tend to incriminate him or to violate some other legal right. Const. art. 1, § 13.

10. Witnesses ⇨21

A witness at investigation conducted by judge of Superior Court of charges of private person that court reporter's transcript had been altered and other crimes committed could not refuse to testify because of absence of his attorney.

11. Prohibition ⇨5(4)

Where judge of Superior Court in conducting investigation of charges of pri-

vate person that crimes had been committed had postponed hearing to enable witness, who had refused to answer questions, to obtain advice of counsel, witness, in absence of showing of any legal excuse for refusal, could not by prohibition restrain court from compelling him to testify. Code Civ.Proc. § 1963, subds. 1, 15; Const. art. 1, § 13.

12. Prohibition ☞ 15

A petitioner who had written letter to judge of Superior Court urging investigation of her charges that court reporter's transcript had been altered was estopped from thereafter obtaining writ of prohibition to restrain the Superior Court from compelling her to testify at the investigation. Const. art. 1, § 13.

WILSON, J., dissenting.

Proceeding in prohibition by Joseph E. Whitlow and another against the Superior Court of the state of California, in and for the county of Ventura, to restrain the Superior Court and the judge thereof from compelling the petitioners to testify at the hearing of charges made by one of them against the phonographic reporter of the court.

Peremptory writ denied.

Proceeding in prohibition to restrain the Superior Court of Ventura County and the Judge thereof from compelling petitioners to testify at the hearing of charges made by one of them against the phonographic reporter of the court while they assign no excuse for their refusal.

Writ denied.

Marion P. Betty, of Los Angeles, and Charles C. Montgomery, Jr., of Burbank, for petitioners.

William A. Freeman, of Los Angeles, and M. Arthur Waite, of Ventura, for respondent.

MOORE, Presiding Justice.

An alternative writ of prohibition was granted against respondent court's further proceeding with an investigation of an ac-

cusation which had been made by petitioner Townsend concerning the alteration of a transcript of the evidence theretofore taken in the case of Martin v. Whitlow, No. 31280, in the same court. Upon the petition, the demurrer and answer this court is now to determine whether such writ should be made peremptory.

Origin of the Proceeding.

In 1946 one Lena Martin, a daughter of petitioner Hattie Townsend, had caused her child to undergo a tonsilectomy at the hands of petitioner Whitlow. At some point in the course of the operation the child allegedly received serious burns. Dissatisfied with the results, Mrs. Martin determined to employ an attorney to investigate her rights with reference to such injuries. Acting upon the recommendation of her landlady she employed Attorney Hollingsworth who had not seen or heard of Mrs. Martin prior to their consultation on January 13, 1947. The trial of the action was commenced in June, 1947, and on the third day thereof it was settled in open court.

Mrs. Martin's Attorney Accused before State Bar.

So far as the record discloses nothing further was thereafter heard of the suit of Martin v. Whitlow until November 25, 1947, when petitioner Townsend addressed a letter to the State Bar Association in which she charged that while her daughter was employed in a cafe as a waitress a niece of Attorney Hollingsworth had advised Mrs. Martin that the attorney would sue the physician and "get her a sum of easy money without any court costs"; that Hollingsworth had consulted two physicians and that they would testify as to the malpractice of the defendant in treating the infant son of Mrs. Martin; that suit was instituted for the sum of \$50,000. In the same letter she wrote that she had seven witnesses who had "signed testimony that Doctor Homer's testimony as given in court was altered" on the transcript of the testimony in action No. 31280 "from a negative answer to an affirmative on the vital issue at stake in the trial * * * page 28, line 5." Also, she accused Attorney Hollingsworth of having solicited her daughter

to employ him to prosecute the action against Dr. Whitlow "with no court costs and a guarantee of payment."

The State Bar made its investigation of the charges filed by Mrs. Townsend, exonerated Mr. Hollingsworth and declared that there was no basis for her accusation.

Her Complaint to Judge Blackstock.

Not content with the disposition of her complaint by the State Bar, on May 1, 1948, Mrs. Townsend forwarded a letter to Judge Blackstock in which she directed his attention to her charges filed with the State Bar and repeated that she had seven witnesses to prove that the testimony given by Dr. Homer had been altered in the reporter's transcript in action 31280 whereby Dr. Homer's "suspected perjury had been effaced and the record of the court was no longer true nor correct." She requested that the judge take the necessary action to correct this error; that he investigate the part played in the alteration of the records by all persons concerned, including counsel who prosecuted the action on behalf of Mrs. Martin. She admonished the judge that he had sworn to serve the people honestly and to see that justice is done and "then you are duty bound to investigate the allegations made by seven witnesses in your court and I request a reply showing a result of your investigation and what corrective action you have taken so that your oath of office and allegiance of justice be not voided before the people."

The Judge Acts.

Following receipt of such accusation Judge Blackstock on May 7, 1948, caused the letter to be filed by the clerk of respondent court in the records thereof under the title "Hattie Townsend's Charges. Matter of Court's Investigation of Ernest Arnold, Court Reporter" and assigned to it No. 33504. Upon the same day the judge took the testimony of court reporter Arnold in open court respecting the alleged alteration of the transcript of the testimony in cause No. 31280 and directed the clerk to issue a subpoena for Mrs. Townsend to attend a session of respondent court on May 10, 1948, at 3 o'clock p. m. to testify as a witness in the investigation.

Mrs. Townsend's Contumacy.

Notwithstanding the service of the subpoena upon her by the sheriff of Ventura county Mrs. Townsend did not appear at the time and place set for the hearing. However, an affidavit of Dr. Hanson was filed which averred that to require Mrs. Townsend to come to court to participate in the proceeding would place her life in jeopardy. Pursuant to the court's request Dr. Hanson appeared and gave his testimony concerning the woman's condition. He testified that while she suffered "kidney and heart insufficiency, yet she might improve to such extent in two weeks as to enable her to attend court and to testify if her progress should in the meantime be favorable."

Thereupon the court continued the hearing to 2 o'clock p. m. on May 24, 1948, when Mrs. Townsend again failed to appear. In her stead the affidavit of Dr. Vorbeck was presented. It averred the same pathology of her heart and kidneys and that she was physically unable to leave her bed. However, from the testimony of Dr. Vorbeck in open court the judge concluded that Mrs. Townsend could come to court and give her statement under oath.

After four witnesses had testified concerning the charges contained in the complaint, Mrs. Townsend finally appeared and was subjected to a questioning concerning the letter which she had written to the judge. Having testified that a friend had written the letter bearing her signature, she declined five times to answer the interrogation, "What friend wrote it?" She assigned no reason other than: "My attorney will take care of it when he comes." To the inquiry as to who told her that somebody went to Mrs. Martin and asked her to go see Mr. Hollingsworth to retain him to bring the suit against Dr. Whitlow, she answered that her daughter had told her and "All I know is what she told me." After she had refused to answer two or three other questions concerning the photostats of her letter and that of the witness Chisholm on the grounds that her attorney was not present and that she was "in no condition to be pestered," the judge advised her that she was not under investigation but that she

was merely a witness who had accused the reporter whom he had found to be innocent of the charges.

Dr. Whitlow Refuses to Testify unless His Attorney be Present.

Among the five other witnesses who testified after Mrs. Townsend on May 24 was petitioner Whitlow. The pertinent questions propounded to him with his replies are in substance as follows:

"By the District Attorney: Q. Have you ever before seen this letter signed by Mrs. Townsend?

"Witness: A. I decline to testify without the advice of counsel before I testify.

"The Court: You have got to have some legal ground.

"Witness: It is my constitutional right as a citizen.

"The Court: That is not a constitutional right. This is not your investigation. You are a witness. Did your counsel advise your silence on the ground that you might incriminate yourself?

"Witness: He didn't state that as the reason in that way. He said to decline to testify upon the advice of counsel.

"Court: Your attorney knew that this proceeding was on today and that I would proceed. I told him so.

"Witness: He is in court or he could have been here.

"Court: That can't interfere with the regular procedure of this court. This matter has been on here and was continued once for two weeks. You are subpoenaed here now as a witness. There is no accusation against you that I know of. You are not on trial.

"Witness: Mr. Betty told me to challenge the jurisdiction of the court to subpoena me. He wanted to know under what act this hearing is being held.

"Court: That letter accuses the court reporter of changing his records and his stenographic notes. This court has a right to investigate such an accusation against our own official reporter.

"Witness: I will be happy to testify if I am permitted advice of my counsel.

"Court: If the court orders you to testify, you are going to testify or go to jail. If you have a legal excuse why you should not testify in this investigation, I will certainly rule your way. You have not given any legal reason yet. You are not a defendant. You are in the same category with any other witness. Now Mr. District Attorney, as long as you have to continue this proceeding until Friday, it might be better to continue the whole matter until that time and not compel Dr. Whitlow to testify now as long as he says he wants advice of counsel. That probably would be the wiser procedure. We will excuse this witness until Friday at two o'clock. Dr. Whitlow, be sure to be in court then."

Thereupon the hearing was continued to May 28, only to be halted by the issuance of the alternative writ herein.

The Court had Jurisdiction.

[1] Before considering the specific acts complained of by petitioners inquiry must first be made concerning their contention that the court had no jurisdiction to investigate the complaint of petitioner Townsend and to ascertain whether the offenses suggested by her complaint had been committed in Ventura county. It is a presumption that a court or a judge acting as such is exercising a lawful jurisdiction. Code Civil Proc. sec. 1963, subd. 16. But other statutes clothe the superior court and the judges thereof with definite authority for the exercise of their power.

The law requires the district attorney to "institute proceedings before magistrates for the arrest of persons * * * reasonably suspected of public offenses." (Pol. Code, sec. 4153.) From the fact that the proceeding before Judge Blackstock was conducted by the District Attorney of Ventura county it must be inferred that he either instigated it or approved of the filing of the accusatory letter and the ensuing trial in which he was the chief actor. In the performance of his duty Judge Blackstock undertook to sift the charges of Mrs. Townsend, and for that purpose caused subpoenas to be issued and served upon those persons who logically should have had knowledge of the acts specified in the letter.

[2] It may be conceded that if an unverified complaint were presented against a person who had no connection with the court or with any adjourned or pending proceeding before it the judge might be warranted in declining to file and consider it. Ordinarily, complaints charging crime are filed in a justice or municipal court. Penal Code, sec. 811. However, the same does not hold true as to a court reporter, who is an adjunct of the court. *Pratt v. Browne*, 135 Cal. 649, 653, 67 P. 1082. Neither does it apply to counsel who have conducted a trial or other hearing before the superior court. And the court's power does not end with the right to control "its ministerial officers, and of all other persons in any manner connected with a judicial proceeding," but also in furtherance of justice it may "compel the attendance of persons to testify in an action or proceeding pending therein." Code Civil Proc. sec. 128, subs. 5, 6; sec. 177, subd. 3.

[3-5] From such provisions it was clearly the office and function of the superior court to entertain the complaint of Mrs. Townsend, and from the evidence of herself and available witnesses to determine what offenses had been committed. (Penal Code, sec. 811.) The sufficiency of the Townsend letter as a pleading was not attacked by the court reporter, who was the only person entitled to plead to it. A witness has no right to question the form of a complaint. But, if an observation may be indulged, there was nothing lacking in the writing to constitute it the basis of an investigation as to whether a crime had been committed. The absence of a verification was not fatal. Penal Code, sec. 806; *In re Sing*, 13 Cal.App. 736, 740, 110 P. 693. Therefore, the court was obliged to

inquire into charges against its officers and attachés with respect to occurrences within the court. Also, as a magistrate it was the judge's duty to take evidence in order to determine whether one or more offenses had been committed. Penal Code, secs. 808, 811.

[6] While the character of Mr. Hollingsworth as attorney had been cleared by the State Bar's inquisition, such decision was not an adjudication of the State's interest in the offenses suggested by the letter, namely: (1) that Hollingsworth and associate had actually assisted the court reporter in altering the transcript in action No. 31280 (Penal Code, sec. 134); (2) that the attorneys had conspired with the reporter to alter such transcript (Gov't Code, sec. 6200; Penal Code, sec. 182); (3) that the same parties had suppressed, or had conspired to suppress, evidence of an act of perjury (Penal Code, secs. 153, 182); (4) that they had conspired to obstruct justice or to commit forgery or other crimes. Penal Code, secs. 132, 182; see *State v. Jones*, 39 N.M. 395, 48 P.2d 403, 405; *People v. Horowitz*, 70 Cal.App.2d 675, 688, 161 P.2d 833; *State v. Keyes*, 8 Vt. 57, 30 Am.Dec. 450; 20 Cal.Jur. 347; 39 Am.Jur. 504, sec. 6.

[7] Another violation of the law was suggested by the written complaint of the witness Chisholm which accompanied Mrs. Townsend's letter, and by his testimony as to the circumstances leading to his act of signing it. A synopsis of that testimony appears on the margin hereof.¹ His testimony given before Judge Blackstock was such as is calculated to arouse the resentment of a judicial officer jealously alert to the public interest against the author

¹ I signed the letter to the State Bar which declares that Attorney Hollingsworth of Ventura called at my home in Fillmore and solicited me to retain him to sue Dr. Whitlow.

It is true that one night a stranger came to my home and asked me to employ him to handle my case against Dr. Whitlow. He said his name was Hollingsworth and that his office was in the Bank Of America Building in Ventura. He offered me 60 per cent of recovery if I would permit him to sue the doctor.

He said that I had a good case, that it would cost me nothing and that I would lose nothing.

After the stranger's visit I told the doctor that I intended to sue him, but he settled my claim. Later the doctor brought this letter over to my home and asked me to sign it. Mr. Wheeler was with him. When I signed it I was in the back of an automobile and had only the light in the dome to see by. Prior to that call by the two men I had never seen this Attorney Hollings-

or perpetrator of such act as that described by the witness. Such act is a crime denounced by section 650½ of the Penal Code which in effect forbids a person wrongfully to use another's name in such way as in any manner to affect the moral reputation of the person whose name is used. In view of the fact that such crimes are proper subjects of inquisition, Judge Blackstock as a magistrate had jurisdiction to proceed with the investigation of the offenses reasonably suspected and alleged in the written charges made in evident good faith by apparently responsible citizens.

[8] In addition to the duty of the district attorney to investigate crimes suspected, under the circumstances disclosed by Mrs. Townsend's letter the judge was under obligation to ascertain whether any of the parties specified was guilty of a contempt of court. He is the guardian of the honor and the character of his court. The behavior of its officers and attachés are the perpetual objects of his judicial concern. He should exercise a reasonable prudence and industry to preserve for it an unblemished name.

As to Dr. Whitlow.

[9,10] No good reason is found in the record why Dr. Whitlow should not have answered the questions propounded to him. The court's position was correctly stated by the judge. He would have been clearly within his rights to enforce the rule that a witness must testify frankly in any proceeding in which he is not a defendant until a question is propounded the answer to which might tend to incriminate him (In re Lemon, 15 Cal.App.2d 82, 89, 59 P.2d 213; Ex parte Tahbel, 46 Cal.App. 755, 758, 189 P. 804; Brown v. Walker, 161 U.S. 591, 596, 16 S.Ct. 644, 40 L.Ed. 819) or to violate some other legal right. The constitution grants no greater liberality to him. (See art. I, sec. 13.) The federal constitution contains no inhibition against state legislation requiring a witness to testify in a proceeding conducted

for the purpose of discovering whether a crime has been committed. That a witness may wish his attorney to be present is no excuse. He might name a thousand wishes and name a thousand persons he would like to have present, but he would not for any or all of them be relieved of his duty to give his testimony. Dr. Whitlow was denied no right. He was threatened with no penalty for refusing to testify if he had a legal excuse for such refusal. Not only did he have no legal excuse, but to gratify his whims or to assuage his fears the court continued the hearing to enable him to have his counsel present before proceeding further. It cannot be assumed that despite a valid argument or the statement of a legal reason for his refusal to answer Judge Blackstock would have compelled the witness to testify. It is a presumption that the judge will follow the law and will not unlawfully oppress a witness by compelling him to do what the law exempts him from doing. Code Civ. Proc., sec. 1963, subds. 1, 15.

[11] The judge was both patient and generous. After vainly endeavoring to induce the witnesses to answer simple questions he postponed further hearing to enable them to have advice of counsel. The pronouncement of the court at the conclusion of Mrs. Townsend's testimony that the reporter was innocent of her charges is not to be taken as a final decision that he was not guilty. Thereafter five other witnesses were examined and the case was continued for further proof. But conceding that such statement of the judge was a final disposition of the complaint against the reporter, it was the court's right and duty to explore the several implications of the accusation.

As to Mrs. Townsend.

[12] In addition to the reasons already recounted for denying petitioners' demand for a writ to prohibit "any further proceedings in said action," the activities of Mrs. Townsend deserve further comment. While she is the author of the entire affair

worth. Having seen him here I know it was not he who called at my home and solicited employment. He never solicited legal business from me, never came

to see me. I retract the statement in my letter to the State Bar accusing Mr. Hollingsworth.

in having made the complaint, she occupies an anomalous position. Having invoked the jurisdiction of the court to "investigate the allegations made by seven witnesses," and having demanded a reply showing the "result of such investigation and what corrective action had been taken," the misguided woman harasses the same court by the present proceeding. Her allegations are without equity and her prayer is a discredit. Having filed the complaint she should have been first to volunteer to attend court and give her testimony. Such conduct is not to be regarded with favor and warrants an estoppel of one who seeks a writ of prohibition against the court whose jurisdiction has been invoked by the petitioner. 21 C.J.S., Courts, § 108, page 162; 50 C.J., 681, sec. 56.

The peremptory writ is denied.

McCOMB, J., concurs.

WILSON, J., dissents.



87 Cal.App.2d 186

MILLER v. BEAN et al.

Civ. 16079.

District Court of Appeal, Second District,
Division 3, California.

Aug. 9, 1948.

Rehearing Denied Sept. 1, 1948.

Hearing Denied Sept. 30, 1948.

1. Limitation of actions §47(1)

Actionable breach of covenant of trust deed to protect and defend realty and title thereto did not take place when realty was sold to the state for nonpayment of 1931 tax in 1932, or when realty was deeded to the state in 1937, but in 1944 when sale was made by the state to purchasers, and therefore action by holder of note and trust deed to recover damages for breach of the covenant was not barred in 1946 by four year limitations. Code Civ.Proc. § 337, subd. 1; Pol.Code, § 3780.

2. Limitation of actions §43

Where act or omission fails to result in any direct injury, however slight, a statute of limitation does not commence to run against an action for consequential injuries resulting therefrom until damage ensues.

3. Limitation of actions §47(1)

A covenant to defend and protect title of realty serving as security for a debt, being prospective in operation, is analogous to a covenant of warranty or quiet enjoyment in a deed or lease, in respect to the breach of which limitation statute does not begin to run until actual injury has been sustained by way of eviction.

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by John E. Miller, as holder of a note secured by a trustee, against E. V. Bean, also known as Edd V. Bean, Ora F. Bean and others to recover damages because of a breach of a covenant of a trust deed to protect, preserve and defend the property and title thereto. From a judgment of dismissal, the plaintiff appeals.

Judgment reversed.

George W. Rochester, of Los Angeles, for appellant.

Haas & Home, of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

This is an action by the holder of a promissory note secured by deed of trust to recover damages resulting from a breach of a covenant of the trust deed "to protect, preserve and defend said property and the title thereto." Plaintiff appeals from a judgment of dismissal after order sustaining without leave to amend a demurrer to a fourth amended complaint.

The note was for \$2,400, payable to Los Angeles Finance Company, was dated October 9, 1929, and fell due October 9, 1932. It was alleged that plaintiff purchased all right, title and interest of the payee under the trust deed on June 13, 1946, and now is the owner and holder of the

note and trust deed. The property which was the subject of the trust deed is certain real property in the county of Tulare. From the complaint it appears that the land was assessed for taxes in the year 1931; that a tax of \$35.78 was levied thereon; and that the tax was not paid. It was not alleged when the land was sold for taxes and deeded to the state, but it was alleged that on or about the 17th day of August, 1944, the tax collector of Tulare county gave notice of an intended sale of the property pursuant to section 3691 of the Revenue and Taxation Code, and that on September 9, 1944, said tax collector sold said real property on behalf of the state, as provided by law, to T. J. and Ethel Edmonds. It was alleged that the defendants had notice of said intended sale and failed and refused to effect a redemption of the property, that the security of said trust deed was thereby lost, and that plaintiff was thereby damaged in a sum of more than \$12,000.

[1] The demurrer was on the general ground and also specified uncertainty in the failure to allege the date when the property was sold to the state, and further uncertainty in that while the complaint alleged that plaintiff had purchased the trust deed security and was the owner of the trust deed and note it was not alleged that the note had been purchased. Neither of these grounds of uncertainty would have warranted the court in sustaining the demurrer without leave to amend. The demurrer also pleaded section 337, subdivision 1 of the Code of Civil Procedure in support of the point that the action was barred by the statute of limitations. This ground of demurrer undoubtedly was the one upon which the ruling was based. The correctness of the judgment therefore depends upon the implied holding of the court that a cause of action arose some time prior to September 9, 1944, when the land was sold by the state to the Edmonds. It is argued by respondent that a breach of the covenant of the trust deed occurred when the 1931 taxes became delinquent, or if not then, when the land was sold to the state for nonpayment of the 1931 tax. This sale normally would have taken place in 1932 and the property would have been

deeded to the state in 1937. The action was filed October 2, 1946. We are of the opinion that no cause of action for breach of the covenant arose until the sale was made by the state in 1944 and that the action was commenced in time.

At the times when the foregoing proceedings were had the state of the law was such that the property was subject to redemption at any time prior to the "entry or sale of said land by the state," namely, September 9, 1944. Pol.Code, sec. 3780. We may regard the failure to pay the taxes before they became delinquent as a breach of the covenants of the trust deed. We take notice of the fact that trust deed forms customarily contain a covenant to pay taxes and assessments before delinquency and we will assume from the fact that plaintiff did not incorporate the trust deed as a part of his complaint but quoted only the covenant "to protect, preserve and defend said property and the title thereto," that he intentionally omitted allegations which were contained in his original complaint that there was such a covenant to pay taxes before delinquency. It is so assumed in the briefs.

This assumption brings us to a consideration of the argument made by respondent that there was a breach of the covenants of the deed of trust through some default of the trustor antedating the sale of the property by the state in 1944, and that the statute commenced to run upon the occurrence of such breach. Assuming the premise to be true, it is clear that the present action is not predicated thereon. Of course, if the failure to pay the taxes when they fell due did give rise to a right of action for a technical breach of covenant, the statute commenced to run when the taxes were allowed to become delinquent. A similar result would obtain if permitting the land to be sold and deeded to the state also constituted a breach of covenant. However, even if timely actions had been brought, we are at a loss to see what manner of relief plaintiff would have been entitled to in either case, unless it be merely nominal damages, for he sustained no detriment through the failure of the trustor to pay the taxes before delinquency, nor did he sustain such detriment merely through

the debtor's failure to effect a redemption prior to the time when the land was deeded to the state.

[2] Where an act or omission fails to result in any direct injury, however slight, the statute of limitations does not commence to run against an action for consequential injuries resulting therefrom until actual damage ensues. See 34 Am.Jur., Limitation of Actions, sec. 115, p. 95; *Emerson v. Gaither*, 103 Md. 564, 64 A. 26, 8 L.R.A.,N.S., 738, 7 Ann.Cas. 1114. Moreover, if we were to hold that the statute began to run in the instant case when the taxes became delinquent, or when the land was sold or deeded to the state, then during the entire statutory period in which an action could have been brought, the plaintiff could have recovered at most only nominal damages. Such a result would in our opinion not only be unjust but would permit the use of the statute of limitations for a purpose never intended. Cf. *Post v. Campau*, 42 Mich. 90, 3 N.W. 272, 276, 277.

[3] On the other hand, it is clear that the entire damages which plaintiff seeks to recover were incurred when the title to the property was lost, thereby rendering valueless his security, for prior to that time he had sustained no actual injury. The loss of title occurred on September 9, 1944, as a result of the trustor's failure to effect a redemption at any time prior to the sale by the state on that date, and the statutory period for bringing an action based on the failure to protect the title could not have commenced to run until then, for only when the sale was completed was the breach complete. This view finds support in the fact that a covenant

to defend and protect the title of property serving as security for a debt, being prospective in operation, is analogous to a covenant of warranty or quiet enjoyment in a deed or lease, in respect to the breach of which it is well settled that the statute does not begin to run until actual injury has been sustained by way of eviction. *McCormick v. Marcy*, 165 Cal. 386, 389, 132 P. 449; *Standard Livestock Co. v. Pentz*, 204 Cal. 618, 625, 269 P. 645, 62 A.L.R. 1239; 16 Cal.Jur. 519; 14 Am.Jur. 559, 560.

Following another line of analysis, we reach the same conclusion. Assuming as we do that the failure to pay the taxes when they fell due was a breach of covenant, it was not the breach upon which the action is founded, and it did not bring about the result complained of. The first breach would have been cured by a redemption. The failure to redeem prior to the sale by the state was an independent breach which, alone, was the proximate cause of the loss of title. Manifestly, no cause of action for that loss arose until that breach occurred. The injustice of a rule that would bar a cause of action for damage that had not yet been sustained was forcefully stated by Justice Cooley in *Post v. Campau*, supra. It is entirely immaterial that a right of action might have arisen out of the first breach, and that an action thereon was barred by the statute. The time for the commencement of the present action arose on September 9, 1944, and not before that time. The facts pleaded show that the action was filed in time.

The judgment is reversed.

WOOD, J., and McCOMB, J. Assigned, concur.

87 Cal.App.2d 206

MATASSA v. MATASSA.
Civ. 16188.

District Court of Appeal, Second District,
Division 1, California.

Aug. 14, 1948.

Hearing Denied Oct. 11, 1948.

1. Husband and wife ⚭30

Property settlements between husband and wife are favored and are sanctioned by the Civil Code. Civ.Code, §§ 158, 159.

2. Divorce ⚭249(2)

Husband and wife ⚭30

A property settlement agreement between husband and wife that is not tainted by fraud or compulsion or is not violative of the confidential relationship of the parties is valid and binding on court in divorce action.

3. Husband and wife ⚭34

Evidence established that a post-nuptial property settlement agreement between husband and wife was tainted by an overreaching and abuse of confidence on part of husband in order to gain advantage over wife, in that husband failed to make disclosure respecting extent of his property, and failed to accord her opportunity of seeking independent advice as to her right in the premises.

4. Descent and distribution ⚭62

A husband and wife may by appropriate agreement waive their respective inheritable rights in the estate of the other.

5. Husband and wife ⚭31(9)

Courts will not construe a property settlement agreement between husband and wife as depriving the survivor of inheritance or other rights growing out of marital relation, except where there is a clear and unmistakable intention to barter away such rights.

6. Divorce ⚭249(2)

In divorce action, trial court abused discretion in eliminating, from post-nuptial contract for uncertainty, provisions giving each an inheritable interest in the property of the other as part of consideration for waiver by wife of her right to alimony and attorney's fees should she bring divorce action.

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Divorce action by Alexa M. Matassa against Thomas J. Matassa, wherein defendant cross-complained. From adverse portions of an interlocutory judgment, and from nunc pro tunc order, plaintiff appeals.

Orders and portions of interlocutory judgment appeal from reversed with instructions.

William C. Ring, of Los Angeles, for appellant.

Wood, Crump, Rogers, Arndt & Evans and Roger Marchetti all of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff appeals from those portions of an interlocutory judgment granting her a divorce from defendant whereby the court adjudged (1) "that there is no community property belonging to the parties hereto, except two vacant lots in San Fernando, * * * of the value of approximately \$1,000.00, and that the parties in and by a written agreement of August 31, 1943, adjusted and settled community property and other rights as in said Agreement provided, and said Agreement is hereby approved." And (2) "that pursuant to said Agreement, plaintiff shall not recover costs, attorneys' fees, damages of any nature, or alimony by reason of her complaint herein." Plaintiff also appeals from a minute order of the trial court granting defendant's motion to amend findings of fact, conclusions of law and the interlocutory judgment of divorce.

By stipulation of the parties both appeals are submitted upon a consolidated record and one set of briefs.

By her complaint herein, plaintiff sought a divorce from defendant on the ground of extreme cruelty, and for awards of the custody of the minor child of the marriage, and of her interest in community property, alimony, attorneys' fees and costs.

The cause came to trial upon the issues presented by the complaint, defendant's answer and amendment thereto, his cross-complaint (alleging cruelty on the part of plaintiff), and the answer of plaintiff to such cross-complaint. In his amendment

to the answer, defendant alleged the execution by him and plaintiff of a property settlement agreement, and prayed for a declaration of the rights of the parties thereunder and for an approval of the enforceable executory provisions thereof.

Said agreement reads as follows:

"This agreement, made and executed this 31 day of August, 1943, by and between Alexa Matassa, of the City and County of Los Angeles, State of California, herein mentioned as party of the first part, and Thomas J. Matassa, of the same place, herein mentioned as party of the second part: WITNESSETH:

"That whereas, the parties hereto are husband and wife, and are desirous of settling any and all of their property rights now existing between them: to the end that these rights may be definitely understood and placed beyond dispute and argument; and

"Whereas, said party of the second part owns, in his own rights, certain Real Properties, some of which are improved and some unimproved, and,

"Whereas, it is the desire of the party of the second part to provide for party of the first part, his wife;

"Now, therefore, in consideration of the covenants and mutual agreements herein contained, it is hereby agreed by and between the parties hereto as follows, to-wit:

"First. That the party of the first part shall have an inheritable interest in all of the Real Property party of the second part now owns and had in his possession at the time of the marriage of said parties, or to which he was entitled at that time.

"Second. That all property acquired subsequent to marriage by either of said parties, shall be considered, and shall be community property of the parties hereto, and said parties shall share and share alike.

"Third. That party of the first part shall keep and shall be the sole owner of all real property now standing in her name, party of the second part having and retaining an inheritable interest therein except party of the first part shall not sell or hypothecate same without the written consent of party of the second part.

"Fourth. That in the event either party hereto should at any time institute an action for divorce or any Court action against the other, neither of said parties shall ask for or be allowed or given costs, attorney fees, or damages of any nature whatsoever therein.

"Fifth. That in the event party of the first part should at any time institute an action in Court for divorce against party of the second part she hereby waives all rights for costs, attorney fees and all alimony.

"Sixth. That the parties hereto shall, to the best of their ability endeavor to interest themselves and to be concerned in the business in which they are engaged.

"Seventh. That they, the parties hereto, will at all times, freely sign any and all papers, documents, leases, deeds, trust deeds, mortgages or other necessary papers, at any time when requested so to do by the other party, in any and all transactions in connection with the buying, selling, hypothecating or handling of the property of the parties hereto.

"Eighth. That it is hereby understood that this agreement is freely, frankly and openly made and for the sole purpose of the mutual benefit and understanding of the parties hereto.

"The parties hereto stating that they each have read the above, and that they understand the statements therein, set down and that they sign same of their own free will and accord, the day and year first above written."

This document was subscribed and sworn to by the parties named under date of September 3, 1943.

At the conclusion of the trial, the court found:

I. That defendant had been guilty of extreme cruelty toward plaintiff;

II. That "there is no community property";

III. That plaintiff "has no funds or money for her support, but that plaintiff and defendant entered into a property settlement agreement on August 31, 1943, in words and figures as follows: * * *"

That this agreement was entered into freely and voluntarily by the parties;

That no property was acquired by either party subsequent to marriage, except two vacant lots in San Fernando, of the value of \$1,000, which were acquired by defendant subsequent to marriage and that the plaintiff owned no property at the time of her marriage. That "the provisions of paragraphs Second and Third of said agreement are severable from the rest of said agreement, and the provisions of said paragraphs Second and Third are so indefinite and uncertain that the purpose and intention thereof cannot be determined and the same are not enforceable."

IV. That plaintiff is a fit and proper person to have custody of the minor child and is awarded the custody of such child.

V. That the maintenance and support of said minor child requires the use of the residence heretofore occupied by the parties at 346 South Gramercy Place, which is within the ability of defendant to provide and necessary to support and educate the child in its station of life. It being further found that \$75 per month is a reasonable sum for defendant to pay to plaintiff for and on account of the support of said minor, payable through the Court Trustee, commencing December 1, 1946.

VI. That by reason of the aforesaid contract, it is not true that plaintiff requires any sum from defendant on account of costs, attorney's fees, alimony, or other relief or damage, excepting only insofar as hereinabove found relating to the support of said child.

VII. That the allegations of defendant's answer that all of the property enumerated in Paragraph III of plaintiff's complaint is the separate property of the defendant, as having been earned and purchased by him prior to his marriage to plaintiff, are true;

VIII, IX. That the allegations of cruelty contained in defendant's answer and cross-complaint are not true and not sustained by any evidence.

X. That the allegations of paragraphs I and II of the amendment to the answer are true and are sustained by the evidence, and that the parties adjusted and settled property and other rights as provided under and by the terms of the said Agreement of

August 31, 1943; that said Agreement was fair, equitable, and is approved by the Court.

From such facts the court concluded:

I. Plaintiff is entitled to a decree of divorce.

II. Defendant is not entitled to take anything by his cross-complaint.

III, IV. Plaintiff is entitled to custody of minor child and to \$75 per month for support of said minor, and to the use and occupancy of the residence at 346 So. Gramercy Place for the maintenance and support of said minor.

V. There is no community property except the two vacant lots at San Fernando of the value of \$1,000, as to which each of the parties is entitled to one-half interest. "That the parties in and by said agreement of August 31, 1943, adjusted and settled the property and other rights as in said agreement provided. That pursuant to said agreement plaintiff is not entitled to costs, attorney fees, damages of any nature, or alimony, nor is she entitled to any interest in any of the property owned by the defendant at the time of the marriage of the parties or to which defendant was entitled at that time. That all property owned by defendant at the time of his marriage is his sole and separate property. That said agreement of August 31, 1943, is entitled to the approval of this court and it is approved."

The interlocutory judgment of divorce, after decreeing in accordance with the above findings and conclusions, further adjudged:

"that *subject to said right of inheritance*, the defendant is owner of all real property mentioned in the pleadings (with the exception of the two lots above mentioned), and all real property owned by defendant and in his possession at the time of marriage of said parties on June 27, 1943, or to which defendant was entitled at said time, as his sole and separate property, and that plaintiff's only right, title and interest therein and thereto is her aforesaid right of inheritance pursuant to the terms of said Agreement of August 31, 1943."

Such interlocutory judgment of divorce was entered on November 21, 1946, and

notice of appeal therefrom was filed on January 20, 1947.

Thereafter, to-wit, on January 27, 1947 (while said appeal was pending), defendant's counsel filed notice of motion to amend the findings of fact, conclusions of law and the interlocutory judgment "for the purpose of correcting therein clerical errors."

On March 31, 1947, the court entered its minute order granting said motion and on May 26, 1947, plaintiff took an appeal from such minute order. On June 9, 1947, the court signed a written order granting defendant's motion to amend the findings of fact, conclusions of law and the interlocutory judgment, amending the same nunc pro tunc as of November 20, 1946, which order was duly entered as of July 11, 1947.

The effect of the amendments, which were made by interlineation, was to add to Finding II after the words "there is no community property" the following: "*except as found in paragraph III hereof*";

To change the word "Second" appearing in the last sentence of Finding III to the word "First";

Finding X is changed to read as follows: "That the allegations of Paragraphs I and II of the Amendment to the Answer are true and are sustained by the evidence, and that the parties adjusted and settled property and other rights as provided under and by the terms of said agreement of August 31, 1943, *except that as found in paragraph III hereof the provisions of paragraphs First and Third of said agreement are severable from the rest of said agreement and are so indefinite and uncertain that the purpose and intention thereof cannot be determined and the same are not enforceable*; that said Agreement was fair, equitable, and *subject to said exception* it is approved by the Court."

Conclusion of Law numbered V was amended in accordance with above quoted Finding of Fact numbered X.

Two paragraphs of the Interlocutory Decree of Divorce were amended to read as follows:

(a) "It is further ordered, adjudged and decreed that there is no community property belonging to the parties hereto, except two vacant lots in San Fernando * * *

of the value of approximately \$1,000.00 and that the parties in and by a written Agreement of August 31, 1943, adjusted and settled community property and other rights as in said Agreement provided, *except that the provisions of paragraphs First and Third of said agreement are severable from the rest of said agreement and are so indefinite and uncertain that the purpose and intention thereof cannot be determined and the same are not enforceable, and subject to said exception* said Agreement is hereby approved."

(b) "It is further ordered, adjudged and decreed that the defendant is the owner of all property mentioned in the pleadings (with the exception of the two lots hereinabove mentioned), and all property owned by defendant at the time of the marriage of said parties on June 27, 1943, or to which defendant was entitled at said time, is his sole and separate property, and that plaintiff is not entitled to any interest in any of the property owned by defendant at the time of the marriage of said parties or to which defendant was entitled at that time."

Recapitulating: The effect of the order nunc pro tunc entered on July 11, 1947, was as follows:

(1) To correct finding II by placing in the category of community property the two vacant lots in San Fernando, as authorized by paragraph second of the agreement;

(2) To correct the last sentence of finding III by eliminating reference to paragraph second of the agreement (dealing with community property) and inserting in lieu thereof a reference to paragraph first of the agreement which gave to the wife an inheritable interest in the husband's property;

(3) To eliminate from the findings, conclusions and judgment all reference to rights of inheritance of both parties, and to approve the property settlement agreement, except as to paragraphs first and third which gave to each party an inheritable interest in the property of the other, the two excepted paragraphs being disapproved on the ground that they were severable from the rest of the agreement, and so indefinite and uncertain that their pur-

pose and intention were not ascertainable, hence were unenforceable.

On the first appeal from portions of the interlocutory judgment, it is contended:

1. The execution of the post-nuptial settlement agreement was induced by defendant's coercion of plaintiff and her misunderstanding of its nature, operation and effect; by defendant's concealment of his financial worth, and by her mistake concerning the same; it is unfair, inequitable and unjust as to her, and the court erred in approving and enforcing it to bar her alimony and costs.

2. The court abused its discretion in approving an inequitable settlement agreement to deny the innocent wife alimony necessary for her support.

3. Findings II, III and VII, conclusion V, and the adjudication that the parties own no community property, excepting two lots in San Fernando, are contrary to the evidence and the law.

On the second appeal from the minute order of the court granting defendant's motion to amend the findings, conclusions and judgment, it is contended:

1. No clerical errors in its findings, conclusions and judgment authorized the trial court's revisions thereof;

2. The trial court lacked jurisdiction (1) to vary the parties' rights, or (2) pending appeal, to correct its findings, conclusions and judgment nunc pro tunc to defeat plaintiff's rights to move for a new trial and for different findings and conclusions;

3. The trial court erred in construing and finding paragraphs 1st and 3d of the property settlement so uncertain and vague as to be unenforceable; and the husband is estopped to so assert;

4. The trial court was not empowered, under the pretext of correcting clerical errors, to revise its approval, or otherwise disapprove, that part of a property settlement, granting the innocent wife an "inheritable interest" in her guilty husband's property, whence it had adjudged her waiver of alimony and suit fees, without abrogating her waiver of the latter;

5. Findings II, III and VII, Conclusion V and the judgment that all the real property is the husband's separate estate and that the parties own no community property, except the San Fernando lots, are contrary to the evidence and the law;

6. The court erred in not finding what income from the parties' "business" was community property.

At the outset it should not be overlooked that the agreement here under consideration is a post-nuptial property settlement agreement, executed within a few weeks after the marriage of the parties, and is in no sense a separation agreement or one made in contemplation of divorce.

[1, 2] As stated in *Adams v. Adams*, 29 Cal.2d 621, 624, 177 P.2d 265, 267: "Property settlement agreements occupy a favored position in the law of this state and are sanctioned by the Civil Code. *Hill v. Hill*, 23 Cal.2d 82, 89, 142 P.2d 417; *Hensley v. Hensley*, 179 Cal. 284, 287, 183 P. 445; Civ.Code §§ 158, 159. Such agreements are usually made with the advice of counsel after careful negotiations, and the courts, in accord with legislative sanction, prefer agreement rather than litigation. *Hill v. Hill*, supra, 23 Cal.2d at page 89, 142 P.2d 417. When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable considerations. A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court. *Hough v. Hough*, 26 Cal.2d 605, 614, 160 P.2d 15; *Hogarty v. Hogarty*, 188 Cal. 625, 628, 206 P. 79; *Estate of Belknap*, 66 Cal.App.2d 644, 651, 652, 152 P.2d 657; *Baxter v. Baxter*, 3 Cal.App.2d 676, 681, 40 P.2d 536; *Brown v. Brown*, 83 Cal.App. 74, 82, 256 P. 595; *McCahan v. McCahan*, 47 Cal.App. 176, 183, 190 P. 460."

On this same subject, it was held in *Norris v. Norris*, 50 Cal.App.2d 726, 733, 123 P.2d 847, 851: "Property settlements of this character are valid, subject 'to the general rules which control the actions of persons occupying the confidential relations

with each other, as defined by the title on trusts.' Section 158 of the Civil Code. Turning to the title on trusts we find section 2228 of the Civil Code which provides: 'In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.' Every violation of the section is declared to be a fraud against the beneficiary of the trust. Section 2234 of the Civil Code. It is established law that confidential relations are presumed to exist between husband and wife; if the husband obtains any advantage over his wife he must stand unimpeached of any abuse of the confidence presumptively reposed in him, and failing in this he bears the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained. *Estate of Cover*, 188 Cal. 133, 143, 204 P. 583; *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 80, 227 P. 715. The policy of the law in respect to such transactions can be best enunciated by quoting from *Estate of Cover*, supra, 188 Cal. at page 144, 204 P. [583] at page 588: 'In short, a husband, by reason of the marital relation, is bound in his dealings with his wife to the highest and best of good faith, and as a consequence is obligated in such dealings not to obtain and retain any advantage over her resulting from concealment or adverse pressure, and he must, if he would avoid the presumption of undue influence emanating from the procurement of any advantage over her, make full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, or else he must deal with her at arm's length and as he would with a stranger, all the while giving her the opportunity of independent advice as to her rights in the premises.' See also *McKay v. McKay*, 184 Cal. 742, 747, 195 P. 385, where it was held that this presumption of undue influence in transactions between husband and wife prevails over other presumptions." See, further, *Auclair v. Auclair*, 72 Cal.App.2d 791, 802, 165 P.2d 527,

532, where it is stated, among other things: "The trial court must take into consideration all of the surrounding circumstances in determining the issue whether or not the transaction was consummated in the utmost good faith. *Murdock v. Murdock*, 49 Cal.App. 775, 194 P. 762."

The case of *Andrew v. Andrew*, 51 Cal. App.2d 451, 455, 125 P.2d 47, 49, involves a post-nuptial contract which provided on its face: "(1) the parties shall own, share and share alike, the Delhi lots; (2) the husband shall own as his separate property The Eighty Acre farm and (3) each relinquishes his right to succeed to the estate of the other. No mention is made of any other property, real or personal."

In discussing this contract, the court there stated:

"Being a purported contract between husband and wife, it was between those standing in a confidential relation and was presumed to be fraudulent. Civ.Code, § 2235. That presumption continued until it was dispelled and the burden of dispelling said presumption rested on the husband. *Odell v. Moss*, 130 Cal. 352, 357, 62 P. 555. That burden he did not assume. The trial court was well within its powers in making the finding which the defendant so vigorously attacks, namely, * * * the court finds that heretofore the plaintiff and defendant made and entered into an agreement in writing bearing date December 15, 1936, that said agreement was unjust, unfair, unreasonable and inequitable, and that at the time of the preparation and execution of said agreement the defendant concealed from plaintiff and from defendant's attorney certain assets possessed by him.'

"Much is said in the briefs that on December 15, 1936, the defendant did not disclose that the title to the Twelve Acre Tract stood in his name. It is sufficient to state he did not disclose the exact title or any title to said tract. He was bound to have done so if, as he claims, the said instrument was to be a property settlement between himself and his beneficiary. Civ. Code, § 2228. Neither did he state the items or values of the numerous items of personal property hereinabove mentioned.

"We conclude therefore that the defendant did not meet the burden of proof resting on him. He pleaded the purported property settlement. As we have shown the burden rested on him to show that it was just, fair, reasonable and equitable. He did not even attempt to do so. It follows that the finding holding it 'was unjust, unfair, unreasonable, and inequitable' may not be said to be without support. The finding in legal effect was but an application to the facts of the statutory rule. Civ.Code, § 2235, supra."

The parties to the instant action were married on June 27, 1943, it being the first marriage of the wife, who was then 18 years of age, and the second marriage of the husband, then 49 years old. Immediately after the marriage they lived in the Los Feliz home, and about three weeks thereafter the wife began working with the husband in his pie business from five o'clock in the morning until seven at night. They then moved to the house on Gramercy Place near the business. Before their marriage respondent told appellant that "he had enough money to support me and our children and grandchildren very comfortably if he were to retire tomorrow * * * that if I should marry him, that half of everything that he had would be mine."

With respect to the property settlement agreement, appellant testified as follows:

"Mr. Matassa invited me to go over to Chinatown one evening about two or three weeks after we were married * * * and we stopped before a building, and he said 'Let's go in here a moment,' and I said 'All right.' I didn't know what he wanted, and I went with him and he took me up to this attorney, William Lee's office, and I asked him what he took me there for, and he said, 'Just a minute', and we went inside and he asked Mr. Lee if the papers were ready.

"Q. Had Mr. Matassa mentioned any papers to you before that time? A. No, he had not; and Mr. Lee said 'Yes,' that the papers were all drawn up ready for my signature, and I asked him what he was talking about, and I told him I didn't understand about any papers, and he put

papers in front of me, which I didn't understand, and it was all legal terms, and I asked him if I could show it to my family before I signed it, because I didn't know anything about it, and he became very angry, and he said in front of Mr. Lee, 'No, you cannot take them to your family.' He said, 'If you do not sign those papers, we won't get along at all.' * * * he kept after me, I think, for about seven weeks, or maybe a little less, kept after me to sign those papers all the time. He was very cold to me until I did sign them. * * * (he) told me if I signed the papers he would turn over the deed to me of the 346 South Gramercy house. * * *

"Q. After you signed this agreement did you ever receive anything from Mr. Matassa? A. No, I did not. * * *

"Q. Did you ever see any attorney alone about this paper and its effects, if any? A. No, I did not. * * * I saw Ward Sullivan.

"Q. Were you alone when you saw him? A. No, I was not. I went to see Ward Sullivan as a friend, and Mr. Matassa was right there with me. * * *

"Q. By Mr. Teel: And what did Mr. Ward Sullivan say in the presence of Mr. Matassa at that time? A. Mr. Sullivan immediately said that he didn't see why any such papers were necessary as we were married and that since we were married those papers were not necessary. He didn't even read the papers. He merely glanced over them to see what was done. * * *

"Q. By Mr. Teel: And nothing more was done about the papers at that time? A. No, nothing was done about the papers."

On cross-examination, the following took place:

"Q. Did you know Mr. Ward Sullivan before you went to see him about this contract? A. Yes, Mr. Sullivan and the family and I have been friends since we were nine years old, my sister and I used to go with Ward all the time when we were children. * * *

"Q. What do you mean by saying that he glanced over it? Do you mean he

didn't read it? A. He was doing just like you are doing now. He just sort of glanced at it and didn't read it. * * * he didn't have time to read it, I know that. * * * At the time as I stated before, I didn't understand what the paper meant. I asked Mr. Matassa—I told him that I would like to show it to my family before I signed it, and Mr. Matassa said 'Absolutely not,' and that if I didn't sign it that we would not get along. I didn't know what then to do, so I suggested—I said, 'What am I to do?' and then later I said, 'I will talk to Ward,' and he said 'Then we will go and see Ward right away,' and we went from Mr. Lee's office to see Mr. Sullivan. * * * The same evening."

On redirect examination, this witness was asked:

"Now, at the time you signed this writing that the Court has before him, did Mr. Matassa go into detail as to the extent of his property and his financial ability? A. No, Mr. Matassa never did go into detail about it."

Respondent Thomas J. Matassa was examined pursuant to section 2055 of the Code of Civil Procedure, during the course of which he testified that he owned the following properties of the approximate value shown:

(1) A 26 acre vineyard at San Fernando—\$15,000 or \$20,000;

(2) Residence at 4213 Dundee Drive, Los Feliz, 20,000 or 25,000;

(3) Residence at 346 So. Gramercy Place, 15,000 or more;

(4) House at 411 Westminster, 10,000;

(5) Brick residence on Parkman near Temple, 4,000 or 5,000;

(6) Frame building at 415 North Cedar, Burbank, 6,000 to 7,000;

(7) A building at 1918 Magnolia, Burbank—

(8) A residence at 670 North Normandie 10,000;

(9) A house on Lankershim Blvd., Burbank, 10,000 or 15,000;

(10) A one-family home on Western Ave. near Venice Blvd., 10,000 or 15,000;

(11) Some vacant lots, one in Culver City and another on West Third Street; one in Springfield, Mass., and some vacant pieces at Atascadero.

He also testified that these properties were acquired prior to his marriage; that since the marriage he had acquired two lots in San Fernando worth \$1,000 or \$1,500, and had paid off an encumbrance of \$5,000 on the Dundee Drive place, which he had rented for \$450 per month.

With respect to the property settlement agreement, respondent testified he went to see Mr. Lee, the attorney who drew it, "about two weeks after the wedding," just before Mrs. Matassa started to work in the bakery. In response to the question: "And did you tell her at that time about all these properties that you have been telling the Court about for the last couple of hours?" the witness stated: "No, I did not." And to the question: "Well, did you tell her at that time what properties you had and upon which this agreement would operate?" the witness answered: "No." He further testified as follows:

"Q. Did you go to Ward Sullivan's office in connection with that writing? A. Yes, sir, I did.

"Q. And you were there all the time she was? A. That is right. * * *

"Q. How old are you Mr. Matassa? A. I will be 53 next May.

"Q. And you heard Mrs. Matassa testify that she was 22, is that correct. A. That is right, to the best of my knowledge.

"Q. Now, Mr. Matassa, after you left Ward Sullivan's office, you say he can testify that you had some conversation with Mrs. Matassa concerning this agreement to a property settlement which is set forth in your amendment to your answer, the document that you saw this morning? A. Yes, I had a conversation some time before, yes.

"Q. What was the conversation, if you do not mind? * * * A. Well, she said she couldn't sign anything that she didn't understand, and then I suggested then to see Mr. Ward Sullivan. * * *

"Q. Then you went to see Mr. Ward Sullivan that same evening, I think you said? A. We both did, yes. * * *

"Q. Do I understand your testimony to be that you do not remember whether she asked you at Mr. Lee's office for the privilege of showing the agreement to her father and mother? A. I do not recall that or anything like that being brought up. * * *

"Q. State the conversation at the time she agreed to go to the bank and sign it. A. I just told her that I was working in the dark, being that everybody was bucking against the whole thing, about the marriage, and I wanted to relieve my mind of it, so I asked her to sign it, so she signed it. * * *

"Q. Did you tell her anything about your property at that time? A. No, sir, I did not. * * *

"Q. And you didn't go into any more detail than you had ever gone into? A. I did not. * * *

"Q. Did she see any other attorney with you or to your knowledge at all? A. She didn't see any attorney with me.

"Q. The only conversation she had ever had about this agreement before she signed it in the presence of anybody was with Mr. Ward Sullivan and this other gentleman, Mr. Lee * * * as far as you know? A. That is right."

[3] In the circumstances disclosed by the record herein, it is perfectly obvious that the property settlement agreement is tainted by an overreaching and abuse of confidence on the part of respondent husband in order to gain an advantage over appellant wife, in that he failed to make any disclosure with respect to the extent of his property and also failed to accord her an opportunity of seeking independent advice as to her rights in the premises. It follows that the court's finding that the property settlement agreement is fair and equitable is not supported by the evidence.

In passing it appears advisable to comment upon the court's finding that paragraphs first and second of the property settlement agreement giving to each an inheritable interest in the property of the other "are so indefinite and uncertain that the purpose and intention thereof cannot be determined and the same are not enforceable." The only evidence upon this ques-

tion was that of respondent when he denied that he either discussed with his wife or ever told her that she should have an inheritable interest in his property; "I didn't know that clause existed until this divorce case came up. I just merely asked Mr. Lee to draw up a little contract that she would not be entitled to any of the properties that I had prior to the time of the marriage or in case of divorce that there would be no alimony, and that is all that I asked him to do."

Keeping in mind that the instant contract is a postnuptial agreement between husband and wife, not made in contemplation of a divorce, the rule enunciated by this court in estate of Hurley, 28 Cal.App.2d 584, 588, 589, 83 P.2d 61, 63, appears particularly applicable to the situation under consideration, to-wit:

[4, 5] "It is not disputed that husband and wife may by appropriate agreement waive their respective inheritable rights in the estate of the other. It is equally well established, however, that the courts will not construe a property settlement between husband and wife as depriving the survivor of inheritance or other rights growing out of the marital relation, except where there is a clear and unmistakable intention to barter away such rights. The agreement before us seems to be, as stated therein, 'A property settlement between the parties, settling everything including community property'. It also contains a mutual release of 'alimony and any and all money demands that one could make against the other of any kind whatsoever'. There is no release in terms by either one of claims upon the future acquisitions of the other, nor, in terms, any release by either one upon the estate of the other in case of death. * * * In Jones v. Lamont, 118 Cal. 499, 502, 50 P. 766, 767, 62 Am.St.Rep. 251, it is said: 'We do not think the courts should come to the aid of these contracts so as to deprive either the husband or wife of the property rights growing out of the marriage relation, except where there is a clear and unmistakable intention to barter away such rights.'"

[6] An inheritable interest was specifically provided for in the contract herein.

This was part of the consideration for the waiver by appellant wife of her right to alimony and attorney's fees. As a result, the disapproval of these two paragraphs and their elimination from the contract without any basis in fact or in law therefor, constituted an abuse of discretion on the part of the trial court.

With respect to the issue of community property, the record is clear that except for the two San Fernando lots, respondent's real property was acquired by him prior to his marriage to appellant. However, it is not disputed that the joint earnings of the parties while engaged in the pie business from the date of the marriage to March of 1945, were community property. Respondent testified that he sold between 500 and 700 pies per day, receiving 55¢ each retail and 45¢ each wholesale; which averaged \$250 per day gross; that he had a balance in one bank account on May 18, 1945 of \$6,905.00 from which he withdrew \$2,100 and \$4,000 to pay for a die in connection with a patent applied for on certain bakery equipment; that his rentals netted him \$3,700 per annum. Otherwise, respondent's accounting of the funds of the community during the trial of the instant cause was uncertain and inadequate. And although paragraph second of the property settlement agreement, to the effect that "all property acquired subsequent to marriage by either of said parties, shall be considered, and shall be community property of the parties hereto, and said parties shall share and share alike," was approved by the trial court, it was not followed in the award made of the community property. It follows that a further accounting must be made in order to determine the extent of the property acquired after the marriage of the parties hereto.

Since it will be necessary for the trial court to make new findings with respect to (1) the invalidity of the property settlement agreement; (2) the extent and amount of property acquired by the parties subsequent to their marriage constituting community property; and (3) an adequate allowance to appellant wife for alimony, attorney's fees and costs, it will serve no useful purpose to discuss the questions raised on the appeal from the order amend-

ing nunc pro tunc the findings, conclusions and judgment herein.

For the reasons stated, the nunc pro tunc order and those portions of the interlocutory judgment appealed from are, and each of them is, reversed, with instructions to the trial court to proceed in accordance with the views herein expressed.

DORAN and WHITE, JJ., concur.



87 Cal.App.2d 151

PODLASKY v. PRICE et al.

Civ. 16369.

District Court of Appeal, Second District,
Division 2, California.

Aug. 6, 1948.

Rehearing Denied Aug. 23, 1948.

Hearing Denied Sept. 30, 1948.

1. Contracts ⇨19

A contract cannot be created by offer and acceptance, if offer is withdrawn before its acceptance.

2. Vendor and purchaser ⇨44

In action to enforce plaintiff's rescission of her contract to purchase apartment building, evidence was insufficient to support trial court's finding that plaintiff withdrew her offer to purchase before defendant's acceptance thereof.

3. Fraud ⇨18

Whether fraud inducing execution of contract is actionable depends on whether it would reasonably defeat or materially impair contractee's freedom of consent.

4. Contracts ⇨94(1)

A contract is voluntary agreement, and intention to enter into it should be formed freely and voluntarily, unaffected by unconscionable contributions.

5. Fraud ⇨9

A fraudulent representation, to be actionable, must be representation of either past or present material fact with scienter on which defrauded party relied to his detriment, and he must have been induced to

act by reason of his reliance on verity of statement.

6. Vendor and purchaser Ⓒ44

In action to enforce plaintiff's rescission of her contract to purchase apartment building on ground of her reliance on defendants' misrepresentation that penthouse apartment was subject to specified OPA rent limitation, fact that OPA fixed lower rent ceiling thereon after rescission was irrelevant.

7. Vendor and purchaser Ⓒ44

In action to enforce plaintiff's rescission of her contract to purchase apartment building, evidence was insufficient to show that plaintiff, in deciding to buy building, relied on defendants' alleged misrepresentation that there was specified OPA monthly rental ceiling on penthouse apartment therein.

8. Vendor and purchaser Ⓒ33

A statement in typewritten prospectus, delivered by vendors' broker to prospective purchaser of apartment building, that rental figures in above statement were OPA ceilings and based on information from sources deemed reliable, but that vendors could not assume responsibility for errors or omissions therein, excused innocent misrepresentations or misstatements of facts by them, though it would not justify false representation knowingly made.

9. Vendor and purchaser Ⓒ44

In action to enforce plaintiff's rescission of her contract to purchase apartment building on ground of vendor's false representation that specified OPA monthly rent ceiling had been placed on penthouse apartment in building, testimony that penthouse was occupied by owner when OPA regulations went into effect and that vendor occupied it when he bought building, so that its registry was not required, and that he received a "set-up," showing such ceiling on penthouse, when he bought building, was admissible to show that he innocently made representation.

10. Vendor and purchaser Ⓒ44

In action to enforce plaintiff's rescission of her contract to purchase apartment building, evidence was insufficient to sup-

port trial court's finding that defendants made deliberate fraudulent misrepresentations that specified OPA monthly rent ceiling had been placed on penthouse apartment in building.

11. Fraud Ⓒ58(1)

A finding of willful fraud cannot be left to conjecture or surmise, but must be based on evidence which is clear and convincing and free from ambiguity.

12. Fraud Ⓒ50, 58(1)

The presumption is against fraud and is not overcome by shadowy evidence, but fraud must be clearly made out.

13. Compromise and settlement Ⓒ17(1)

One making compromise settlement of all her claims against vendors for damages or rescission of her contract to purchase apartment building because of alleged fraudulent misrepresentations after three weeks of discussion, investigation and consideration by her and her counsel, was not entitled to enforce rescission on ground of vendors' alleged fraudulent misrepresentation that specified OPA monthly rental ceiling had been placed on penthouse apartment in building.

14. Vendor and purchaser Ⓒ33

Where vendee is suspicious of vendor's representations, inquires for himself, is unhampered in his investigation and aided by his own attorney, and acts on his own judgment, purchase may not be canceled because of misstatements made by vendor as inducement.

15. Compromise and settlement Ⓒ8(3)

One employing veteran broker and seasoned lawyer to advise her throughout negotiations for compromise settlement and release from her contract to purchase apartment building on ground of vendors' alleged fraudulent misrepresentation that specified OPA monthly rental ceiling had been placed on penthouse apartment in building could not enforce rescission of compromise agreement on such grounds, where such lawyer made inquiry at Office of Price Administration and was informed that ceiling prices had been fixed on all units in building as set out in prospectus furnished purchaser by vendors' broker.

16. Compromise and settlement ⇨23(1)

To justify decree rescinding compromise settlement of contract to purchase realty on ground of vendors' fraudulent representations, purchaser must show, not only that such representations were false and intended to deceive, but that they actually did deceive her and that she relied thereon.

17. Compromise and settlement ⇨8(3)

Where party to compromise settlement contract is aware that one of statements made to induce him to settle is false, he owes legal duty to make complete investigation and may not rely on contractee's statements.

18. Equity ⇨64

The doctrine that equity aids the vigilant applies to one seeking release from contract with which he is displeased while claiming to be victim of fraud as well as to one who stands on threshold of his bargain.

19. Cancellation of Instruments ⇨60**Vendor and purchaser** ⇨123

Where broker, employed by prospective purchaser of apartment building solely to advise her, rendering services for her alone, and performing his agreement to pay her half of commission paid him by vendor's broker, was not party to purchase contract and compromise agreements, rescinded by purchaser on ground of vendors' fraudulent misrepresentation that O. P. A. rental ceiling had been placed on penthouse apartment in building, and did not know that no such ceiling had been placed thereon, there was no foundation for judgment against him in purchaser's action to enforce rescission.

20. Appeal and error ⇨1046(5)

A trial judge's statements in interrogating defendants' witnesses that judge could not give people brains, that "some of these people look like human beings," that witness should be quiet a moment as if she were endowed with certain intelligence, that "you can't beat brains into these people's heads," etc., and statement to defendant's counsel that he and judge did not agree on ethics, constituted such misconduct as to require reversal of judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Mynette Podlasky against Guy Price and others to enforce plaintiff's rescission of her contract to purchase an apartment building and a compromise settlement and release from such contract. Judgment for plaintiff, and defendants appeal.

Reversed with instructions.

Howard F. Shepherd, of Los Angeles, for appellants.

Mark F. Jones and Irving S. Baltimore, both of Los Angeles, for respondent.

MOORE, Presiding Judge.

Having executed a writing which bound her to purchase an eight-unit apartment building in Beverly Hills for the sum of \$67,500 from defendants Bearce, plaintiff effected a mutual rescission of the agreement of sale. This action was instituted by her for the purpose of enforcing her rescission of (1) the contract of purchase and (2) the compromise and release from that contract. The resulting decree having adjudged the rescission, defendants demand a reversal thereof on the grounds (1) that the attempt to rescind the contract of purchase was a nullity, the same having been already mutually rescinded; (2) that the alleged representations made to induce the purchase were not available as grounds for rescinding the compromise settlement; (3) that such settlement was not rescindable; (4) that the conduct of the trial judge deprived appellants of a fair trial.

The Facts

In July, 1945, Mr. and Mrs. Bearce, herein referred to as Bearce, owned the building involved, one apartment of which was designated as the "penthouse." They listed the property for sale with appellant Price who was consulted by respondent on July 31 for investment advice. He recommended the purchase of the Bearce apartments. Thereafter, accompanied by her friend, appellant Birnbaum, also a real estate broker, respondent called upon Price. After Birnbaum approved of the investment, with respondent's express consent he made an agreement with Price that in the

event of sale Price would pay him 25 per cent of the commission, which he in turn agreed to divide with respondent. In the course of the negotiations for the sale Price exhibited a printed prospectus or "set up" of the data concerning earnings of the apartments. That document contained a declaration of the OPA ceiling rental values of the eight apartments indicating that the ceiling rental value of the penthouse was \$175 monthly.

After respondent and her husband had with Price inspected the building, on the husband's request Birnbaum advised her not to make the purchase. However, after respondent had alone agreed with Price to buy the building Birnbaum read and approved the written offer to purchase on August 24, 1945, and advised her to sign it. She thereupon affixed her signature to the writing and paid Price \$5,000. The following morning respondent visited the office of Price and urged him to release her from the contract. He replied that he had worked four hours with the owners and had already induced them to accept her offer for the apartments. After he declined to exhibit the Bearce acceptance of her offer she delivered to him a written notice of her revocation of her offer to purchase. Shortly thereafter Attorney Baltimore appeared at Price's office and demanded the privilege of inspecting the Bearces' acceptances. Having been refused, the attorney departed but soon reappeared with respondent, whereupon Price exhibited the signed acceptance and adhered to his refusal to cancel the purchase. As proof of his contention that the acceptance had not been signed prior to the revocation Baltimore testified that he had seen Mr. Bearce enter Price's office between his first call alone and his second call with respondent, who argues that such circumstance is evidence that the acceptance had not been signed prior to her revocation.

Respondent then commenced negotiations to effect a rescission of the contract. After extended negotiations the parties arrived at a compromise of their controversy. Mutual releases were executed on September 15, 1945, whereby respondent received \$1,000, the Bearces retained \$625 and Price kept \$3,475, out of which sum in accord-

ance with his agreement he paid \$847.75 to Birnbaum who paid one half thereof to respondent.

She Alleges Discovery of Fraud and Moves to Rescind

In March, 1946, respondent discovered that on August 24, 1945, there was no ceiling price on the penthouse of the building under the orders of the Office of Price Administration. Deeming such discovery to be proof of willful deceit on the part of appellants, respondent cause a notice of rescission of the agreement to purchase and the agreement of compromise to be served on appellants whereby she demanded the return to her of \$4,000 and agreed to return whatsoever she had received from appellants. In her notice she specified the grounds of rescission to be her reliance upon the representation of appellants that the OPA ceiling rental value of the penthouse was \$175 per month, whereas no ceiling upon that unit had been fixed prior to the date of her compromise settlement but the rental ceiling of only \$100.00 monthly had been granted after September 15; (2) her continued reliance at the time of the compromise upon the statements of appellants (a) that no misrepresentation had been made in obtaining her offer of purchase and (b) that all statements of fact contained in the prospectus exhibited to respondent were true, whereas such statements were untrue; (3) her reliance upon the representation of appellants that the offer to purchase had been fully accepted by the Bearces prior to service upon Price of her notice of revocation, whereas such representation was false. Her notice was not accompanied by an offer to pay Mr. Birnbaum the sum he had paid her in the compromise settlement. Neither did respondent at the same time offer to resume her status under the purchase agreement. Her complaint in this action, to enforce the rescission, repeated the contents of her notice of rescission.

The court made findings that appellants had falsely represented to respondent that the penthouse "was rented at a monthly rental of \$175" and that appellants Price and Bearce had falsely stated to respondent "that said sum of \$175 per month was the

OPA ceiling rental for said premises," whereas in fact there was no rental ceiling on the penthouse; that appellants knew such representations to be false; that respondent relied upon them and only by reason thereof signed the purchase contract; that prior to Bearces' acceptance respondent revoked her offer; that while relying upon appellants' representations that no false statement had been made to induce her to sign the agreement she agreed to and did enter the compromise settlement; that respondent's attorney on August 27, 1945, investigated the representations of appellants as to the OPA ceiling prices and was informed by the Office of Price Administration that the apartment building was duly registered. Judgment was upon such findings entered against appellants Price and Bearce for \$3,156.25 and against Birnbaum for \$421.88.

The Finding That There Was No Contract of Purchase

[1,2] The finding is that respondent withdrew her offer before Bearce accepted it. If this had been true there could have been no agreement. A contract cannot be created by the method of offer and acceptance if the offer is withdrawn prior to its acceptance. If there was no contract there was no basis for the compromise; neither was there any basis for the notice of rescission served upon appellants, nor for this action to enforce the so-called rescission. Therefore the finding is at total variance with the conduct of respondent and with the theory of rescission on the ground of fraudulent representation. Furthermore, such finding is without evidential support; there is not a scintilla of substantial evidence of the "acceptance after the revocation." The finding rests solely upon the suspicion of Attorney Baltimore which was born of (1) Price's refusal promptly to exhibit the signed acceptance to respondent and (2) the observed visit of Mr. Bearce to the office of Price. The finding is contrary to the positive and unambiguous testimony of the only signatories to the acceptance. All three testified that they had each signed it on the evening of August 24, whereas respondent advances no claim other than that she served a notice

of withdrawal on the morning of August 25. The implication that Mr. Bearce signed the acceptance on the 25th when Baltimore saw him enter Price's office is refuted by the instrument itself. It bears the signature of Mrs. Bearce who did not accompany her husband into the Price office on the morning of the attempted revocation. Since it bore her signature at the time it was shown to respondent, she could have signed it only at some time prior to respondent's revocation. Suspicion on the part of any witness, however learned or observant, is not a sufficient basis upon which to predicate a finding of a gross fraud.

The Alleged Fraud Not of Sufficient Influence to Defeat Freedom of Consent

[3-5] The test which determines whether a fraud is actionable is: would it reasonably defeat or materially impair freedom of consent of the contractee? A contract is a voluntary agreement and the intention to enter into it should be formed freely and voluntarily, unaffected by unconscionable contributions. "A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties * * *." Civil Code, sec. 1566. One of the factors which prevents the exercise of free will in entering into an agreement is fraud in the inducement whereby the consent is procured. For a fraudulent representation to be actionable it must be one of either a past or a present material fact made with scienter on which the defrauded party relied to his detriment. Rest. Contracts, sec. 470 et seq.; 17 C.J.S., Contracts, § 153. Not only is materiality an essential element of the deceitful representation, but the defrauded party must have been induced to act by reason of his reliance upon the verity of the statement. *Harding v. Robinson*, 175 Cal. 534, 539, 166 P. 808; *De Garmo v. Petitfils Confiserie*, 93 Cal.App. 261, 265, 269 P. 692. Section 1572 of the Civil Code defines actual fraud as "1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that

which is not true, though he believes it to be true."

[6] In the instant case the fraud which is alleged to have vitiated the free consent of respondent is evidenced by the typewritten prospectus delivered by Price to respondent before she signed the purchase agreement. It contains not only a detailed listing of the rentals of the apartments earned during August and previous months of 1945 but immediately below the income figures appears the following: "The above are OPA ceilings; rentals should be higher and it is reasonable to expect higher income when OPA is lifted." At the bottom of the page appears the following printed note: "The above statements are based upon information from sources deemed reliable and which we believe to be correct, but we cannot assume responsibility for errors or omissions therein." This was nothing less than a warning that Bearce and Price disclaimed responsibility for the statements contained in the set up and that a buyer should beware. At the trial respondent proved that on the date she signed the purchase agreement there were OPA ceiling prices on all the units except the penthouse. She contends that appellants' assertion that the penthouse was subject to OPA limitations was a misrepresentation of a material fact, and that she relied upon it and was induced thereby to execute the agreement. She supports her argument with the recital that at some time after September 15, 1945, the OPA fixed the ceiling on that unit at \$100 monthly. The fact that an OPA ceiling of a lesser sum was placed on the penthouse months later is entirely irrelevant since respondent's alleged deception and detriment must be based upon (a) the nonexistence of an OPA ceiling on the penthouse on August 24, 1945, (b) its materiality, and (c) her reliance thereon if it was material. It is clearly evident that her decision to buy the building was not derived from the penthouse rental being represented as the OPA ceiling.

[7] According to her own testimony respondent intended to use the income from the apartments to pay the mortgage about to be assumed. Her reliance, therefore, was not on the assertion that the OPA ceil-

ing on the penthouse existed on August 24, but rather upon her belief that it would continue to exist and thereby produce a high income for her. From this it is evident that she relied upon a mere conclusion, entirely of her own creation, derived from her assumption that because a ceiling did exist it would continue to exist. Such a conclusion would not have been warranted even if there had been an OPA ceiling on the penthouse, for a continuance or change of controls is a matter entirely within the purview of the federal government. Also, her basis for such conclusion involved the assumptions (1) that the extant social and economic conditions would be static, and (2) that the same regulations would remain unchanged, and (3) that the same appraisers or others of their school would continue to fix rental ceilings. If she did not assume those possibilities as facts then the statement of the ceiling on the penthouse was meaningless to her and could not have deceived her.

If perchance respondent did in fact apprehend a significance in a ceiling rental on the apartments it is more reasonable than otherwise to believe that she must have concluded that it would profit her as owner of the property not to have the ceiling. Without controls she would be at liberty to exact any rental the traffic would bear. If the OPA had fixed a ceiling on the penthouse prior to August 24, 1945, there is neither presumption nor proof that the rental would have been for a sum less than the monthly rental then being paid, to wit, \$175. Inasmuch as the court found that Bearce was then receiving that sum as rental for the penthouse is it reasonable to believe that respondent relied upon the representation of the OPA ceiling and not upon Price's statement of the actual receipts for the rental? If it was earning that sum and there was no ceiling upon its price the new owner was in a far more favorable position. Therefore it could not have been reasonably found that respondent relied upon the alleged misrepresentation as to the penthouse rental ceiling in view of the proof of her complete reliance upon other considerations.

[8] Furthermore, at the very threshold of her conferences with Price respondent

was warned not to rely upon the contents of the prospectus. Its statement that "the above are OPA ceilings" was qualified by the language of the footnote whereby appellants other than Birnbaum disclaimed responsibility for "errors or omissions therein." The office of such language was to emphasize that appellants did not pledge their faith to the statements concerning the ceilings on the Bearce apartments. Therefore the printed caveat or warning would excuse an innocent misrepresentation or misstatement of fact, even though it would not justify a false representation knowingly made.

[9] Since the court found "that all the defendants other than defendant I. W. Birnbaum knew that no OPA ceiling price had been placed on said penthouse," it becomes necessary to determine the correctness of that finding. Price testified that he did not know that the penthouse was not registered. At the trial appellants' attorney attempted to show that when OPA regulations went into effect the penthouse was occupied by the owner and that its registry was not required; that when Bearce bought the building he occupied the penthouse; consequently, it was unnecessary for it to be registered; that when Bearce bought it he received a "set up" showing a ceiling of \$175 on the penthouse. This testimony was improperly excluded. It would have shown that Bearce innocently made the representation which the court found to have been made with knowledge of its falsity. Contrary to the pronouncement of the trial judge, there is a vast distinction between an untruthful statement due to negligence and one born of a fraudulent desire to cheat another. The author of the former is liable only for his error to his contractee, while the originator of a fraudulent scheme to swindle becomes indebted to the state also for his unsocial act. Admittedly Bearce should have known of the existence or absence of OPA ceilings on his building, but his neglect to know was not scienter. The exculpatory notice on the statement presented to respondent by Price would extend to the innocent though negligent representations of Bearce, his principal.

[10-12] From the foregoing considerations the finding that a deliberate, fraudulent representation was made by appellants is unsupported by the evidence. Such a finding is too serious a charge to be left to conjecture or surmise. A finding of wilful fraud must be based upon evidence that is clear and convincing and free from ambiguity. *Bruce v. Bruce*, 71 Cal.App.2d 641, 644, 163 P.2d 95; *Gorman v. Steinke*, 7 Cal.App.2d 507, 510, 46 P.2d 293; *Shaw v. Imperial Mutual Life and Benefit Association*, 4 Cal.App.2d 534, 537, 41 P.2d 574. The presumption is against fraud and is not overcome by shadowy evidence (*Shapiro v. Equitable Life Assurance Society*, 76 Cal.App.2d 75, 91, 172 P.2d 725), and must be clearly made out. *Wolfe v. Severns*, 109 Cal.App. 476, 480, 293 P. 156. It follows that the court's finding of a wilful misrepresentation was prejudicial error.

The Compromise Not Rescindable

[13] But conceding, arguendo, that a deliberate fraud had been perpetrated on respondent, she faces the insurmountable fact that by her own act she settled all her claims against appellants for damages or rescission. During three weeks of discussion, investigation and consideration she and her counsel had abundant opportunity to appraise and reappraise her bargain and the building and to ascertain the facts as to whether the OPA had fixed a ceiling of \$175 monthly on the rental of the penthouse prior to September 15, 1945. Indeed, so suspicious was Attorney Baltimore at the time of his entry into the negotiations with Price that he called at the OPA on August 27, 1945, where he was advised that the ceiling rental on the penthouse was the same as set forth in the "set up."

[14, 15] The fraud declared as grounds for the rescission of the compromise agreement is a repetition of the same allegations made as the basis for rescinding the purchase contract. But as to the inducements to compromise respondent's testimony that she relied upon the representations of appellants is weakened if not wholly negated by the facts (1) that during the negotiations for a release of respondent the Office of Price Administration was open and ac-

cessible; (2) that Attorney Baltimore made inquiry there when in quest of facts with which to compel acceptance of respondent's revocation, and (3) that he was informed that ceiling prices had been fixed on all the units in the apartment building as set out in the prospectus. Thus respondent did not rely upon the truthfulness of appellants' representations but rather on the independent investigation by her attorney. When a vendee is suspicious of the representations made by his vendor and proceeds to inquire for himself, is unhampered in his investigation, is aided by his own attorney and acts upon his own judgment, then the purchase may not be canceled by reason of misstatements made by the vendor as an inducement. *Colton v. Stanford*, 82 Cal. 351, 383, 23 P. 16, 16 Am.St.Rep. 137. Since respondent employed both a veteran broker and a seasoned lawyer who advised her throughout the negotiations for the compromise, she did not rely on anything told her by appellants and therefore cannot enforce the rescission. *McCarter v. Zeller*, 35 Cal.App. 593, 596, 170 P. 636. If Baltimore inquired of the OPA and was advised that the penthouse had been registered, he learned exactly what Bearce or Price believed to be the fact. And since respondent knew all that was known to her attorney, she is in no position to demand a judgment of rescission.

[16,17] It is not denied that respondent entered into the compromise after Baltimore's investigation of the OPA ceilings on the apartments and that he advised respondent. This fact places the responsibility for the compromise solely upon respondent. She had been dissatisfied with her purchase from the 25th day of August. According to her own testimony she made the settlement because she wished to rid herself of the burdens of her investment. Upon that subject she testified as follows: "As I told Mr. Price, I could not go on with the deal, that I had been in terrible mental trouble, that my husband had disapproved of the deal, that I did not have the money to go on with it; my husband refused to help me; that he was going to divorce me if I would go on with the deal, and for him to have mercy on me and call the owner, and tell him not to go on with the deal."

Her attorney testified that he told Mr. Bearce on August 25, 1945: "She feels she has made a mistake, and regardless of the merits of her position if we try to avoid the deal against you, well, it seems to me that she is entitled to some sympathy. * * * She would like to get out of the deal * * * and get me to cancel the deal." To justify a decree of rescission because of misrepresentations it must be shown not only that they were false and intended to deceive, but also that they actually did deceive the plaintiff and that he relied upon them. *Maggini v. McBain*, 65 Cal.App. 133, 135, 223 P. 428; *McCarter v. Zeller*, supra. Moreover, where a party to a contract of compromise is aware that one of the statements made to induce him to settle is false he is under a legal duty to make a complete investigation and may not rely upon the statements of his contractee. *Carpenter v. Hamilton*, 18 Cal.App.2d 69, 75, 62 P.2d 1397.

[18] Having on the advice of her lawyer elected to salvage what she could from what she deemed her hasty action, and having had her own attorney investigate her claims (1) that her offer was not accepted prior to her revocation and (2) that she had been defrauded in her purchase, respondent settled once and for all any action for rescission or for damages by her settlement of September 15, 1945. The doctrine that equity aids the vigilant applies as well to one who while claiming to be the victim of a fraud seeks to be released from a contract with which he is displeased as to one who stands at the threshold of his bargain.

The Effect of Including Birnbaum in the Judgment

[19] The court specifically found that appellant Birnbaum did not know that there had been no OPA ceiling price placed on the penthouse. It is not even alleged that Birnbaum was an agent of Price or of the Bearces, but it was proved that he was a broker and friend of respondent. She had brought him into the transaction for his advice to her only. He rendered no service to Price, for in fact no sale of the property was ever consummated. All his services were intended for the benefit of respondent.

The payment by Price to Birnbaum of a portion of the commission had the effect of paying for Birnbaum's services to her. Also it affected an additional saving to respondent of \$421.87 in the compromise settlement. In any event, if respondent had been entitled to rescind both the purchase and compromise agreements, Birnbaum was not a party to either; and even if he had been he was allied with respondent and not with any appellant. There was utterly no foundation for a judgment against him.

Conduct of the Trial Judge

[20] If no other grounds for reversal existed, the conduct of the trial judge alone would adequately supply them. Judge Burnell at various stages of the trial made statements calculated to intimidate the litigants and their counsel and to confuse the witnesses. The following are some of his responses to testimony or to argument of counsel.

In interrogating a witness as to prior statements in his deposition the following colloquy took place:

"The Court: The only question is whether those questions were asked you and whether you gave those answers, as appear on the typewritten transcript of the testimony taken down by the reporter when your deposition was taken. Were they asked you or were they not? Do you have to think over that? Why don't you answer the question?"

"A. I don't get it.

"The Court: I cannot give people brains. Mr. Birnbaum, when your deposition was taken, there was a reporter that took everything down just as this lady is taking it down. This is a transcript of what she took down. The only question—nobody could make it simpler—is whether the question Mr. Jones just showed to you and read to you was asked you at the time your deposition was taken." (Tr. 145.)

In interrogating Mrs. Birnbaum, an elderly woman, the following is reported:

"Mr. Jones: I move that the answer be stricken.

"The Court: That may be stricken.

"The Witness: That is all I heard.

"The Court: Some of these people look like human beings.

"The Witness: You asked what I heard.

"The Court: Will you be quiet a moment as if you were endowed with certain intelligence. I tell them, counsel tells them. They proceed and give their opinions and conclusions, which nobody is interested in. The whole answer will be stricken out. Will you please listen. Do you know what the word conversation means? Did you ever see it?"

"A. Yes.

"The Court: You better look it up in the dictionary, and you will find it means what two or more people said. We are not interested in what you think or your conclusions, or opinions. Please listen." (Tr. 169.)

And later:

"The Court: It will be stricken. I give up. You can't beat brains in these people's heads." (Tr. 171.)

And again:

"Q. Did you state that? A. I did say it.

"Q. Did she say—strike that out. She hasn't answered my questions.

"The Court: That is three strikes.

"Mr. Jones: We will start again.

"The Witness: She is the one that said it.

"Mr. Jones: I move that answer be stricken.

"The Court: That will be stricken. I give up. I often wonder why some of these people are put in asylums and others are left out.

"Mr. Jones: Mrs. Birnbaum—

"The Court: Just pretend you have a brain now. Just play you have. Listen to the question and answer what is asked you." (Tr. 172.)

When counsel attempted to show that Mr. Bearce was unaware of the nonexistence of OPA regulations on the penthouse the court said:

"Does that justify making a misstatement of a material fact in order to induce someone into making a contract, if someone made a similar misstatement to him?"

"Mr. Shepherd: It shows good faith, your Honor.

"The Court: Wouldn't it be better if he said, 'If I made some misstatements, as an honest man, I will give you back your money'?"

"Mr. Shepherd: I do not think so.

"The Court: You and I do not agree on our ethics.

"Mr. Jones: Your Honor has that exactly; if he doesn't know what the facts are.

"The Court: It is the same thing if he makes a false statement, knowing it is false, and makes a statement without taking reasonable precautions to determine whether it is true." (Tr. 175.)

In attempting to ascertain the extent of the preliminary negotiations of the parties to the agreement and while appellant Price was on the stand the following is reported:

"Q. Between the time he made that offer and August 24, was Mrs. Podlasky at your office or in conversation with you? A. I think she may have been in once or twice. She came in quite often. Her purpose—

"The Court: How do you know what her purpose was?

"A. She tried to get me to accept an offer of \$65,000.

"The Court: This man looks almost intelligent at times.

Mr. Shepherd: He is quite intelligent, your Honor.

"The Court: I doubt it very much. He keeps on interpolating what he thinks people's motives were and how furniture was arranged.

"Mr. Shepherd: If he were a court official he might be a little more capable. I think our witness is under a little strain while on the witness stand.

"The Court: They seem to be unable to be silent. They seem to be utterly incapable of answering a question and then stop talking, and not interpolating extraneous matter. I have told witnesses on both sides that, time and time again. Apparently we are trying a case with a bunch of morons.

"The Witness: Your Honor—

"The Court: No one has asked you a question.

"The Witness:—I would like to state this.

"The Court: You keep quiet, now. You will wind up in jail if you do not look out." (Tr. 193.)

When Mrs. Podlasky attempted to testify as to her notice of rescission, the following transpired:

"Q. By Mr. Jones: Did you have a copy of that paper you handed to Mr. Price that morning? A. I jotted it down that I hereby cancel—

"The Court: Won't you please use your brains? Listen to the question and answer the question. You were asked a very simple question. Did you have a copy of the paper you gave Mr. Price?

"A. To my knowledge I did write it down and hand it to Mr. Baltimore. Did I hand it to you?

"The Court: Please confine yourself to answering questions that are asked you.

"The Witness: Can I say I don't remember?

"Mr. Jones: You can say that, yes.

"Q. Do you know what was on that paper you handed to Mr. Price? A. I do.

"Q. Please state what it was.

"Mr. Shepherd: I object to that on the ground that it is incompetent, not the best evidence.

"The Court: You were asked to produce the paper and you refused to produce it. The objection is overruled.

"Mr. Shepherd: There was no notice to produce.

"Mr. Baltimore: Yes, there was.

"The Court: You produce it then.

"Mr. Shepherd: The notice is: 'that plaintiff demands the production of and requires—'

"The Court: Let us forget it. The objection is overruled. I get tired of these asinine objections that prevent the judge from finding what the facts are." (Tr. 60.)

Later, in reference to the same witness the court said: "I do not know what we are

going to do with this witness. The Court has admonished her time and time again; she hasn't any brains or she will not use them. I do not know which." (Tr. 64.)

When Attorney Baltimore was testifying as to Price's refusal to show him Bearces' acceptance he testified as follows:

"I said, 'Guy, when you were flat on your fanny I came to your rescue.' I said, 'What a heel you are' and we walked out.

"Mr. Shepherd: I move to strike that statement, your Honor. I have no objection to any conversation about the refusal of delivery, but these side remarks between counsel and Mr. Price are unnecessary.

"The Court: I think we are entitled to all the conversation. I want to know the facts in the case. When counsel starts to make objections I get suspicious." (Tr. 115.)

When Price was testifying as to his knowledge of the existence of OPA regulations:

"Q. Did you honestly believe at the time that setup was given to Mrs. Podlasky, that the penthouse was registered at \$175 a month? A. I believed it had been, that it was registered.

"The Court: You did not check it up with the Office of Price Administration to find out, did you?

"A. No, your Honor, I—

"The Court: When you have answered, cease firing." (Tr. 188.)

In the course of the summation of the trial the following transpired:

"Mr. Shepherd: May I say something?

"The Court: Yes. Save it for the District Court of Appeal or the Supreme Court. The judgment will go for the plaintiff as prayed. How about interest on this amount?

"Mr. Jones: I think we are entitled to it.

"The Court: Interest from the time of the deposit. Will you prepare findings?

"Mr. Jones: Yes.

"Mr. Shepherd: If your Honor has not given full judgment, I was going to call your attention to a case.

"The Court: I do not want any cases.

"Mr. Shepherd: On a deposit, your Honor.

"The Court: You have already made your argument.

"Mr. Shepherd: All right.

"The Court: I do not permit attorneys after they have made their arguments and the Court has decided the case, to attempt to argue the Court out of its decision. Lawyers have tried many times but it has never worked with me. Will you prepare findings, unless they are waived, Mr. Jones.

"Mr. Jones: Thank you.

"Mr. Shepherd: May I ask a question. Are you going to find Mr. Price guilty of fraud in the findings?

"The Court: False representations with utter disregard of the truth." (Tr. 263.)

Such conduct is not that of a legendary tyro but of a living, functioning judge who apparently delights in exhibitions calculated to deprive the court of the complacency, the disinterestedness, the zeal for truth, the judicial calm and mien indispensable to the avoidance of prejudicial error. The pronouncements of his personal opinions upon counsel and witnesses impair their efficacy as well as that of the court. Similar behavior by Judge Burnell has been the subject of many reversals during the past 24 years (see *Etzel v. Rosenbloom*, 83 Cal.App.2d 758, 189 P.2d 848) without effecting a reform in his behavior or causing him to conform with orthodox judicial deportment. However, it is still error thus to conduct a trial.

The judgment is reversed with instructions to enter judgment for defendants.

McCOMB and WILSON, Justices.

We concur in the opinion prepared by Mr. Presiding Justice MOORE. In addition it is our view that the nonjudicial conduct of Judge Burnell during the trial of numerous cases, many of which are cited in *Etzel v. Rosenbloom*, 83 Cal.App.2d 758, 189 P.2d 848, is verging on a public scandal and is bringing the courts and the administration of justice into disrepute. (See also *People v. Reese*, [1934]

136 Cal.App. 657 at 665 et seq., 29 P.2d 450, 454.)

No longer should such disgraceful acts be lightly brushed aside. In order that

taxpayers, litigants, witnesses and lawyers may be protected from further insults, harassment and ridicule at his caprice and whim two courses at least are

1 Division One of the Second Appellate District Court of Appeal in discussing the misconduct of Judge Burnell, in *People v. Reese*, supra, says:

"Although not embracing a complete list of the separate occasions on each of which it is asserted by appellants that the trial court was guilty of misconduct in the trial of the action, an inspection of the specifications of error in that regard reveals the fact that the attention of this court is directed to not less than sixty-eight separate violations of proper decorum on the part of the trial judge. A few of such specifications will suffice:

"On the first day of the trial of the action, in giving the required statutory admonition to the jury, and in especially cautioning them to have nothing to do with the attorneys on either side of the case, the judge made the following remarks:

"So just be a little bit careful, please. I don't want you to think that these gentlemen all have leprosy, or smallpox, that you have to get from them, but just kindly figure that they have all got the measles, or something you don't want to be exposed to. It is just a little tip, ladies and gentlemen, because I don't want anything talked around such as I have indicated. * * *

"Referring to objections by counsel for defendant to the reading of testimony given by a witness on a former trial of the action, and to the fact that the witness might return to the state before the trial could be completed, the trial judge said:

"If he is (has returned to the state), anyone that wishes can put him on the stand, but the idea is to get the facts before this jury, and not to play a game to see how many points either side can win."

"Without any apparent underlying reason for the statement, at one time the judge said:

"We can put on enough side-shows in this court of our own, without going into Judge White's court and copying his part of it."

"Apparently with the same thought in mind, following a recess of the court and a stipulation that the jury was present, the judge remarked:

"All right, proceed. Both sides of the show are here. We might just as well go ahead."

"It appears that one of the attorneys representing one of the defendants was looking into a 'bag' which was the prop-

erty of one of the other attorneys in the case, and the judge said:

"Judge Perky's bag; we want to make sure which judge you are talking about. I only hope it doesn't leak on you, Mr. Lawson."

When a complaining witness had testified that he had paid the sum of \$20,000 to one of the defendants in connection with the sale of shares of stock, the attorney for the people asked him:

"Q. Did you get anything for that \$20,000? A. Not a thing." The judge then interposed the following question: "You got experience, didn't you? A. Plenty of that."

"On another occasion, the court made the following remark to a witness on the stand:

"Mr. Robinson, you are just a little too eager to answer questions without giving either side a chance to object. If you see either of these gentlemen going through gesticulations or motions that indicate that they are about to give birth to an objection, just stop a moment."

"At a time when one of counsel for defendants was examining one of the witnesses on cross-examination, the judge interrupted and began to examine the witness himself. After several questions had been asked by the court, one of the attorneys for one of the defendants interposed the following remark:

"If your Honor please, I prefer to examine my own witness."

"The Court: I dare say, but when it appears that the witness is becoming confused in matters, I am going to take a hand in order to get the thing straightened out and the facts before the jury. We are not playing a game to get the witness balled up on the witness stand."

In criticizing one of the attorneys for his manner in asking questions, the judge said:

"I think we might make better time if Mr. Bialock would supply Judge Perky with one of these old-fashioned street-car bells, to let him ring it when he wants to go ahead."

"During the reading of certain testimony, Mr. Perky and Mr. Kelby took turns in reading from the transcript, and upon one occasion, as Mr. Kelby was about to take up the reading, the judge made the following comment: 'All right; we will listen to the reading of the Word from the Reverend Kelby now.'

"With reference to the proposed reading of each of several checks which had

readily available: (1) The Judicial Commission, acting on recommendation of the Governor, can retire him for the "reason of mental * * * disability that is or is likely to be of a permanent character" rendering him unfit to perform the duties

of the office which he occupies. (The Judges' Retirement Act, 5849a, secs. 2 and 3, Vol. 2, Deering's General Laws of California, 1944, p. 2252 et seq.) (2) The legislature may remove him by a "concurrent resolution of both Houses of the

been introduced as exhibits on the trial of the action, the judge made this remark: 'There is no heart or sex appeal in reading checks.'

"On another occasion the judge addressed the following remark to one of the attorneys for one of the defendants: 'I am not particular for too much decorum in the court room, but I have never yet allowed any attorney to stand on his head; he will have to stand on his feet.'

"Following the cross-examination of one of the witnesses introduced by the defendants, the judge had this to say: 'Are you gentlemen all through with Mr. Mort, with what is left of him? * * * All right, Mr. Mort, I guess if they are all through with you, you have been here a couple of days, and what is left of you can be excused.'

"One of the attorneys for one of the defendants having stated to the court that he would prepare proposed instructions for one of the defendants as soon as he could obtain a copy of the instructions offered by the people, the judge made the following remark:

"Yes, do so, as soon as you can. The idea of most instructions seems to be to confuse the jury, or to try to confuse them as far as possible.'

"It appears that counsel for the people had a book which belonged to Judge Perky, who was one of the attorneys for one of the defendants, and that Judge Perky had made an inquiry for it; whereupon the judge remarked:

"Well, I don't think anyone would want to take a date book away from you, Judge Perky, particularly if it contained any live telephone numbers.'

"At a time when the court had commented upon the testimony given by one of the witnesses for the prosecution to the effect that he did not think that the attorneys for the defendant 'should put a sort of shotgun statement to her answer,' without any objection thereto having been interposed by either of the attorneys for either of the defendants, the judge said:

"If you want an exception, however, I will give you an exception. In fact, I will give you another exception for good measure on account of the depression.' To which remark one of the attorneys said: 'Well, I wish to take an exception to the statement of the court.'

The Court: 'Well, I will give you another one on that; only one on that, however. I cannot give you too many bargains.'

"In cross-examination of a witness on attempted impeachment by one of the attorneys for defendant, he asked a question which had a tendency to distinguish between two persons who bore the same name. In connection therewith, the judge made the following remark: 'Well, it is assuming facts not in evidence. In the first place, it is assuming that she is particular. We don't know whether she is or not. * * *'

"During the examination of a witness, reference was made to the kind of work which he was doing and the court said: 'What was he doing, flagpole sitting?'

"Referring to another witness, the court said: 'Well, he has made his explanation of why he made a certain remark, indicating a tendency, perhaps, to commit the crime of mayhem.'

"Referring to the fact that one judge may not agree with another with reference to some question of law, the judge of the trial court made the following disparaging remark: 'He (Judge White) might have made a different ruling on some question than I might have made. We do not always agree, and that is why we have Supreme Courts, and rubber mats on the cuspidors. * * *'

"As indicating what the judge of the trial court thought of the mine in question, the following remark of the trial judge may be cited: 'In other words, you don't contend that that hole in the ground had ore in it, or didn't have ore in it.'

"Commenting upon certain proposed exhibits in the case, the judge remarked: 'Are you about to introduce the three wise monkeys as an exhibit here?' Whereupon counsel for the prosecution said: 'There is only one prosecution counsel.' The Court: 'Gentlemen, it is practically twelve o'clock, and I think that is a happy thought to adjourn with.'

"Extended comment would seem to be unnecessary. In cases too numerous to properly admit of citation thereof, because of judicial misconduct that was insignificant compared to that which so unmistakably appears in the instant case, the respective judgments therein were reversed."

Legislature adopted by a two-thirds vote of each House." (Constitution, State of California, Art. VI, sec. 10.)

Hearing denied; EDMONDS and CARTER, JJ., dissenting.



BOGAN v. WILEY.

Civ. 13416.

District Court of Appeal, First District,
Division 2, California.

Aug. 9, 1948.

Rehearing Granted Sept. 8, 1948.*

1. Bills and notes Ⓒ63

Payee obtains no property in a negotiable instrument until its delivery. Civ. Code, § 3097.

2. Executors and administrators Ⓒ43, 86(2),
539

Trusts Ⓒ103(5)

Where it was administrator's theory that defendant as managing partner of debtor partnership caused check to be drawn to decedent and her husband for defendant's own purposes with intent to use it for his own ends, no theory of trust or analogy to doctrine of executor de son tort could avail administrator, and check never became property of decedent or of her estate and hence could not fall within statute authorizing a double recovery by administrator when any property of a decedent is embezzled, concealed, smuggled, or fraudulently disposed of. Probate Code, § 612; Civ. Code, § 3097.

3. Partnership Ⓒ146(1)

Where a member of a partnership draws a check payable to a third party, even if partnership may be considered as a separate entity and may be conceived of as having delivered check to partner who drew it, the intention with which it was delivered was intention of partner who drew it, and such intention would control in determining effect to be given check.

4. Partnership Ⓒ146(2)

Where partnership was allegedly indebted to decedent or her estate, manipula-

tions by defendant, who was managing partner, by which he allegedly drew a check in payment of such debt and appropriated the proceeds thereof, did not affect partnership's obligation and it continued to owe decedent or her estate.

5. New trial Ⓒ41(3)

Where check drawn by defendant partner on partnership account in the sum owed to decedent was not delivered and was not intended to be delivered to decedent or to her estate, so that check never became the property of decedent or of her estate and debt of partnership continued to exist, order granting defendant a new trial in administrator's action for a double recovery was justified for prejudicial error in giving instruction which permitted jury to find that defendant, in retaining check and the proceeds thereof for his own use, had embezzled property of decedent's estate. Probate Code, § 612.

6. Executors and administrators Ⓒ86(2)

The statute allowing administrator a double recovery from one who conceals property of a decedent does not impose double liability upon any debtor of a decedent who attempts to conceal the fact of his indebtedness. Probate Code, § 612.

7. Property Ⓒ2

The word "property" in its most general sense is broad enough to cover everything, tangible and intangible, which may be the subject of ownership although the meaning of the term may be restricted by context of a particular statute or writing in which it is used.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

8. Executors and administrators Ⓒ86(2)

Under statute permitting a double recovery to executor or administrator against anyone who embezzles, conceals, smuggles, or fraudulently disposes of any "property of a decedent", the quoted phrase does not include naked choses in action but is limited in its sense to tangible property. Probate Code, § 612.

See Words and Phrases, Permanent Edition, for all other definitions of "Property of a Decedent".

* Subsequent opinon 202 P.2d 824.

9. Statutes ⇨225

Court may properly examine other related statutes to determine sense in which Legislature intended to use a particular word in statute under consideration.

10. Executors and administrators ⇨86(2)

Showing that defendant attempted to conceal an indebtedness due decedent's estate failed to disclose that defendant had concealed any property of decedent, and hence did not give administrator a cause of action against defendant for a double recovery. Probate Code, § 612.

11. Judgment ⇨199(3)**Trial** ⇨178

Where, under pleadings and evidence, plaintiff is entitled to any recovery, giving the evidence the interpretation most favorable to him, defendant's motions for directed verdict and for judgment notwithstanding the verdict are properly denied.

12. Executors and administrators ⇨86(2)**Judgment** ⇨199(3)

Where complaint and evidence most favorable to administrator would support a recovery by administrator from defendant as a surviving partner on account of a partnership debt owing to decedent, defendant's motions for directed verdict and for judgment notwithstanding the verdict were properly denied, notwithstanding that evidence would not justify administrator's demand for double the amount of the indebtedness on the theory of embezzlement or concealment of property of decedent. Probate Code, § 612.

13. Partnership ⇨258(6)

A surviving partner may sue and be sued alone upon claims of or against the firm without joining the personal representatives of deceased members.

14. Action ⇨37

That plaintiff misconceived his remedy should not deprive him of right of recovery to which pleadings and proof entitle him.

15. Limitation of actions ⇨197(1)

Evidence which would authorize the finding that a confidential relationship existed between husband and mother-in-law, that mother-in-law had promised to leave

her share in partnership to husband and wife, and, after wife's death, that mother-in-law promised husband to take care of whatever wife had coming from partnership, was sufficient to support a finding that, up to time of mother-in-law's death, partnership was estopped to plead statute of limitations as a bar to an action by husband to recover sum wife had lent to partnership. Code Civ.Proc. § 339, subd. 1.

16. Limitation of actions ⇨13

An estoppel to plead bar of limitations may arise when a debtor induces a creditor not to sue by representations designed to lull creditor into a false sense of security.

17. Partnership ⇨156

Estoppel to plead bar of limitations is binding on a partnership where representations designed to lull partnership creditor into a sense of security are made by a general partner. Code Civ.Proc. § 339, subd. 1.

18. Pleading ⇨427

Variance between pleading and proof is cured where evidence concerning facts which were not pleaded goes in without objection.

19. Executors and administrators ⇨87

Where partnership was indebted to wife, the fact that, after wife's death, husband refrained from bringing action against partnership on representation of mother-in-law, a general partner, that she would "take care of husband," was not a waiver of the debt, and, upon discovery, after mother-in-law's death, that she had not done so, husband, as wife's administrator, was entitled to sue on obligation of partnership to his wife's estate.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by Lewis E. Bogan, as administrator of the estate of Zaida Bogan, deceased, against James Francis Wiley for double recovery for the alleged embezzlement or concealment of property of decedent. From an order granting a new trial after verdict for plaintiff, plaintiff appeals,

and, from such order and from orders denying defendant's motion for directed verdict and for judgment notwithstanding the verdict, defendant cross-appeals.

Orders affirmed.

Courtney L. Moore, and Marcel E. Cerf, Robinson & Leland, all of San Francisco, for appellant Bogan.

Sullivan, Roche, Johnson & Farraher and Frank M. Hultman, all of San Francisco, for appellant and respondent James Francis Wiley.

DOOLING, Justice.

Plaintiff, as administrator of the estate of Zaida Bogan, deceased, appeals from an order granting defendant a new trial following a jury's verdict awarding plaintiff judgment and assessing damages in the sum of \$24,000, and defendant Wiley cross-appeals (pursuant to rule 3(b), Rules on Appeal from the order granting a new trial and the orders denying defendant's motion for directed verdict and motion for judgment notwithstanding the verdict.

Plaintiff's action filed May 5, 1944, was based on an alleged loan of \$12,000 made by plaintiff's wife Zaida in 1932 to the firm of J. H. Wiley, The Furniture Man, a partnership then consisting of plaintiff's mother-in-law, Mrs. Martha Wiley, and her son James F. Wiley, defendant herein. Plaintiff alleged that at the time of his wife's death her estate exclusive of this loan was not of sufficient value to require probate, and that defendant concealed from plaintiff, the fact of the loan which was discovered by plaintiff's attorneys after October, 1942. On the trial however plaintiff admitted that he knew at the time of the interest payments to his wife and believed that she had loaned the partnership money but explained his delay in proceeding to collect it by his reliance upon the promises of Martha Wiley hereafter detailed. Plaintiff asked double recovery under section 612 of the Probate Code dealing with embezzlement or concealment of property of a decedent. Plaintiff had married Zaida Wiley in 1914 and from about two and one-half years after their marriage, plaintiff and wife worked together in the Wiley furniture store till Zaida's death in

1938. Zaida collected their salaries, and gave her husband whatever spending money he needed. She took care of all family financial matters.

On August 3, 1932, Zaida withdrew \$12,000 from a joint account of her mother and herself and deposited it in her individual account. On August 9, 1932, she withdrew \$12,000 and \$3,000 from her account and on the same day \$15,000 was deposited in the partnership account and used by the partnership to repay a loan to Bank of California. Defendant Wiley testified that he could not remember whether the money used to repay the aforesaid loan had come from Zaida. In 1932 the firm paid Zaida \$370.40 interest and thereafter 720 per year through 1937 (which plaintiff notes is 6% on \$12,000) and \$600 for 1938. She died in November of that year. The bookkeeper made the interest entries. Zaida's and plaintiff's joint returns and the partnership's income tax returns both showed the payment and receipt of interest as set forth above. Defendant testified that the interest was really bonuses paid his sister, and so disguised in order that other salesmen would not know, although he admitted the salesmen had no access to the books.

On November 23, 1938, the day of Zaida's death, defendant and his mother borrowed \$12,000 from the Bank of America, depositing it in the firm account. On the same day \$12,000 was also withdrawn from the firm account. Defendant testified that on the same day he had the bookkeeper draw a check to the order of his wife, Maud Wiley, for \$12,000 in payment of a \$12,000 loan made to the firm by her father Frank Johnson, in 1926. The check register showed that an erasure had been made at this entry and when restored the entry read "Zaida and Lewis E. Bogan" in the bookkeeper's handwriting. Defendant testified that although he did not customarily go over the check register, in checking through it he had noted the mistake made by the bookkeeper in entering this check and had corrected it himself. The reason he paid off the loan to his wife on the day of his sister's death was because he thought some questions might be raised in settling his sister's estate inasmuch as the books showed interest payments to his sister and

none to his wife, "and I thought if it was out of the book, it would be just as well."

Defendant points out that the "Notes Payable Others" ledger at page 201 (the posting reference in the check register at the erasure) contains the names of Frank Johnson and Maud Wiley, while the names of Zaida and Lewis Bogan do not appear thereon. The accountant's entry on November 23, 1938, shows the loan of \$12,000 repaid to Maud Wiley.

Plaintiff on February 3, 1943, had filed a complaint against Martha Wiley to enforce an alleged contract to make a will in his favor. In that case plaintiff testified that he did not probate Zaida's estate at the time of her death because he expected from his mother-in-law's assurances that he would receive a half interest in the firm's business when she died. This court held in *Bogan v. Wiley*, 72 Cal.App. 2d 533, 164 P.2d 912, that plaintiff had no enforceable contract against Martha Wiley's estate on this alleged contract to make a will.

The court gave the following instruction at the plaintiff's request:

"If you find that the defendant so used the right of the Estate of Zaida Bogan to collect the sum of \$12,000, referred to in the complaint, in such a manner as to prevent said estate from successfully asserting its right thereto, thereby depriving the said Estate of said property, and that by so doing defendant fraudulently appropriated said property to his own use, without the assent of the said estate, and with the fraudulent intent to so appropriate it, then you may find that the defendant embezzled said property. If you do not find from the evidence then you may not find that the defendant was guilty of such embezzlement."

It was on the ground that the giving of this instruction was prejudicial error that the court granted defendant's motion for new trial. It is the plaintiff's theory that by the manipulations above recited defendant violated the provisions of Probate Code, section 612, reading as follows:

"If any person embezzles, conceals, smuggles or fraudulently disposes of any property of a decedent, he is chargeable

therewith, and liable to an action by the executor or administrator of the estate for double the value of the property, to be recovered for the benefit of the estate."

Even if the word "embezzles" as used in this section is not used in the technical sense of the criminal law, but means "to fraudulently appropriate to one's own use, or conceal the effects of the estate which such person has in his possession", as suggested in the early case of *Jahns v. Nolting*, 29 Cal. 507, 511, the question still presents itself: What property of the estate of Zaida Bogan which defendant had in his possession did he "fraudulently appropriate to his own use or conceal"?

Plaintiff suggests that it may have been either the check drawn to Zaida and Lewis Bogan or the debt owed to Zaida Bogan by the partnership. We shall examine each of these suggestions in turn.

[1-3] The check never became the property of Zaida Bogan or of her estate. No rule is better settled than the one that the payee gets no property in a negotiable instrument until its delivery. Civ.Code sec. 3097; 19 Cal.Jur. 826. It is perfectly clear that there was never under plaintiff's own theory any intention to vest title to this check in Zaida Bogan or her estate. It is plaintiff's theory that defendant as managing partner caused the check to be drawn to Zaida and Lewis Bogan for his own purposes with intent to use it for his own ends. Even if the partnership be considered as a separate entity and may be conceived of as having delivered the check to defendant the intention with which it was delivered was the intention in defendant's mind for he was the one who caused it to be executed; and he had no intention (on plaintiff's own theory) of transferring or delivering the check to the payees or either of them. No theory of trust or analogy to the doctrine of executor de son tort can avail plaintiff under the circumstances. Since title to the check was neither vested in, nor held by defendant for, Zaida Bogan or her estate it never became her property or that of her estate. If it was not property of Zaida Bogan or her estate it could not be embezzled, concealed, smuggled or fraudulently disposed of within the meaning of

Probate Code sec. 612 since by its terms that section applies only to "any property of a decedent."

[4-5] Turning to the debt or chose in action, the manipulations of defendant did not affect the partnership's obligation to Zaida Bogan. If the partnership owed her or her estate \$12,000 before the check was drawn and its proceeds appropriated by defendant, it continued to owe her \$12,000 afterwards. The debt had not been paid and it could not be cancelled by any such *legerdmain*. Under no justifiable definition of the word can the defendant be said to have embezzled the debt or chose in action. We are satisfied that the instruction complained of was prejudicially erroneous when applied to the facts of this case and the motion for new trial was properly granted on that ground.

[6] Plaintiff argues that the instruction on embezzlement even though erroneous was not prejudicial on the theory that even if defendant did not embezzle property of the decedent he did fraudulently conceal it within the meaning of Probate Code sec. 612. This can only be true if any debtor of a decedent who attempts to conceal the fact of his owing the debt violates the provisions of Probate Code sec. 612 and thereby renders himself liable to the estate in double the amount of debt. Probate Code sec. 612 cannot reasonably bear this construction.

[7] The word "property" in its most general sense is broad enough to cover everything, tangible and intangible, which may be the subject of ownership (21 Cal. Jur. 639, 640) but "The meaning of the term may be restricted by the context of a particular statute or writing in which it is used" (21 Cal. Jur. 640) and it has been construed by our courts in certain contexts not to include choses in action. *People v. Hibernia Savings & Loan Soc.*, 51 Cal. 243, 21 Am. Rep. 704; *Franklin v. Franklin*, 67 Cal. App. 2d 717, 155 P. 2d 637. In the latter case the court says in 67 Cal. App. 2d at page 727, 155 P. 2d at page 641:

"But the meaning to be given to the word depends upon the sense in which it is used, as gathered from the context and the

nature of the things which it was intended to refer to and include."

[8-9] A consideration of the language of Probate Code sec. 612 indicates that the "property of a decedent" therein referred to does not include naked choses in action but is limited in its sense to tangible property. No person can embezzle, smuggle or fraudulently dispose of another's right of action to recover a debt, and yet all those verbs are used in section 612 with relation to the property there spoken of. Furthermore, we may properly examine other sections of the Probate Code to determine the sense in which the legislature intended to use "property" in section 612. *McPike v. Superior Court*, 220 Cal. 254, 258, 259, 30 P. 2d 17. The very next section makes a distinction between the word property and choses in action. In Probate Code sec. 613 it is provided:

"Upon complaint made under oath by an executor, administrator, or other person interested in the estate of a decedent, that any person is suspected of having embezzled, concealed, smuggled or fraudulently disposed of any property of the decedent, or has in his possession or has knowledge of any deed, conveyance, bond, contract or other writing, which contains evidence of or tends to disclose the right, title, interest or claim of the decedent to any real or personal property, or any *claim or demand*, or any lost will, the court or judge may cite the suspected person to appear before the court, and may examine him on oath upon the matter of such complaint."

We have italicized the words "claim or demand" which are there treated as distinct from and additional to the words "real or personal property," which they immediately follow.

See also Probate Code sec. 571, which authorizes the executor or administrator to "take into his possession all the estate of the decedent, real and personal, and collect all debts * * *"; Probate Code sec. 573, which authorizes executors and administrators to maintain "actions for the recovery of any property, real or personal * * * and all actions founded upon contracts * * *"; and Probate Code sec.

574, where the word "property" can only be used in the sense of tangible property capable of being "wasted, destroyed, taken, or carried away, or converted * * *"

[10] We conclude that a naked chose in action is not included within the meaning of "any property of a decedent" as those words are used in Probate Code sec. 612. This being so plaintiff did not make out a case falling under that section.

[11] It does not follow however that defendant's motion for a directed verdict or his motion for judgment notwithstanding the verdict should have been granted. If under the pleadings and evidence plaintiff was entitled to any recovery, giving the evidence the interpretation most favorable to him, those motions were properly denied. *Gish v. Los Angeles R. Corporation*, 13 Cal.2d 570, 572-573, 90 P.2d 792; *Card v. Boms*, 210 Cal. 200, 291 P. 190.

[12,13] The complaint and the evidence most favorable to plaintiff would support a recovery by plaintiff of \$12,000 from defendant as surviving partner on account of a partnership debt owing to Zaida Bogan for money lent by her to the partnership. The complaint alleged the fact of partnership, that the partnership was indebted to Zaida Bogan in the sum of \$12,000 for money loaned by her to the partnership, that said \$12,000 is unpaid, the death of Zaida Bogan, the death of her mother and defendant's sole partner, Martha Wiley, and the appointment of plaintiff as administrator of his wife's estate. "A surviving partner may sue and be sued alone, upon claims of or against the firm, without joining the personal representatives of the deceased members." 20 Cal.Jur. 766 and cases cited in note 11.

[14] The evidence, with the inferences reasonably to be drawn therefrom, was sufficient to support the finding that the partnership owed Zaida Bogan \$12,000 for money loaned to it by her and the jury in bringing in its verdict for double that amount impliedly so found. While the verdict of \$24,000 was not justified by the evidence a verdict of \$12,000 with accrued interest against defendant as surviving partner on the partnership obligation so found by the jury would have been sup-

ported. That plaintiff misconceived his remedy should not deprive him of the right to the recovery to which the pleadings and proof entitle him.

[15-17] The only remaining question is the statute of limitations. Martha Wiley died on September 9, 1942. This action was commenced on May 5, 1944, less than two years after Martha Wiley's death. The applicable statute to the cause of action on the loan (assuming that it was not evidenced by a writing) is Code Civ.Proc. sec. 339, subd. 1, under which the action must be brought within two years. Plaintiff testified that before his wife's death Martha Wiley had promised to leave to them her interest in the partnership upon her death, that after Zaida's death Martha Wiley said, "Well, you do not have to worry, Lewis, everything will be taken care of" and that "whatever Zaida had coming to her, she (Martha Wiley) would take care of"; that he understood from this that Martha Wiley would properly provide for him on her death and that relying on this assurance he did nothing about collecting the debt from the estate. The relations between plaintiff and Martha were extremely close, he continuing to live with her after his wife's death until shortly before his remarriage, and the jury could well find that a confidential relation existed between them. These facts would support a finding of estoppel to plead the statute of limitations up to the time of Martha's death if the jury chose to make such finding. Such estoppel may arise when a debtor induces a creditor not to sue by representations designed to lull him into a sense of security. *Benner v. Industrial Accident Commission*, 26 Cal.2d 346, 349, 350, 159 P.2d 24, and cases there cited. Since Martha Wiley was a general partner this estoppel would be binding on the partnership.

[18] It is true that these facts were not pleaded but the evidence went in without objection and any variance would thereby be cured. 2 Cal.Jur. 279. Prior to another trial the complaint may be amended to plead these facts by way of estoppel.

[19] Defendant suggests that plaintiff accepted this promise of Martha Wiley in exchange for the obligation of the partner-

ship to pay its debt to his wife's estate and thereby waived the debt. This does not follow. The case is not as strong as the acceptance of a new note for an antecedent debt which does not constitute payment unless the debtor expressly so agrees. 20 Cal.Jur. 920-925. Upon discovery after her death that Martha Wiley had not "taken care of him" plaintiff would be entitled to sue on the obligation of the partnership to his wife's estate.

The orders appealed from are, and each of them is, affirmed with directions to the trial court to permit such amendments to the pleadings consistent with this opinion as the parties may request, each party to bear his own costs on appeal.

NOURSE, P. J., and GOODELL, J.,
concur.



87 Cal.App.2d 115

In re EMDEN'S ESTATE.

BAECKER v. EMDEN et al.

Civ. 16277.

District Court of Appeal, Second District,
Division 2, California.

Aug. 4, 1948.

Rehearing Denied Aug. 19, 1948.

Hearing Denied Sept. 30, 1948.

1. Appeal and error ⇨110, 782

Order denying motion for new trial was nonappealable and purported appeal therefrom would be dismissed.

2. Wills ⇨386

Whether will has been executed in accordance with statutory requirements is fact question, and trial court's determination cannot be overturned unless without support in the evidence. Probate Code, § 50(3).

3. Wills ⇨119, 120

Testator need not state orally that document is his will or expressly request witnesses to sign it as such, but the requirements are met if, by testator's con-

duct and actions, the declaration and request are unmistakably indicated to the persons signing as witnesses. Probate Code, § 50(3).

4. Wills ⇨302(1)

Evidence supported trial court's finding that will was not executed in manner prescribed by law in that it was not subscribed by testator in presence of two witnesses, that the testator did not declare the instrument to be his will in the presence of two witnesses, and that both witnesses did not sign the instrument as witnesses at testator's request. Probate Code, § 50(3).

5. Wills ⇨289

There is a presumption that a will has been duly executed upon proof of the signature of the testator and the witnesses. Probate Code, § 50(3).

6. Evidence ⇨317(18)

Any statements made outside testator's hearing by witness to will as to what testator had said would be hearsay and inadmissible.

7. Witnesses ⇨388(2)

Testimony as to what was said by one witness to will to the other witness to will in conversations which took place outside hearing of testator could not be used for purpose of impeachment without laying foundation therefor. Code Civ.Proc. § 2052.

8. Wills ⇨302(1)

Evidence establishing that both witnesses to will knew it was a will would be immaterial if there was no declaration on part of testator either by words or conduct at time of execution that it was his will, and such evidence was properly excluded. Probate Code, § 50(3).

9. Wills ⇨119

That witness knows in his own mind that a document is a will does not satisfy statute requiring a declaration on the part of testator that it is his will. Probate Code, § 50(3).

10. Wills ⇨384

In will contest, admission of written statements of witnesses to will was not reversible error even if the statements were inadmissible where there was no material

variation between the statements and the testimony of the witnesses. Probate Code, § 50(3).

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

In the matter of the estate of Victor C. Emden, deceased. Petitions were filed for the probate of two wills of Victor C. Emden, deceased, and the probate of both wills was contested, the contestants being Sally Emden Baecker and Courtland V. Emden. From the entire judgment, including the admission to probate of a certain will and codicil, Sally Emden Baecker appeals. She also appeals from an order denying a motion for a new trial.

Attempted appeal from order denying motion for new trial dismissed and judgment affirmed.

Aaron Levinson and Albert E. Marks, both of Los Angeles, for appellant.

Jones & Hoyt and George A. Elstein, all of Los Angeles, for respondent.

WILSON, Justice.

Victor C. Emden died on August 31, 1945. Shortly before his death he executed two wills, both of which were offered for probate. The first of these was dated June 30, 1945, and by its provisions the bulk of his estate was left to his only son, Courtland, the issue of his first marriage, with certain bequests to his nurse, Nita Dubail, and a small bequest to his second wife, Sally Baecker, from whom he was divorced. A codicil to this instrument, dated August 7, 1945, eliminated the nurse as a beneficiary. The second will was executed August 11, 1945, and by its terms the entire estate was left to Sally Emden Baecker with the exception of \$1.00 each to testator's son and daughter-in-law.

The probate of both wills was contested and the petitions for probate and contests were tried together. Contestant Sally Baecker alleged undue influence on the part of the nurse, Nita Dubail, in connection with the execution of the will of June 30th, and contestant Courtland Emden alleged undue influence upon the part of Sally Baecker, her sister, Edith Verdi, and her

mother, Ray Lapidus, in connection with the execution of the will of August 11th. Each contestant alleged unsoundness of mind on the part of the testator and that the will presented by the other party was not executed in the manner and form required by law.

[1] This appeal is from the entire judgment, including the admission to probate of the will of June 30, 1945, and the codicil dated August 7, 1945. However, the issues raised by appellant as grounds for reversal relate solely to that part of the judgment denying the admission to probate of the will of August 11, 1945. The order denying the motion for a new trial is nonappealable and the purported appeal therefrom will be dismissed.

Victor C. Emden's first wife died in 1933 and in the following year he married Sally Emden. About 1934 or 1935 he became estranged from his only son, Courtland. He executed a will on September 15, 1939, in which he bequeathed to his son and daughter-in-law \$1.00 each and stated he intentionally made no other provision for his son and that he had advanced various sums of money to him from time to time. The balance of the estate was left to Sally Emden. In January, 1941, Emden obtained a default decree of divorce from Sally in Las Vegas and she subsequently married Mr. Baecker and resided in Honolulu from the time of her marriage until June, 1945. Emden remained on friendly terms with her and they corresponded. In April, 1944, he wrote Sally and enclosed a codicil to his 1939 will, the codicil being dated April 7, 1941, the sole purpose of which was to change the name of Sally Emden as shown in the 1939 will to Sally Baecker.

In May, 1945, Emden suffered a heart attack while dining at the home of Sally's mother, Ray Lapidus. He was taken to a hospital in Santa Monica and when he left there he returned to the home of Sally's mother where he stayed for two or three weeks and then went to the Hermoyne Apartments. Nita Dubail was his nurse in the hospital and she continued to be his nurse until about August 1st, when he moved to the Glendale Sanitarium. On June 22, 1945, Emden executed a holo-

graphic will in which he gave \$5,000 to Nita Dubail and the residue of his estate to his son.

L. J. Jones, who had been Emden's attorney for about 15 years, testified that on June 25, 1945, Emden gave him the holographic will and asked him to make a new will cutting down the bequest to Nita Dubail to \$2,000, adding one or two other bequests and giving the balance of his estate to his son. In accordance with these instructions Jones prepared the will which was executed by the testator on June 30, 1945, and which is the will admitted to probate together with the holographic codicil of August 7th, which eliminated the bequest to nurse Nita Dubail. Jones further testified that pursuant to Emden's instructions about August 7th, he prepared a new will which he sent to Emden and which was the same as the will of June 30th, with the change effected by the codicil. That will was never executed. Jones testified also that during this period Emden informed him that Sally Baecker's sister, Edith Verdi, had \$50,000 in cashier's checks possession of which he desired to recover; that following Emden's instructions he and Edith Verdi opened a joint account with Emden by depositing the cashier's checks and then obtained a cashier's check for the entire amount payable to Victor C. Emden, which Emden turned over to him for safe-keeping. The witness also related that Emden told him that when he, Emden, should have regained his health, he wished to see his son; that he didn't want Mrs. Verdi or any of the family including his ex-wife to have any part of his property; that he had provided for his former wife very handsomely and had taken care of her family over a period of years and he did not feel they were entitled to any more of his estate; that he had done enough for them; that he was afraid of them; that blood was thicker than water. Jones further testified that Mr. Emden wanted to execute the will of June 30, 1945, at a time when Mrs. Verdi would not be present and therefore arranged for its execution on the day her son was being operated upon; that commencing in June, 1945, Mr. Emden never expressed the desire to disinherit his

son but on the contrary stated he wanted to leave his estate to his son.

Nita Dubail testified that Mr. Emden told her he had a son with whom he had a disagreement when he married Sally Baecker and that they had not been on friendly terms since; that his son was successful and had a fine wife and at some future date he wanted her to meet them and take a message to them; that Emden instructed her to telephone Courtland and make an appointment to see him on the fourth of July; that Emden told her he wanted her to meet his son and tell him about his condition and who his doctor was; that they were going to be father and son when he was well but he did not wish to see him until he was well; that after she saw Courtland on July 4th Emden was interested in knowing how his son looked and what he was doing and wanted her to see him again and go to their home and meet his son's wife; that she reported to Mr. Emden that his son and the latter's wife wanted him to come and live with them and be taken care of but that he said he would never go home like a prodigal son, that he desired to be well on his feet before he would go into their home. She further testified that after the will of June 30th was signed Emden said: "We will conceal it so Edith won't be suspicious and won't ask what it is and when Mr. Jones comes out to visit me again, I will let him take it."

On July 25, 1945, Emden wrote a letter to Jones in which he stated: "Should you receive an emergency call, please notify Courtland as soon as same reaches you."

About August 8, 1945, Emden requested Sally Baecker to bring him the will she had which was dated September 15, 1939. He went over this will and made minor changes in his own handwriting and asked Mrs. Verdi to have a copy made with the changes. Both Sally Baecker and Edith Verdi were standing beside Emden as he made these changes. Mrs. Verdi had the will copied by a notary and this was the instrument which was executed on August 11, 1945, and which appellant offered for probate.

Also on August 8th Emden wrote Jones as follows: "Just a line to remind you not to forget to telephone C and tell him I received his letter and that I have an apartment. Will see how my condition progresses—the idea being, Jones that I do not want him to call on me until such time as thru you I'll notify him to do so. * * *"

On August 10th Emden wrote Jones: "Letter with will received. I found out my nurse is 64 (don't look it) so won't use her to sign so the return of the will may be delayed a few days."

The trial court found that the will of August 11, 1945, was not executed in the manner prescribed by law in that it was not subscribed by the testator in the presence of two witnesses, that the testator did not declare the instrument to be his will in the presence of two witnesses, and both witnesses did not sign the instrument as witnesses at the request of the testator; that Sally Baecker and Edith Verdi did exert undue influence over the testator and but for their influence the will of August 11, 1945, would not be in existence.

Appellant asserts as grounds for reversal (1) that the trial court erred in rejecting offers of proof made in connection with the testimony of the witnesses to the will; (2) that there was error in permitting respondent to use and have received in evidence written statements obtained by him from those witnesses without laying the proper foundation; (3) that there was no evidence to support the trial court's finding that the will of August 11th was not duly executed and (4) that there was no evidence upon which the court could base a finding of undue influence.

[2] Whether or not a will has been executed in accordance with the statutory requirements is a question of fact and the trial court's determination on that issue cannot be overturned unless it is without support in the evidence. In *re Estate of Cullberg*, 169 Cal. 365, 370, 146 P. 888; In *re Estate of Goldsworthy*, 54 Cal.App.2d 666, 670, 129 P.2d 949.

The formalities required in the execution of a will are found in section 50 of the Probate Code, subdivision 3 of which provides: "The testator, at the time of

subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will."

[3] It is not necessary for the testator to state orally that the document is his will or to expressly request the witnesses to sign it as such. The requirements of the statute are met if by the testator's conduct and actions the declaration and request are unmistakably indicated to the persons signing as witnesses. In *re Estate of Cullberg*, supra; In *re Estate of Silva*, 169 Cal. 116, 120, 145 P. 1015; In *re Estate of Gray*, 75 Cal.App.2d 386, 390, 171 P.2d 113.

In the instant case both witnesses testified that Emden did not in so many words ask them to act as witnesses to his will, nor did he at any time during the execution of the document state that it was his will. If there were any such request and declaration it will, therefore, have to be implied from the testator's conduct and actions.

Witness Foster testified that Mrs. MacLeod called her into the testator's room and said that Mr. Emden wanted her to sign a document; that when she entered the room Mr. Emden was sitting on the edge of the bed and he handed her the pen and indicated the place where she was to sign; that she saw him use a pen; that he signed something but she did not see his signature; that she did not recall whether this was before or after she signed; that the document was partly folded, she did not remember how much; that she did not see Mr. Emden's signature on the document; that in her own mind she knew it was a will. Witness MacLeod testified that on the preceding day Mr. Emden stated he had a paper he would like to have someone sign, and on the day the document was executed he asked her whether she would sign a paper and have someone with her sign; that she went out and met Mrs. Foster and told her Mr. Emden wanted her to sign a paper; that she did not see Mr. Emden using a pen; that she did not know the document was a will and nothing was said to indicate it was a will; that she did not see Emden's signature on the document and that she signed where he indicated

and walked away; that the document was "folded, just folded where I would just see the line I was to sign on."

The witnesses to the will executed on June 30, 1945, testified that Mr. Emden requested them to witness his signature to his will; that he signed the document and gave the pen to the first witness; that after she signed he handed the pen to the other witness, who signed; that the document was laid out and the whole lower page was exposed.

[4] From the foregoing it is apparent that there is substantial evidence to support the finding of the trial court. There was nothing said or done by Emden at the time of the execution of the document of August 11, 1945, from which it could be implied that Emden signed the document as his will or that he gave the witnesses to understand it was his will or that he desired them to attest it for the purpose of constituting it a will. Indeed, a consideration of the background and all the surrounding circumstances and a comparison of the manner in which the document of August 11th was executed with the manner in which the will of June 30th was executed justifies the conclusion reached by the trial court that the testator deliberately concealed from the witnesses the fact that he had not signed the alleged will but folded the document so they could not see the line where he should have signed; that his acting as though he was in fact signing his name when he was not, was deliberately done to conceal from the witnesses the fact that the document was incomplete, with the intent on his part to give it the appearance of a complete will at the time it was delivered to Sally Emden Baecker and her sister, Edith, and that he well knew himself the effect such concealment and the failure to declare the document to be his last will would have as a matter of law.

The evidence shows and the court found that the will of June 30th was executed in all respects as required by the provisions of section 50 of the Probate Code and this fact, coupled with the care exercised by Emden in not executing the will of August 11th as required by the statute, indicates a knowledge on his part of the

manner in which a will must be executed to be valid and a fixed intent and purpose that the will of June 30th should be his last will and testament and that the document of August 11th should be ineffective for any purpose.

[5] There is a presumption that a will has been duly executed upon proof of the signatures of the testator and the witnesses. In re Estate of Morey, 75 Cal.App.2d 628, 634, 171 P.2d 131; In re Estate of Pitcairn, 6 Cal.2d 730, 732, 59 P.2d 90; In re Estate of Braue, 45 Cal.App.2d 502, 505, 114 P.2d 386; In re Estate of Silva, 169 Cal. 116, 120, 145 P. 1015. As stated in Re Estate of Flentjen, 80 Cal.App.2d 731, 733, 182 P.2d 579, 581, "If the evidence shows that an instrument purporting to be a will bears the signature of the testator and *was declared by him to be his will* to two persons who signed at the end of the will as witnesses, in his presence and at his request, the instrument is duly proved as a will. A presumption of due execution arises under these circumstances and it supplies evidence that the signature of the testator had been affixed to the will before he made his declaration and before the signatures of the subscribing witnesses were affixed." (Emphasis added.) As hereinabove stated, there was no evidence that Emden either by words or actions *declared* the document of August 11th *to be his will*.

The cases cited by appellant in support of her contention that the will was duly executed may be distinguished on their facts. In re Estate of Pitcairn, *supra*, one of the witnesses testified that she was asked to sign a paper without being told it was a will. The court, after stating the general rule that a presumption is independent evidence which may be weighed against positive testimony, found that under the facts of that case the presumption, together with other circumstances such as the exposed mistaken testimony of the witness justified a finding that the will was properly executed. In re Estate of Abbey, 183 Cal. 524, 191 P. 893, testatrix signed with only her attorney present and when the witnesses came into the room acknowledged it was her will and

that she wanted them to sign as subscribing witnesses. In *re Estate of Cullberg*, 169 Cal. 365, 146 P. 888, the will, including the attestation clause, was read in the presence of the witnesses and the testatrix, who remained silent. Under such circumstances her silence was found to be a sufficient indication that the request was by her authority. In *re Estate of Gray*, 75 Cal.App.2d 386, 387, 171 P.2d 113, one witness testified the testatrix called her on the telephone and asked her if she would witness her will and the other witness testified she signed the will at the testatrix' request. The court held that this was a sufficient declaration and acknowledgment to meet the requirements of the statute.

There is a similarity between the facts in the instant case and those in *Re Estate of Krause*, 18 Cal.2d 623, 117 P.2d 1. In that case the testatrix telephoned next door to Mrs. Cullinan and asked her to come over with Mrs. Frizelle to witness a will. Mrs. Frizelle at the request of Mrs. Cullinan went over to the testatrix' home. The testatrix did not say anything about her will but said, "There is the pen and ink, sign it." The paper was folded so the signature, if any, could not be seen. Testatrix neither signed nor declared nor acknowledged to the witnesses that it was her will. The court held that the presumption of due execution did not apply where testimony of witnesses showed positively that the will was not executed in accordance with the requirements of the law.

Appellant maintains that the rule as stated in *Re Estate of Fusilier*, Myr.Prob. 40, that "in some way and at the time the witnesses must be informed from the testator that he wishes them to understand that the paper is executed as his will" is not the law today and cites *In re Estate of Abbey*, *supra*, and *In re Estate of Cullberg*, *supra*. Neither of these cases supports appellant's contention, since in each case the court held that there was a declaration and acknowledgment at the time of the execution of the will.

Appellant contends that contestant was required to offer proof which standing alone would have warranted a finding

that the will had not been duly executed and cites *In re Estate of Stone*, 59 Cal. App.2d 263, 138 P.2d 710. In that case there was no evidence adduced which would affirmatively support contestants' claim that the will had not been duly executed, and the presumption of due execution therefore applied. In the instant case the testimony of both witnesses gives affirmative support to respondent's allegation that the will was not duly executed.

[6-9] Appellant asserts that the trial court erred in rejecting the testimony included in the two offers of proof and that by this testimony she could have impeached respondent's witness MacLeod, who had previously testified she did not know the document she signed was a will, and could have established that both witnesses knew it was a will and that they were acting as witnesses to a will and that such knowledge would constitute part of the declaration of the testator. The first offer of proof was that the witness Foster would testify that before she affixed her signature to the will she was approached by Mrs. MacLeod who said to her that Mr. Emden wanted her to be one of two witnesses; that she stated she did not want to be a witness to a will and that Mrs. MacLeod said in effect: "Don't be an old fussbody, Mr. Emden wants to execute his will, just come in and be one of the two attesting witnesses with me." The second offer of proof was that witness Foster would testify that after they left the room Mrs. MacLeod said that they had just witnessed Mr. Emden's will. The proffered testimony related to conversations which took place outside the hearing of the testator and any statements made by witness MacLeod as to what the testator had said would be hearsay and therefore inadmissible. The testimony as to what was said by witness MacLeod to Mrs. Foster in those conversations could not be used for the purpose of impeachment without laying the foundation therefor. Code Civ.Proc., sec. 2052. Furthermore, to establish that both witnesses knew it was a will would be immaterial if there was no declaration on the part of the testator either by words or conduct at the time of the execution.

The testimony was properly excluded. It is also noted that witness Foster had already testified to the fact that Mrs. MacLeod asked her to sign a "document" and that "in her own mind she knew it was a will." The fact that a person knows in his own mind that a document is a will does not constitute a declaration on the part of the testator that it is his will.

[10] Appellant's contention that the use and admission of the written statements of the witnesses Foster and MacLeod constitute reversible error is without merit. Comparing the testimony of witness MacLeod with the statement admitted in evidence, there is little if any contradiction. In the statement signed by Mrs. MacLeod she declared: "Mr. Emden did not sign this document in our presence." She testified that she did not see the testator sign and did not see him use his pen and that she never saw his signature before it was shown to her in court. There is no conflict in these statements. To her knowledge the testator did not sign the document in her presence. Similarly, the statement signed by Mrs. Foster that "I did not see Mr. Emden's signature on the document as he took the pen & document after I signed, he wrote something but I didn't see what" is virtually the same as her testimony. Therefore conceding, without deciding, that the statements were not admissible the error was not prejudicial to appellant since there is no material variation between the statements and the testimony of the witnesses.

Having determined that the will of August 11, 1945, was not executed in the manner provided by law, it is not necessary to decide the question whether there was any substantial evidence to support the finding that Emden executed it by reason of the undue influence of Sally Emden Baecker and Edith Verdi.

Since appellant in her brief does not content that the evidence does not support the findings relative to the execution of the will of June 30, 1945, and the codicil of August 7, 1945, or that portion of the judgment admitting the will and codicil to probate, there is no reason for a discussion of the evidence relative thereto.

The judgment is affirmed and the attempted appeal from the order denying the motion for a new trial is dismissed.

MOORE, P. J., and McCOMB, J., concur.



87 Cal.App.2d 241

LA VELLE v. LA VELLE.

Civ. 16360.

District Court of Appeal, Second District,
Division 1, California.

Aug. 18, 1948.

Divorce 161

Setting aside default in divorce action on motion was not abuse of discretion, affidavit in support of motion being sufficient, and motion was not improper on ground that proper remedy was suit in equity.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Bessie La Velle against Claude E. La Velle for divorce. From an order granting defendant's motion to set aside default, the plaintiff appeals.

Affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

H. Leonard Richardson, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order granting defendant's motion to set aside a default.

Appellant filed an action for divorce on July 25, 1947; summons and complaint were served; default was entered August 21, 1947; the trial on the default was held September 15, 1947, and judgment entered September 18, 1947; on September 23, 1947, defendant served notice of intention of a motion to set aside the default entered on

August 21; following a hearing the motion was granted and plaintiff appeals.

It is contended that the court's action was an abuse of discretion.

Defendant's affidavit in support of the motion was sufficient, indeed there is no contention to the contrary. Appellant argues that the proper remedy was a suit in equity.

There is no merit to the argument nor to the appeal.

The order is affirmed.

YORK, P. J., and WHITE, J., concur.



87 Cal.App.2d 201

MCCUNE et al. v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 16365.

District Court of Appeal, Second District,
Division 1, California.

Aug. 10, 1948.

1. Railroads ⇨347(9)

Where plaintiff saw defendant's electric interurban train approaching crossing, exclusion, as immaterial, of evidence of train operator's sounding or failure to sound bell and whistle warnings was not error.

2. Appeal and error ⇨205

Complaint cannot properly be made on appeal of an exclusion of evidence in the absence of an offer of proof made in respect to excluded evidence to make the record show what the expected answer would have been.

3. Appeal and error ⇨1050(1)

Where plaintiffs had full cross examination of defendant as an adverse witness and various questions were propounded by jurors and plaintiffs had full use of defendant's deposition, assignment of error that trial judge refused to let

plaintiffs' counsel bring out admissions against interest by defendant under oath at coroner's inquest and in his deposition by cross-examination and that counsel for plaintiffs was compelled to take stand and read prior recorded admissions did not show prejudicial error.

4. Appeal and error ⇨1064(1)

Record in death and personal injury action did not disclose prejudicial confusion in instructions given.

5. Appeal and error ⇨1062(1)

In husband's action for his personal injuries and, joined with other heirs at law, for wrongful death of his wife, where verdict was for defendants, any error in presenting interrogatories to jury requiring an apportionment of any verdict rendered in the unlawful death case was immaterial.

Appeal from Superior Court, Los Angeles County; Paul Vallee, Judge.

Action by Orville H. McCune for personal injuries and property damages and action by Orville H. McCune and others, as heirs at law of Bernice McCune, for her wrongful death respectively against Pacific Electric Railway Co., and others. Judgment for defendants and plaintiffs appeal.

Affirmed.

William C. Rau, of Los Angeles, and George A. Pickering, of Beverly Hills, for appellants.

C. W. Cornell, O. O. Collins and Malcolm Archbald, all of Los Angeles, for respondents.

DORAN, Justice.

On February 25, 1945, about 8:30 p. m., Orville H. McCune, accompanied by Mrs. Bernice McCune as the only passenger, attempted to drive a 1940 Chevrolet coupe north across the tracks of the defendant railway company at the intersection of Huntington Drive and Van Horne Avenue, a railroad grade crossing on the outskirts of the City of Los Angeles. The Chevrolet was struck by a two-car train pro-

ceeding easterly on Huntington Drive, operated by the defendant G. Reid for the railway company. The weather was clear and the roads were dry. The automobile was hit at its left door while on the first set of four railway tracks south of the center of the right of way; it was forced or carried some 75 feet and completely wrecked. Bernice McCune was instantly killed, and the driver, Mr. McCune, suffered serious injuries.

The present action involves two separate causes of action, namely, an action for personal damages and property damage, brought by Orville H. McCune alone; and an action for the wrongful death of Bernice McCune, brought by Orville H. McCune and three half brothers of the decedent as heirs at law. The cause was tried before a jury, resulting in a verdict and judgment for defendants in both causes of action, from which judgment plaintiffs now appeal.

There is evidence in the record to the effect that the train was traveling between 15 and 25 miles per hour; that the driver, Orville H. McCune, was familiar with the crossing; that before starting to make the lefthand turn across the tracks McCune stopped, looked west and saw the train approaching some 200 feet from the crossing, after which plaintiff attempted to cross the tracks and the collision occurred as aforesaid. The record also discloses that after seeing the train approaching, McCune "did not again look at the train", and did not again see it until it was about 10 feet away just before the collision. The train was about 50 feet from the crossing, according to the motorman's testimony, when plaintiff started to make the turn across the tracks; the motorman anticipated that plaintiff's automobile would stop until it started to cross the tracks, and then applied the emergency brakes, stopping the train some 78 feet beyond the point of collision. The motorman testified that at the speed the train was traveling it would take between 125 and 150 feet to stop with an emergency application of the brakes. It further appears that Orville H. McCune was 64 years of age and that Bernice McCune was 45 years old at the time of death. Mr.

and Mrs. McCune had been married in 1940; an interlocutory decree of divorce had been granted Mrs. McCune in 1944, but no final decree had ever been entered.

According to the appellants' brief and oral argument, this appeal "is not upon the ground of insufficiency of evidence", and "under the evidence received a verdict either way * * * would have ample support". Notwithstanding the sufficiency of evidence, however, it is appellants' contention that prejudicial errors in the exclusion of evidence, instructions to the jury, etc. require a reversal. The record does not support this contention.

Appellants' argument is predicated on the theory that, in the wrongful death action the defendant motorman Reid "was negligent because of failure to sound proper warning signals, speed, and failure to use the braking power at his command. Defendant company was negligent under the doctrine of respondeat superior, and also independently, because of failure to instruct its train operator in proper use of the braking equipment and warning devices, and as to speed." Likewise in the personal injury action it is contended that "The defendants were negligent as stated above. Plaintiff Orville H. McCune made a misjudgment, but he was not negligent."

[1,2] The first point presented is that "The trial judge erred in excluding evidence of the train operator's sounding, or failure to sound, bell and whistle warnings." Respondents' answer to this contention is the objection made at the trial, namely that such evidence was "wholly immaterial, for the reason that the witness (Orville H. McCune) saw the car approaching." McCune had testified to seeing the approaching train some 200 feet from the crossing. The following quotation from *Rather v. City & County of San Francisco*, 81 Cal. App.2d 625, 635, 184 P.2d 727, 733 is directly applicable: "Appellant points out that no bell was rung or other warning given. His admission that he had seen the on-coming car renders this failure immaterial. In *Starck v. Pacific Electric R. Co.*, 172 Cal. 277, 282, 156 P. 51, 53, L.R.A.1916E 58, it is said: 'Where a plaintiff by his own testimony admits that he knew of the approach

of the car, the failure of the defendant to sound an alarm has no causal connection with the accident". In this connection it may also be noted that no offer of proof was made in respect to the excluded evidence, and that the record is silent as to what the expected answer would have been. Moreover, as respondents' brief states, the motorman testified, upon plaintiffs' interrogation, that the use of the whistle at the crossing was restricted to emergency cases; that the gong was rung, and when the motorman saw the automobile start across the track the whistle was blown.

[3] Appellants further contend that "The trial judge's refusal to allow counsel for plaintiff to question defendant operator in a recognized and usual examination manner prejudiced all the plaintiffs in both actions". The complaint here is that the trial judge "refused to let plaintiffs' counsel bring out admissions against interest made by the defendant operator under oath at the Coroner's Inquest and in his deposition. * * * Counsel for plaintiffs was compelled to take the stand and read the prior recorded admissions". Appellants' brief is no more specific than the above in discussing the alleged error.

It appears that, by stipulation, appellants were accorded the right to read to the jury the motorman's deposition "or any part thereof", and that certain parts were read. There was also full cross-examination of the motorman by plaintiffs' attorney under Civil Code of Procedure, section 2055, and various questions were propounded by jurors. Plaintiffs' counsel stated to the court that "I had no intention of asking him for his present recollection, if he testified this way. I am going to ask him whether his recollection was as testified in the deposition", to which the trial court replied, "That is a highly improper question." In *White v. White*, 82 Cal. 427, 450, 23 P. 276, 283, 7 L.R.A. 799, it was held objectionable cross-examination to read parts of a deposition to a witness and to then inquire "if that was correct", or "Is that what you said then?" or "Is that true?", although any admissions appearing in the deposition might have been offered as such. In view of the state of the evidence, and since plain-

tiffs had full use of the deposition herein, the record presents no prejudicial error.

[4] It is argued that "The trial judge prejudiced plaintiffs in both actions by its general scheme of instructions", the gist of this complaint being that "the trial judge, after advising the jury to consider each cause separately, failed to follow his own advice, and proceeded to thoroughly mix and confuse the issues". Other than by general reference to the last clear chance doctrine, contributory negligence, and burden of proof, appellants' brief fails to precisely point out the alleged vice in the instructions. Nor does the record disclose any prejudicial confusion in the instructions given, when considered as an entirety.

As admitted in appellants' brief, the court had explained to the jury the difference between the two causes of action, the jury was also told that Mrs. McCune was not negligent; that negligence of Mr. McCune could not be imputed to the other plaintiffs in the death action, and that the latter could recover for Mrs. McCune's death notwithstanding negligence on the part of the driver, Mr. McCune. Burden of proof, degree of proof, and proximate cause, were likewise fully discussed, and correctly treated. In reference to the instructions given, it is interesting to note that many of those given by the court had been requested by the appellants, including instructions on last clear chance. In some cases the instructions given were more favorable than those requested.

[5] Appellants' final complaint is that "The trial court erred in presenting certain interrogatories to the jury", requiring an apportionment of any verdict rendered in the unlawful death case. However, as pointed out in respondents' brief, since the verdict was for the defendants, any error in this respect must be deemed immaterial, for the jury found that none of the plaintiffs were entitled to recover any amount. And as appellants' brief admits, there is substantial evidence in the record to support such verdict.

The judgment is affirmed.

YORK, P.J., and WHITE, J., concur.

**GEORGE et ux. v. BEKINS VAN &
STORAGE CO.**

Civ. 16182.

District Court of Appeal, Second District,
Division 3, California.

Aug. 9, 1948.

Rehearing Denied Sept. 1, 1948.

Hearing Granted Oct. 7, 1948.*

1. Warehousemen ⇨34(7, 10½)

Findings as to conversion by storage company of plaintiffs' household furnishings which were destroyed by fire while in possession of storage company were without support in the evidence and were inconsistent with other findings as to breach of storage agreement and destruction of property by fire due directly to negligence of storage company.

2. Trover and conversion ⇨4

"Conversion" consists of any act of dominion wrongfully exercised over personal property of another inconsistent with, or in denial of, his rights thereto.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

3. Trover and conversion ⇨12

Mere failure to exercise ordinary care does not of itself indicate any assumption of control or ownership over goods of another and is not an "act of dominion" over them sufficient to support a finding of "conversion".

See Words and Phrases, Permanent Edition, for all other definitions of "Act of Dominion" and "Conversion".

4. Bailment ⇨31(3)

Proof of bailment and subsequent refusal of bailee to make delivery on demand makes out a prima facie case of conversion against bailee and, unless bailee establishes that compliance with demand was impossible due to reasons other than intentional exercise of dominion over the goods, a judgment for conversion is proper.

5. Bailment ⇨16

Where bailee establishes inability to re-deliver goods to bailor on demand because of unintentional loss or destruction thereof, recovery cannot be had on strict conversion theory but must be predicated on proof of either negligence or breach of contract.

* Subsequent opinion 205 P.2d 1037.

6. Warehousemen ⇨34(7)

In action against storage company for value of household furnishings destroyed by fire while in defendant's possession, evidence sustained finding that defendant had breached its storage agreement by failing to exercise due care in management of its warehouse and safe-keeping of plaintiff's property as a result of which property was destroyed by fire.

7. Contracts ⇨114

Warehousemen ⇨24(7)

Provision in non-negotiable warehouse receipt that goods were accepted for storage at exclusive risk of depositor for damage thereto by fire was invalid as being against public policy in so far as it attempted to relieve warehouseman from exercise of ordinary care. Gen.Laws, Act 9059, § 3.

8. Warehousemen ⇨34(5)

In action against storage company for breach of contract to safely store and re-deliver household furnishings, defendant had the burden of proving defense that the goods were destroyed by fire and that such destruction was not due to any failure of defendant to exercise due care. Gen.Laws, Act 9059, § 8; Code Civ.Proc. §§ 1869, 1981.

9. Evidence ⇨90

The incidence of the burden of proof is generally a question of policy and fairness based on experience.

10. Appeal and error ⇨931(1), 1010(1)

Trial court's findings of fact are conclusive if the record contains any substantial evidence which, taken in its most favorable aspect, together with reasonable inferences therefrom, supports such findings.

11. Negligence ⇨4, 136(14)

Whether given conduct is reasonably careful or negligent depends upon the attendant facts and circumstances and is ordinarily a question for the trier of fact.

12. Warehousemen ⇨34(9)

In action against storage company for value of household furnishings destroyed by fire while in defendant's warehouse, whether, in view of crowded storage conditions with concentration of highly inflammable packing and wrapping materials, failure to

maintain a fire detection or sprinkler system was negligence, whether adequate equipment was readily accessible for effectively fighting a fire, whether reasonable efforts were made to use such equipment to prevent spread of fire when discovered and whether a deficiency in any of such respects was the proximate cause of destruction of plaintiffs' goods were questions of fact.

13. Evidence ⇨571(3)

Expert testimony that construction of building and methods of fire protection as employed by defendant in management of warehouse were in conformance with general custom of warehousemen in the area was not conclusive on the issue of whether defendant exercised ordinary care in storage of plaintiffs' goods so as not to be liable for destruction thereof by fire.

14. Warehousemen ⇨34(7)

In action against storage company for value of goods destroyed by fire while in defendant's warehouse, evidence sustained trial court's finding that defendant had breached storage agreement by failing to exercise due care in management of warehouse and safe-keeping of plaintiffs' property as a result of which such property was destroyed by fire.

15. Evidence ⇨555

Opinion evidence based on hearsay is generally inadmissible except in case of necessity in circumstances which clothe the hearsay basis of opinion with a substantial degree of trustworthiness.

16. Evidence ⇨553(1)

Expert opinion testimony as to cause of fire should be based upon a hypothesis founded in the evidence, including observations made by the witness.

17. Appeal and error ⇨1052(2)

Error in admitting opinion evidence based on hearsay may be cured by subsequent admission of proper evidence showing the facts relative to which the opinion was given.

18. Appeal and error ⇨1052(2)

Any error in admitting expert opinion evidence based in part on hearsay that

fire which started on second floor of defendant's warehouse was caused by careless smoking was substantially cured, at least to the extent of eliminating any possible prejudice to defendant, by subsequent admission of competent evidence of facts upon which such opinion was based, though hearsay denials by unidentified employees of defendant of any motive for arson on which opinion was in part based were not substantiated, particularly in view of statutory presumption of innocence and obedience of the law. Code Civ.Proc. § 1963, subs. 1, 33.

19. Bailment ⇨31(3)

In action against bailee for loss of subject of bailment, due to difference in incidence of burden of proof, on issue of ordinary care bailee may prevail on negligence cause of action, while under the same evidence, bailor prevails on cause of action for breach of contract, notwithstanding the fundamental doctrine of code procedure that there is but a single form of action. Code Civ.Proc. § 307.

20. Appeal and error ⇨1008(1), 1071(5)

Appellate court must give full effect to trial court's findings of negligence on cause of action for breach of storage contract while disregarding findings responsive to cause of action for negligence apparently based on *res ipsa loquitur* doctrine, since application of such doctrine in trial of breach of contract issue would serve no purpose, inasmuch as proof of negligence was not necessary to establish breach of contract and defendant's burden of proving due care was even greater than that imposed by *res ipsa loquitur* doctrine.

21. Warehousemen ⇨24(7)

Provisions in warehouse receipts limiting liability to declared or agreed value of the goods are generally valid. Civ.Code, § 1840.

22. Warehousemen ⇨24(7)

Provision in warehouse receipt limiting liability will be given effect only when agreement is reasonable and was fairly and freely entered into by the parties, since such provision is merely a privileged deviation from the rule of full accountability embodied in uniform warehouse receipts act. Gen.Laws, Act 9059, § 21.

23. Warehousemen ⇨10, 24(7)

Where warehouse receipt is not delivered at same time as delivery of goods to warehouse, a contract of storage arises by implication of law upon acceptance of goods by storage company and the efficacy of provisions permitted but not required by law, such as limitation upon liability for negligence, which are sought to be inserted in the contract by means of subsequently issued warehouse receipt depends upon knowledge and consent thereto by bailor and in absence of such knowledge and consent attempted modification of implied contract is ineffective. Gen.Laws, Act 9059, § 21; Civ.Code, §§ 1565, 1567.

24. Warehousemen ⇨24(7)

Where warehouse receipt is issued at time goods are received for storage, depositor is normally chargeable with knowledge of all the terms thereof which are clearly set forth in an intelligible manner, and provision therein limiting liability to stipulated value, if otherwise valid, may fairly be given its intended effect, provided warehouseman has no notice of true value. Gen.Laws, Act 9059, § 21; Civ.Code, §§ 1565, 1567.

25. Warehousemen ⇨24(7)

Where warehouseman has knowledge or notice of facts reasonably indicating that the true value of goods stored is substantially greater than that stipulated, provision limiting liability to stipulated value is ineffective unless it was brought to actual attention of bailor and assented to by him. Gen.Law, Act 9059, § 21; Civ.Code, §§ 1565, 1567.

26. Warehousemen ⇨34(7)

Evidence as to subsequently acknowledged telegram informing storage company that plaintiffs wished to store five rooms of valuable furniture and testimony as to company's business experience in buying and selling such property were sufficient to charge company with notice that actual value of goods stored substantially exceeded value of \$10.00 per hundred pounds per article stipulated in limitation of liability provision of subsequently issued warehouse receipts and sustained finding that plaintiffs did not agree to such a limitation of liability or store their property pursuant to terms

of receipt. Gen.Laws, Act 9059, § 21; Civ. Code, §§ 1565, 1567.

27. Evidence ⇨183(14)

Showing that copies of telegrams exchanged by parties were not available to plaintiff, having been destroyed by fire, and that defendant claimed it had no copies justified proof of contents of telegrams by secondary evidence by way of oral testimony.

28. Warehousemen ⇨34(6)

Evidence of contents of telegrams relating to storage of household furnishings was competent on issue of whether subsequently issued warehouse receipt was the only and the entire contract between the parties and as tending to show that storage company knew value of property to be stored with it.

29. Trial ⇨86

Evidence, admissible for any purpose, must be received even though it may be highly improper for another purpose.

30. Warehousemen ⇨24(7)

Warehouse receipt issued after household furnishings had been received for storage pursuant to telegram informing storage company that they were valuable and acknowledgment thereof and identification card merely referring to receipt in general terms were inadequate to bring to bailors' attention provisions incorporated for the most part in small print on reverse side of receipt purporting to limit storage company's liability on basis of weight and so phrased as to convey to ordinary inexperienced bailor no definite notion as to exact extent of storage company's liability. Gen.Laws, Act 9059, § 21; Civ.Code, §§ 1565, 1567.

31. Warehousemen ⇨24(7)

A conspicuous and unambiguous statement in warehouse receipt clearly disclosing upon inspection the amount of the limited liability is necessary to bring provision limiting warehouseman's liability to attention of bailor so as to make such limitation effective, where warehouse receipt is issued after acceptance of goods for storage. Gen.Laws, Act 9059, § 21; Civ.Code, §§ 1565, 1567.

32. Warehousemen ⇨34(7)

Evidence that storage company had notice that value of household furnishings accepted for storage substantially exceeded value stipulated in provision of subsequently issued warehouse receipt purporting to limit company's liability, that bailors did not have actual knowledge of limitation provision and would not have knowingly stored goods at less than full valuation, and that subsequently issued warehouse receipt and identification card merely referring to receipt in general terms were inadequate to bring limitation provision to attention of bailors justified conclusion that bailors were not shown to have fairly and freely assented to such limitation and hence were not bound thereby. Gen.Laws, Act 9059, § 21; Civ.Code, §§ 1565, 1567.

33. Warehousemen ⇨34(10½)

In action against storage company for value of household furnishings destroyed by fire while in defendant's warehouse, trial court's findings in respect to status of warehouse receipt as a contract between the parties were consistent with each other and with applicable legal principles.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Raymond George and wife against Bekins Van & Storage Company to recover value of household furnishings and effects of plaintiffs destroyed by fire while in defendant's possession. From a judgment in favor of plaintiffs and an order denying its motion for new trial, defendant appeals.

Appeal from order dismissed and judgment affirmed.

See also 189 P.2d 301.

Chase, Rotchford, Downen & Chase, of Los Angeles, for appellant.

C. Paul DuBois and Henry F. Walker, both of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

Plaintiffs' household furnishings and effects, valued at more than three thousand dollars, were destroyed by fire on May 16, 1945, while in the possession of defendant

storage company at its Grand Avenue warehouse in Los Angeles. Plaintiffs were promptly notified by defendant of the destruction of their goods. Thereafter, having paid all charges due, plaintiffs tendered to defendant the non-negotiable warehouse receipt for the goods, which had been previously issued to them, and demanded redelivery of their property. Defendant's failure to redeliver gave rise to the present action in which plaintiffs have recovered a judgment for the full value of the destroyed articles in an amount exceeding three thousand dollars.

The complaint stated six separate causes of action against defendant storage company, but since the findings and judgment were predicated on only three of these counts, the others may be disregarded. The first successful cause of action alleged a conversion of plaintiffs' personalty by defendant; the second set forth a breach of contract to safely keep, store, and redeliver said property; and the third was based on negligence. By its answer, defendant alleged that the plaintiffs' property had been destroyed by fire while in the warehouse, and set forth four affirmative defenses material here, of which two went to the issue of the existence of legal liability, and two others (as will be discussed more fully hereafter) to the issue of the extent of any liability which might exist. The former two defenses alleged that by the terms of the storage agreement, defendant was to be liable only for lack of ordinary care in the storage of plaintiffs' goods; and that the fire which destroyed plaintiffs' property was not caused by any act or omission to act on the part of said defendant.

The trial court made findings to the effect that defendant had failed to redeliver plaintiffs' goods on demand, and had wrongfully converted them to its own use; that defendant had breached its storage agreement by failing to exercise due care in the management of its warehouse and safekeeping of plaintiffs' property, as a result of which the said property was destroyed by fire; and that plaintiffs' property was destroyed by fire due directly to negligence on the part of defendant. The court also made a specific finding that at the time of the fire, the warehouse and its contents

were within the sole and exclusive control of defendant and that the fire was of such a nature that it would not ordinarily have occurred under such circumstances if ordinary care had been exercised.

[1-3] Defendant challenges the findings in respect to conversion as having no support in the evidence. We think this contention is well taken. The tort of conversion consists of any act of dominion wrongfully exerted over the personal property of another inconsistent with, or in denial of, his rights therein. *Zaslow v. Kroenert*, 29 Cal.2d 541, 549, 176 P.2d 1; *McCaffey, C. Co., Inc. v. Bank of America*, 109 Cal.App. 415, 424, 294 P. 45; 24 Cal.Jur. 1021. Mere failure to exercise ordinary care does not in itself indicate any assumption of control or ownership over the goods, and hence is not an "act of dominion" over them sufficient to support a finding of conversion. In *Emmert v. United Bank etc. Co.*, 14 Cal. App.2d 1, 4, 57 P.2d 963, 964, the court states that "The general rule is that neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion." To the same effect, see, 1 Rest., Torts, sec. 224 and comment b, sec. 237, comment d; *Poggi v. Scott*, 167 Cal. 372, 375, 139 P. 815, 51 L.R.A., N.S., 925; *Vagim v. Hazlett Warehouse Co.*, 131 Cal.App. 197, 201, 20 P.2d 992; *Cass v. Ocean Park Bath Co.*, 45 Cal.App. 656, 658, 188 P. 616.

We do not find any real conflict of authority on this point. Cases like *Atwood v. Southern California Ice Co.*, 63 Cal.App. 343, 218 283, and *Wolfe v. Willard H. George, Inc.*, 110 Cal.App. 532, 294 P. 436, in which some intimation may be found that conversion may be based on negligence, were true conversion cases. While the complaints in *Dieterle v. Bekin*, 143 Cal. 683, 77 P. 664, and *Wilson v. Crown Transfer, etc. Co.*, 201 Cal. 701, 258 P. 596, alleged conversion, the evidence of negligence would have warranted a recovery on the theory of breach of contract and no question was raised as to the sufficiency of the complaints to support the judgment. And in *Scotts V. F. Exch. v. Growers Refrig. Co.*, 81 Cal.App.2d 437, 184 P.2d

183, an action in conversion, which had been tried on the theory that defendant was liable if it had been negligent, it was pointed out, in affirming a judgment for the plaintiff, that the question whether negligence alone will support an action in conversion was not presented for decision. Since the loss of plaintiffs' property in the present case was found to be due solely to negligence on the part of defendant, there was clearly no basis for recovery on the theory of conversion.

[4,5] In reaching this conclusion, we are not unmindful of the well established rule that in an action for conversion against a bailee, a prima facie case is made out by the plaintiff by proof of the bailment and subsequent refusal of the bailee to make delivery on demand. *Chatterton v. Boone*, 81 Cal.App.2d 943, 945, 185 P.2d 610; *Vagim v. Hazlett Warehouse Co.*, 131 Cal.App. 197, 201, 20 P.2d 992; *Wolfe v. Willard H. George, Inc.*, 110 Cal.App. 532, 535, 294 P. 436; *U. Drive & Tour v. System Auto Parks*, 28 Cal.App.2d, Supp., 782, 784, 71 P.2d 354, and cases cited. Where the bailor makes such proof and the bailee fails to establish that compliance with the demand was impossible due to reasons other than intentional exercise of dominion over the goods, a judgment for conversion is proper. See *Atwood v. Southern Cal. Ice Co.*, 63 Cal.App. 343, 347, 218 P. 283. But where the bailee's evidence establishes his inability to deliver because of unintentional loss or destruction of the goods (as, for example, by fire or theft) the basis for a recovery on the strict conversion theory vanishes, and plaintiff's right to recover must be predicated upon proof of either negligence or breach of contract, although, as already noted, recovery has been sustained occasionally on the conversion theory where that theory of recovery has not been brought in question. The findings of conversion are without support in the evidence, and are inconsistent with other findings which have evidentiary support.

[6,7] Defendant's next contention, that the findings on the issue of breach of contract are not supported by the evidence, is, we think, without merit. Preliminarily, it

may be noted that a clause appearing in the warehouse receipt stating that the goods were accepted for storage "at the exclusive risk of the Depositor for damage thereto from * * * fire," is clearly invalid as being against public policy insofar as it attempts to relieve the warehouseman from the exercise of ordinary care. *England v. Lyon Fireproof Storage Co.*, 94 Cal.App. 562, 571, 271 P. 532; *Dieterle v. Bekin*, 143 Cal. 683, 688, 77 P. 664; Uniform Warehouse Receipts Act, Deering's Gen. Laws, Act 9059, sec. 3; Rest., Contracts, sec. 575, subd. 1(b). We do not understand defendant to contend to the contrary.

The tenor of defendant's argument is that plaintiffs had the burden of proving that defendant did not exercise due care in carrying out the storage agreement, and failed to satisfy that burden. The issue of due care, of course, also arose in respect to plaintiff's cause of action for negligence, but the incidence of the burden of proof is not necessarily the same in both instances. See 6 Am.Jur., Bailments, secs. 368, 369, pp. 446-448. In the carefully considered case of *Wilson v. California C.R.R. Co.*, 94 Cal. 166, 29 P. 861, 17 L.R.A. 685, which was a contract action brought against a bailee for failure to redeliver on demand, the bailee, as in the present case, pleaded as an affirmative defense that the goods were destroyed by fire without fault on its part. The Supreme Court there held that the burden of proving this defense, including a lack of negligence, was on the defendant. The basis for the decision was succinctly stated in the following words, 94 Cal. page 172, 29 P. page 863: "All the facts pleaded by defendant in avoidance of its confessed contractual obligation were material and necessary to constitute a defense to the action, and of course the burden of proving all such facts was upon the defendant. It will hardly be contended that the new matter pleaded would have constituted a defense without the allegation that the destruction of the goods by fire was 'without the carelessness or negligence of this defendant.' Had the defendant been sued as a tortfeasor, and charged in the complaint with negligence whereby plaintiff's goods were destroyed by fire, the burden of proving the alleged neg-

ligence would have been upon the plaintiff. *Wilson v. Southern Pac. R. R. Co.*, 62 Cal. [164], 171."

[8] This decision was expressly approved and followed in *Dieterle v. Bekin*, 143 Cal. 683, 687, 688, 77 P. 664; *Wilson v. Crown Transfer Co.*, 201 Cal. 701, 706, 258 P. 596, and *U. Drive & Tour v. System Auto Parks*, 28 Cal.App.2d, Supp., 782, 785, 71 P.2d 354. See also, *Dodwell & Co. v. Los Angeles W. Co.*, 119 Cal.App. 457, 460, 6 P.2d 990; *Wolfe v. Willard H. George, Inc.*, 110 Cal.App. 532, 535, 294 P. 436. We think it is necessarily determinative of the issue in the case at bar.

In respect to contract actions against warehousemen, the principles stated in the foregoing cases received legislative sanction more than forty years ago in the provisions of section 8 of the Uniform Warehouse Receipts Act. Deering's Gen. Laws, Act 9059, Stats.1909, p. 437, as amended. That section reads as follows:

"A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—(a) An offer to satisfy the warehouseman's lien, (b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt, and (c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

"In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, *the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.*" (Italics added.)

Conceding that the demand made by plaintiffs met the requirements of this section, defendant maintains that the italicized words do not purport to shift the burden of proof, but merely affect the burden of proceeding or going forward with the evidence, leaving the ultimate burden upon the plaintiff to establish by the preponder-

ance of the evidence that the bailee was negligent. There is an apparent conflict of opinion in cases from the various states dealing with this problem, due largely perhaps to the failure of some courts to accord to the expression "burden of proof" its full significance. See cases cited in 3 U.L.A. 37-43. The Supreme Court of California, however, in *Wilson v. Crown Transfer etc. Co.*, supra, 201 Cal. 701, 705, 707, 238 P. 596, after full consideration of the prior California cases on the point, decided this precise question adversely to defendant's contention. The court there expressly approved an instruction that the burden was upon the defendant to establish by a preponderance of the evidence in its affirmative defense that plaintiffs' goods were destroyed by fire without negligence on its part.

[9] Generally speaking, the incidence of the burden of proof is "a question of policy and fairness based on experience in the different situations." 9 Wigmore on Evidence, sec. 2486, p. 275. On this basis, the rule placing the full burden of proof of due care upon the warehouseman finds ample justification. As said in *Leckie v. Clemens*, 135 Md. 264, 108 A. 684, 686, "The goods are in the possession of the defendant or bailee, and usually upon his premises at the time the injury or loss occurs, and he knows, or is presumed to know, not only the condition of the premises, but also what is going on there in respect to such goods, and thus he is in a far better position to explain or account for their injury or loss than the bailor, who, generally speaking, has no such information, and at times cannot acquire it. In many cases the bailee might be guilty of the grossest negligence, and yet, because of the character of his exclusive possession and custody of the goods, it would be almost impossible for the bailor to show such negligence; while, on the other hand, the bailee, with the information ordinarily possessed by him, could show without difficulty in most cases that he had exercised proper care in respect to such goods, if such was the fact, and he relieved of all liability." A similar rationale has been approved in *Alabama's Freight Co. v. Jiminez*, 40 Ariz. 18, 9 P.2d 194, 195; *Trader's Compress*

Co. v. Precure, 140 Okl. 40, 282 P. 165, 167, 168, 71 A.2d 759, and *Rustad v. Great Northern Ry. Co.*, 122 Minn. 453, 142 N. W. 727, 728. Furthermore, the correctness of the rule is forcefully indicated by our code provisions as to the burden of proof. Under sections 1869 and 1981, Code of Civil Procedure, discussed in *Wilson v. California C. R. R. Co.*, supra, 94 Cal. 166, 174, 175, 29 P. 861, 17 L.R.A. 685, plaintiff would necessarily have prevailed on the contract theory if no evidence had been produced by either party on the issue of negligence.

[10] Defendant further maintains that in any event it has more than sustained the burden of proving that it did exercise due care in carrying out the storage agreement. In considering this contention, our duty, of course, is limited to a determination of whether the record contains any substantial evidence, which, taken in its most favorable aspect, together with reasonable inferences therefrom, supports the findings.

It was shown that defendant's Grand Avenue Warehouse was of reinforced concrete construction with steel framed windows, and was an unheated building. All electrical wiring was placed in metal conduit, and electric lights were located over aisles at least two feet from any stored goods. The elevator shaft, and the stairway adjacent to it, were in the northwest corner of the building, and each was equipped with a fire door. For fire fighting purposes, there was on each floor, located opposite the elevator door, a chemical fire extinguisher of two and one-half gallons capacity and a wet standpipe under city water pressure with two hundred feet of hose attached. A dry standpipe was located in the southeast corner. The extinguisher and hose were periodically inspected. Defendant obtained annual physical inspections of the warehouse by the Fire Prevention Bureau of the Los Angeles Fire Department, and received safety recommendations of the bureau in writing as well as a follow-up inspection by the bureau to see that these suggestions were complied with. On pain of dismissal, defendant forbade smoking in the warehouse at any time except in the lavatory on the first floor. "No

Smoking" signs were posted on the ground floor, but not on the second floor. The storage of gasoline, oil, kerosene, ammunition, explosives, or motion picture film was prohibited. Daily inspections of the warehouse were required to be made by the foreman of the building, and comprehensive monthly written reports of conditions in the warehouse were made by the warehouse superintendent.

On the other hand, the evidence revealed that the second floor was an open loft area of 100,000 square feet with no dividing walls, and that at the time of the fire it was very full of household furnishings, wrapped in paper and packed in excelsior, stacked from floor to ceiling. No fire detection device or fire sprinkler system was maintained by defendant, nor was any fire alarm system in use in the warehouse. No night watchman was employed. Some of the bailments were stacked against the windows, thereby hampering access to the fire by firemen.

On the morning of the fire, the warehouse foreman opened the building about 7:15. About 7:30 he took a crew of four employees to the seventh floor, stopping for a minute at the second floor to let one man obtain his apron which had been left there. At this time, the men observed nothing unusual on the second floor and smelled no smoke. A short time later, the foreman again went by elevator to the seventh floor, and upon arriving there, smelled smoke. He left the elevator and ran down the stairs to the second floor. On opening the door he saw thick black smoke but no flame; he went about 25 feet into the loft before retreating because of the smoke. He then ran downstairs to the manager and reported that the second floor was on fire. Another employee, then present, though not regularly employed at the warehouse, testified that he looked for a fire extinguisher on the second floor with which to fight the fire but did not find one. There was no evidence that defendant's employees made any effort to put out the fire before the firemen arrived. All the goods stored on the second floor were destroyed. Over defendant's objections two members of the Los Angeles Fire Department's Arson Bureau testified in plaintiffs'

behalf, as experts, that the fire could not have started by spontaneous combustion, and that, in their opinion it was caused by careless smoking.

[11,12] Whether given conduct is reasonably careful, or is negligent, depends upon the attendant facts and circumstances of the case, and is ordinarily a question for the trier of fact to determine. 19 Cal.Jur., Negligence, sec. 133, p. 719. In view of the crowded storage conditions on the second floor of defendant's warehouse, with its concentration of highly inflammable packing and wrapping materials, the trial court might reasonably have concluded that a relatively high degree of care was required of defendant. It was a question of fact, on which differing inferences could have been drawn, whether the failure to maintain a fire detection or sprinkler system under these circumstances was negligent (see *Cox v. Vermont Cent. R. Co.*, 170 Mass. 129, 49 N.E. 97, 100; *Tubbs v. American Transfer & Storage Co.*, Tex.Civ.App., 297 S.W. 670, 672); or whether there was adequate equipment readily accessible for effectively fighting a fire which might occur (see *Runkle v. Southern Pacific Milling Co.*, 184 Cal. 714, 717, 195 P. 398, 16 A.L.R. 275; *Exporters' & Traders' Compress & Warehouse Co. v. Shaw*, Tex.Civ.App., 20 S.W.2d 248, 251), and whether reasonable efforts were made to use such equipment to prevent the spread of the fire once it was discovered. cf. *Jordan v. Federal Compress, etc. Co.*, 156 Miss. 514, 126 So. 31, 33. Likewise, the issue of whether a deficiency in any of these respects was the proximate cause of the destruction of plaintiffs' goods was essentially one of fact. *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872; *Fennessey v. Pac. G. & E. Co.*, 20 Cal.2d 141, 124 P.2d 51.

[13] Although an expert witness testified on behalf of defendant that the construction of the building and methods of fire protection employed by defendant in the management of its warehouse were in conformance with the general custom of warehousemen in the Los Angeles area, it is clear that such evidence is not conclusive on the issue of ordinary care. *Polk v. City of Los Angeles*, 26 Cal.2d 519, 529, 159 P.2d 931; *Mehollin v. Ysuchiyaama*, 11 Cal.2d 53,

57, 77 P.2d 855. Conformity to the "general practice or custom would not exonerate defendant unless such practice or custom was consistent with due care." Neel v. Manning's, Inc., 19 Cal.2d 647, 655, 122 P.2d 576, 580.

[14] On the record as a whole, we cannot say that defendant has so conclusively sustained its burden of proving due care as to justify a reversal of the judgment, for there was evidence from which reasonable inferences of negligence could be drawn, and the trial court's findings on that issue may not be disturbed.

Defendant strenuously maintains that the trial court committed prejudicial error in admitting the opinion testimony of plaintiffs' experts as to the cause of the fire since it was to a large extent based upon hearsay. These witnesses, Bice and Halter, both were present while the fire was raging, and conducted their investigations both during and after the fire. Analysis of their testimony indicates that the opinion they expressed that the cause of the fire was careless smoking was reached in part by a process of elimination. The several elements upon which the ultimate opinion was based may be briefly summarized as follows: (1) the fire started near the men's lavatory in the southeast corner of the second floor; (2) cigarette butts were observed in the second floor lavatory after the fire; (3) Bekins had recently discharged an employee for smoking in unauthorized areas; (4) the fire could not have been caused by spontaneous combustion; (5) it was not caused by arson. Conclusion number (1) was based partly on personal observation and knowledge, and partly on hearsay; number (2) was a personal observation entirely; numbers (3), (4), and (5) were based largely on hearsay statements of defendant's employees.

[15-17] It is undoubtedly true, as a general rule, that opinion evidence based on hearsay is inadmissible. See *Nelson v. Painless Parker*, 104 Cal.App. 770, 778, 286 P. 1078; 32 C.J.S., Evidence, § 521, Page 219, note 81. Some well-defined exceptions, based chiefly upon necessity in circumstances which clothe the hearsay basis of the opinion with a substantial degree of

trustworthiness. See *United States v. Aluminum Company of America*, D.C., 35 F. Supp. 820, have been recognized. *McElligott v. Freeland*, 139 Cal.App. 143, 157, 158, 33 P.2d 430 (property value); *Fishel v. F. M. Ball & Co., Inc.*, 83 Cal.App. 128, 134, 256 P. 493 (market value); *Glantz v. Freedman*, 100 Cal.App. 611, 614, 280 P. 704 (market value); *Hammond Lumber Co. v. County of Los Angeles*, 104 Cal.App. 235, 247, 248, 285 P. 896 (land value); *Willoughby v. Zylstra*, 5 Cal.App.2d 297, 300, 42 P.2d 685 (medical diagnosis); *Tierney v. Charles Nelson Co.*, 19 Cal.App. 2d 34, 37, 38, 64 P.2d 1150 (medical diagnosis). Where expert opinion as to the cause of fire is concerned, it would seem that it should be based upon a hypothesis founded in the evidence, including observations made by the witness. See *Manney v. Housing Authority*, 79 Cal.App.2d 453, 461, 180 P.2d 69; *Gallichotte v. California etc. Ass'n.*, 23 Cal.App.2d 570, 581, 74 P.2d 73, 535. Cf. *Commercial Union Assur. Co. v. Pacific G. & E. Co.*, 220 Cal. 515, 524, 31 P.2d 793. The error in admitting such opinion may be cured by subsequent admission of proper evidence showing the facts relative to which the opinion was given. See cases cited, 5 C.J.S., Appeal and Error, § 1735, page 1016, note 90.

[18] A careful reading of the record in the present case discloses that, with one exception, the hearsay basis for the opinions of plaintiffs' experts was substantially cured, at least to the extent of eliminating any possible prejudice to defendant, by the subsequent admission of competent evidence of the same facts. The exception was the opinion excluding arson as a possibility. This opinion was based in part on hearsay statements of unidentified employees that no unauthorized persons could obtain access to the second floor, and in part upon unsworn statements of various employees interviewed that none held a grievance or grudge against defendant. The former basis was cured by direct testimony of defendant's foreman to the same effect; but while the latter basis was not so cured, we fail to discern how defendant was in any way prejudiced thereby. Such self-serving statements, which amounted to a denial of the existence of a

motive for a crime, would certainly have been given little if any weight by the experienced trial judge. It is indeed doubtful whether, in view of the statutory presumptions that a person is innocent of crime or wrong, and that the law has been obeyed (Code Civ.Proc., sec. 1963, subds. 1 and 33), the exclusion by evidence of the possibility of arson on the part of defendant's employees was even an important element in the ultimate opinion.

Because of the conclusion we have reached that the judgment should be affirmed on the cause of action for breach of contract, it is unnecessary to consider whether it might also be upheld on the theory of negligence. Counsel for defendant has earnestly attacked the rule, adhered to here, which, in respect to the same facts, places the burden of proof on the bailor where negligence is pleaded, and on the bailee where breach of contract is pleaded, as being inconsistent with the fundamental doctrine of code procedure that there is but a single form of action. Code Civ.Proc., sec. 307. The rule, it is said, may lead to conflicting judgments arising out of the same fire or other cause of the destruction of bailments, depending on the theory of the pleadings.

[19] It is possible, of course, that in a single action and upon the same evidence the bailee may prevail on a negligence cause of action and the bailor on a cause of action for breach of contract. The evidence may be so evenly balanced that as a result, the plaintiff fails to produce a preponderance on the negligence cause of action; and on the other hand, the defendant may likewise fail to prove want of negligence on his part by a preponderance of the evidence on the contract cause of action. We see nothing in this situation of which the bailee may justly complain. Whether the action be upon one theory of liability or the other, the bailee must be prepared to meet the issue of negligence and the same is true as to the bailor. If the latter, by suing in negligence, has unnecessarily assumed a burden that would have rested upon the bailee had the action been for breach of contract, he is the one who will suffer if the evidence is evenly

balanced or preponderates against him. Appellant's argument upon this phase of procedure is wistful and introspective, but is lacking in practicality. It points out only that the bailee may sometimes escape liability for negligence where he would be liable upon the same evidence for breach of contract.

[20] Defendant directs our attention to the finding which furnished a basis for the application of the doctrine of *res ipsa loquitur*, and contends that the findings responsive to plaintiff's cause of action for negligence were based upon this doctrine. Apparently this is true. However, it is unnecessary for us to decide whether the doctrine could properly be applied to the facts as established. There were other findings of negligence in respect to the cause of action for breach of contract which were not based upon the *res ipsa loquitur* doctrine. It is clear that ordinarily it would serve no purpose to apply that doctrine in the trial of the breach of contract issue, inasmuch as the bailor is not required to prove negligence in establishing breach of contract, and the burden of proof which rests upon the bailee is even greater than that imposed by the doctrine. We must therefore give full effect to the finding of negligence on the cause of action for breach of contract and may disregard the finding which appears to have been based upon the *res ipsa loquitur* doctrine.

On the issue of damages, defendant's answer, which incorporated the terms of the warehouse receipt issued to plaintiffs, pleaded as affirmative defenses, first that the receipt constituted the contract of bailment between the parties and in terms limited defendant's liability to the "depositor's declared value" of \$10.00 per 100 pounds per article; and, second, that defendant had no reason to suppose the plaintiffs' property to be worth more than the said "declared value." These defenses were evidently framed in cognizance of the provisions of section 1840 of the Civil Code, which states that "The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth."

Inspection of the warehouse receipt itself discloses the following statement which appears on its front, not as a separate statement, but as a part of a printed paragraph: "The Company's rates and its responsibility under this Contract are based on the Depositor's declared value of \$10.00 per 100 lbs. per article." In somewhat smaller print immediately below appears this legend: "See Provisions, Limitations, Terms and Conditions on the Reverse Side." The upper half of the reverse side is covered by more than a hundred lines of small print arranged in two columns. Among the provisions there stated may be found the following: "2. Storage Rates; It is agreed that the storage rate is based upon the space occupied by the goods and upon the declared valuation herein stated, and for the purpose of fixing such charges, the Depositor declares that the value of any article, box, package, or receptacle including the contents thereof, packed, transported, received, handled or stored hereunder or later received for the account of said depositor shall not exceed ten dollars per 100 pounds per article, unless the Depositor fixes a greater value in writing at the time of the delivery to this Company and the same is receipted hereon, in which event the Depositor agrees to pay an additional charge therefor. * * * 6. Liability of Company. * * * (c) The Company shall only be liable for failure to use ordinary care and then only upon the basis of the Depositor's declared valuation of said goods."

Plaintiffs introduced evidence tending to prove the following facts. In October, 1943, while residing in Oregon where her husband was preparing himself for foreign sea duty with the Navy, plaintiff's wife sent a telegram to defendant stating, "Wire immediately if you will store my five rooms of valuable furniture." A reply was received from defendant saying that it would store the furniture. The goods were shipped to Los Angeles by the Navy, and were received by defendant on or about January 22, 1944. No warehouse receipt was then issued, and no negotiations as to the terms of storage took place between the parties at any time. On February 24, 1944, a non-

negotiable warehouse receipt prepared by defendant alone, and dated February 4, 1944, was mailed to plaintiff wife, together with a salmon colored "identification card." The card, reciting that the warehouse receipt had been received and its terms accepted, was subsequently signed by plaintiffs and mailed back to defendant. Plaintiff wife did not read the warehouse receipt, but looked at it and noticed the number of articles acknowledged to have been received by defendant. She thought it was merely a receipt showing that Bekins had received the items. Plaintiff husband did not recall ever seeing the receipt, since it arrived while he was at sea, and his wife mailed it to her mother-in-law for safekeeping about three days after it was received. The salmon card was apparently signed by plaintiffs about March 13, 1944, although plaintiff wife did not recall signing it and did not read it. She testified that she would not have stored the property with defendant had she known of the claimed limitation on liability. It was stipulated that expert testimony would set the reasonable value of the property on the date of storage and on the date of the fire at \$3,126.15. The weight of the goods was stipulated to be 5,014 pounds. It was also shown that for at least fifteen years prior to the time of the fire, the defendant had been engaged in the business of buying and selling household furniture.

On the basis of the foregoing evidence, the trial court made findings on the issue of damages, which may be summarized as follows: Defendant received plaintiffs' goods for storage on or about January 22, 1944, but did not enter into the written agreement for storage, designated "Warehouse Receipt and Contract," until on or about February 4, 1944. Defendant did not agree to and did not receive plaintiffs' goods for storage pursuant to the terms of this warehouse receipt, nor was its agreement to return the goods based exclusively thereon. Prior to February 4, 1944, plaintiffs made no declaration of value of their property to defendant in any amount less than the fair and reasonable value thereof. The receipt was not mailed to plaintiffs until February 24, 1944, and prior thereto plaintiffs were not notified or informed of any

provisions or terms thereof. Plaintiffs did not agree to a declared value of \$10.00 per hundred pounds per article by virtue of the warehouse receipt, would not have entered into a storage contract with defendant on a basis of less than fair and reasonable value, and in fact did not store their property under and pursuant to the terms and provisions of the warehouse receipt. The storage charges, which were based on the "declared value" stated in the receipt, were fixed by defendant alone and were not negotiated for, and defendant did not believe, rely, or act upon any declarations, acts, or omissions of plaintiffs concerning the valuation of the property. And finally, the court found that the reasonable value of the property was \$3,126.15; that defendant knew that the value of plaintiffs' property far exceeded \$10.00 per hundred pounds per article; and that defendant was familiar with the values of household furnishings of this character.

[21] In attacking the foregoing findings as not being supported by the evidence, defendant predicates its argument chiefly upon the proposition that the facts proven are legally insufficient to render nugatory the express stipulation in the warehouse receipt which fixed the "declared value" of the property as the basis of responsibility. Despite the rule, adverted to previously, which invalidates contractual provisions purporting to *exempt* a warehouseman from liability due to his own negligence, clauses which merely *limit* liability to the declared or agreed value of the goods have generally been upheld. *Wilson v. Crown Transfer etc. Co.*, 201 Cal. 701, 258 P. 596; *McMullin v. Lyon Fireproof Storage Co.*, 74 Cal.App. 87, 239 P. 422; 56 Am.Jur. 420; annotation, 142 A.L.R. 776. The distinction is based on the theory that a property valuation freely agreed upon by the parties for the purpose of the contract does not constitute an illegal exemption from full responsibility for the actual value of the goods, but is merely a permissible determination, reached in advance, as to what the actual value is. *Donlon Bros. v. Southern Pacific Co.*, 151 Cal. 763, 769, 91 P. 603, 11 L.R.A., N.S., 811, 12 Ann.Cas. 1118, followed in *McMullin v. Lyon Fireproof Storage Co.*, *supra*. The authorities

have also recognized the fact that where, as in the present case, warehouse storage charges are based upon the value of the goods stored, "declared value" clauses are a feasible and practical means for measuring compensation by the risk assumed. To this effect, it has been held that "The right of warehouse owners to limit their liability by such a notice is given in order that they may protect themselves from unreasonable and excessive demands for loss of goods without any previous knowledge of their real value." *Wilson v. Crown Transfer, etc. Co.*, *supra*, 201 Cal. at page 714, 258 P. 602.

[22] The question of general validity, of course, is distinct from the question whether such a provision will be enforced in a given case. Since provisions limiting liability are merely a privileged deviation from the rule of full accountability embodied in the statute (Uniform Warehouse Receipts Act, Deering's Gen.Laws, Act 9059, sec. 21), they will be given effect only where the agreement is reasonable and was fairly and freely entered into by the parties. See *Donlon Bros. v. Southern Pacific Co.*, 151 Cal. 763, 774, 91 P. 603, 11 L.R.A., N.S., 811, 12 Ann.Cas. 1118; *McQueen v. Tyler*, 61 Cal.App.2d 263, 267, 142 P.2d 466; cf. *Scott's V. F. Exch. v. Growers Refrig. Co.*, 81 Cal.App.2d 437, 184 P.2d 183.

It will be observed that if full effect should be given to the terms of the receipt defendant's liability would be limited to approximately one-sixth of the actual value of the goods. Plaintiff does not attack this limitation as one whose practical effect would be to substantially relieve the defendant of liability for negligence, and we do not consider the point. It is mentioned only to call attention to the fact that there might be such a discrepancy between the limited liability and the actual value of the goods as to deprive the agreement of reasonableness, which is essential to the validity of such an agreement.

[23] The requirement that the contract be fairly and freely entered into (cf. Civ. Code, secs. 1565, 1567) must be considered in relation to the cases which have held that where the warehouse receipt was not delivered at the same time as delivery of the goods to the warehouse, the storage

company was under an affirmative "duty, if it desired to limit its liability for the loss of the goods, of bringing home to the respondents [i. e. the bailors] notice that the goods were accepted and held under such limited liability." *Wilson v. Crown Transfer etc. Co.*, 201 Cal. 701, 714, 258 P. 596, 602. Under such circumstances, a contract of storage arises by implication of law upon acceptance of the goods by the storage company; and the efficacy of provisions permitted but not required by law (e. g. a limitation upon liability for negligence) which are sought to be inserted into the contract by means of a subsequently issued warehouse receipt depends upon knowledge and consent thereto by the bailor. *Colgin v. Security Storage & Van Co.*, 208 La. 173, 23 So.2d 36, 39, 160 A.L.R. 1107; *Brasch v. Sloan's Moving & Storage Co.*, 237 Mo.App. 597, 176 S.W.2d 58, 60, 61; *Voyt v. Bekins Moving & Storage Co.*, 169 Or. 30, 119 P.2d 586, 127 P.2d 360, 362; annotation 160 A.L.R. 1117. In the absence of such knowledge and consent, there is no meeting of the minds, and the attempted modification of the original implied contract therefore cannot be held to have been freely and fairly entered into, or be given effect as a binding agreement.

[24,25] Furthermore, in determining whether, within the framework of a specific factual situation, a limitation of liability clause should be enforced, the practical considerations discussed above upon which the rule of validity is based should be constantly kept in mind. Where a warehouse receipt is issued at the time the goods are received, the depositor is normally chargeable with knowledge of all the terms thereof which are clearly set forth in an intelligible manner (*Taussig v. Bode & Haslett*, 134 Cal. 260, 265, 266, 66 P. 259, 54 L.R.A. 774, 86 Am.St.Rep. 250) and accordingly, where the receipt in terms purports to limit liability to a stipulated value, and the warehouseman has no notice of the true value, the limiting provision (assuming it to be otherwise valid) may be fairly given its intended effect. *McMullin v. Lyon Fireproof Storage Co.*, supra, 74 Cal.App. 87, 239 P. 422. But where the warehouseman has knowledge or notice of facts

reasonably indicating that the true value is substantially greater than that stipulated, the clause limiting liability is denied effect unless it has been brought to the actual attention of the bailor and assented to by him. *England v. Lyon Fireproof Storage Co.*, 94 Cal.App. 562, 572, 573, 271 P. 532; cf. *Wilson v. Crown Transfer etc. Co.*, 201 Cal. 701, 714, 258 P. 596. The correctness of this result is indicated by the fact that, under such circumstances, the reason for imparting effectness to the "declared value" provision vanishes, for the warehouseman, being advised of the greater actual value of the goods, is in a position to protect himself either by rendering care and supervision commensurate with that value and exacting an appropriate charge based on the additional risk, or by obtaining the bailor's consent to the limitation.

[26] In the present case, the defendant's liability, calculated according to the terms of the receipt, was limited to \$501.40, whereas the actual value of the property was over three thousand dollars. The evidence as to the subsequently acknowledged telegram informing defendant that plaintiffs wished to store "five rooms of valuable furniture," and the testimony as to defendant's business experience in the buying and selling of such property, formed a sufficient basis for charging defendant with notice that the actual value of the plaintiff's goods, weighing over two and one-half tons, substantially exceeded the stipulated value. The evidence clearly supports the findings on this point.

[27-29] Defendant, however, maintains that the testimony of plaintiff wife as to the contents of the said telegrams was erroneously admitted. We find no merit in the contention. It was shown that no copies of the telegrams were in the possession of or available to plaintiffs, having been burned in the same fire that destroyed the rest of their belongings. Defendant was requested to produce copies, but stated that it had none. Upon this showing, secondary evidence by way of oral testimony as to the contents of the telegrams was fully justified. 10 Cal.Jur.,

Evidence, sec. 132, p. 850. This evidence, moreover, was expressly not offered for the purpose of varying the terms of the written warehouse receipt, but went to the issue of whether the receipt was the only and entire contract between the parties. It was also clearly competent as tending to show knowledge on the part of defendant as to the value of the property to be stored with it. It is well settled, of course, that "if evidence is admissible for any purpose, it must be received, even though it may be highly improper for another purpose." *Hatfield v. Levy Bros.*, 18 Cal. 2d 798, 809, 117 P.2d 841, 847.

It is evident from what we have said that the correctness of the amount of the recovery turns upon the issue of whether defendant has satisfactorily discharged its duty of bringing the limitation of liability clause to plaintiffs' attention. The evidence was plainly adequate to prove that plaintiffs did not have actual knowledge of the limitation clause in the warehouse receipt, and that they would not have knowingly stored their property at less than its full valuation. Our attention is thus directed to the question of whether the receipt and salmon card were sufficient in themselves to give actual notice to the average bailor, for only if such were the case could it be held that defendant had discharged its duty in the premises as a matter of law. Parenthetically, we may note that in addition to these two documents, defendant relies in part upon a third document, designated by it as a "transmittal letter," which is claimed to have been sufficient to call to plaintiffs' attention the terms of the warehouse receipt. However, there was no substantial evidence that any such letter was ever mailed to, or received by, plaintiffs, and it may be disregarded here.

[30-32] Turning to the receipt and salmon identification card, we find that the latter document merely refers to the receipt in general terms, and contains no independent recitation of the terms and provisions of the receipt nor indication of their substance. Its efficacy as notice, therefore, can stand on no better footing than the receipt itself. The provisions of the receipt purporting to limit defend-

ant's liability are not distinctively set forth in a manner calculated to attract the attention of the bailor, but on the contrary, are for the most part incorporated into the mass of small print on the reverse side of the document. In respect to equally inconspicuous provisions in a passbook purporting to limit a bank's liability to its depositor, the Supreme Court has said, "It is just the character of thing that the average man would not trouble to read, or reading would fail to appreciate * * * the fact that it very materially changed the usual obligation of a bank to its depositors." *Los Angeles Inv. Co. v. Home Sav. Bank*, 180 Cal. 601, 613, 182 P. 293, 298, 5 A.L.R. 1193, holding the provision not binding on the depositor in the absence of knowledge and consent. This comment is directly applicable to the facts of the present case, for not only is the limitation clause unlikely to be noticed, but its terms are completely inadequate to convey to the ordinary inexperienced bailor any definite notion as to the actual extent of the storage company's liability. Few householders could even approximate the weight of bulky household furniture. There was no showing that plaintiffs knew or were informed of the weight of their stored property in the present case; whereas, defendant presumably weighed it in order to fix its charges. Considered in respect to the present facts, therefore, we think that the receipt was plainly insufficient to discharge defendant's duty of bringing the liability limitation to plaintiffs' attention, and that its deficiencies would have been eliminated only if it had contained an unambiguous and conspicuous statement which would have clearly disclosed upon inspection the amount of the limited liability. A notice of this nature, set out in a manner likely to attract attention, could normally be expected to result in actual knowledge on the part of the average bailor. Upon the evidence the court was justified in concluding that plaintiffs were not shown to have freely and fairly assented to the contractual limitation, and that it was not binding upon them.

[33] Defendant makes a final contention that certain of the findings in respect to the status of the warehouse receipt as

a contract between the parties, are inconsistent and contradictory. There is no merit in the argument. We have examined the challenged findings carefully and find them fully consistent with each other and with the legal principles set forth above.

The judgment is affirmed. The attempted appeal from the order denying motion for new trial is dismissed.

WOOD, J., and McCOMB, J. Assigned, concur.



GUERIN et al. v. BLAIR.
Civ. 16374.

District Court of Appeal, Second District,
Division 2, California.

Aug. 11, 1948.

Hearing Granted Oct. 7, 1948.*

1. Replevin ⇨8(4)

To maintain claim and delivery action, plaintiff must have unqualified right to immediate and exclusive possession of property sued for, and if there be any condition precedent or preliminary act which must be executed before plaintiff is entitled to such right, action cannot be maintained.

2. Bailment ⇨22

Lessee's violation of covenant against subletting or assigning in lease of personal property does not ipso facto terminate lease or render it void, but lessor has option to declare forfeiture of lease or to ignore breach and treat lease as subsisting.

3. Landlord and tenant ⇨70

An estate for years is not "real property," but a "chattel real," and is regarded as part of lessee's personal estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Real" and "Real Property".

4. Bailment ⇨1

Bailor's and bailee's rights, duties and liabilities must be determined from terms

of bailment contract, whether express or implied.

5. Bailment ⇨1

Terms of express bailment contract control in determining parties' rights, duties and liabilities, since they are entitled to impose on each other any terms they choose increasing or diminishing their rights, and their express agreement will prevail against general principles of law otherwise applicable.

6. Bailment ⇨22, 26

A provision in lease of tractors against subletting thereof by lessee without lessors' written consent was a "covenant," not a "condition," so that lessee's violation thereof by subletting one of tractors gave lessors right to possession of such tractor only after giving of three days' notice to sublessee of termination of lease pursuant to express provision therein, and in absence of such notice lessors could not maintain claim and delivery action against sublessee.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition" and "Covenant".

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Claim and delivery action by H. T. Guerin and others against John H. Blair, to recover possession of a tractor sublet to defendant by plaintiffs' lessee. Judgment for plaintiffs, and defendant appeals.

Reversed.

Prior opinion, Cal.App., 194 P.2d 74

Arthur C. Webb, of Los Angeles, and Charles Reagh, of San Francisco, for appellant.

Latham & Watkins, of Los Angeles, and John G. Evans, of San Francisco, for respondents.

WILSON, Justice.

On January 8, 1945, plaintiffs leased to Vergil Grove under an equipment rental agreement two tractors, each with a power

* Subsequent opinion 204 P.2d 884.

control unit, and two carryalls. Paragraph 16 of the lease reads as follows: "Subletting. No equipment shall be sublet by the lessee, nor shall he assign or transfer any interest in this Agreement without written consent of the Lessor."

In violation of this provision against subletting, on January 15, 1945, Grove sublet one of the tractors to defendant. On September 7, 1946, plaintiffs brought a claim and delivery action against defendant to recover possession of the tractor and from a judgment in favor of plaintiffs, defendant appeals.

The only demand made by the plaintiffs upon the defendant for the return of this equipment was by a telegram filed at 4:12 P.M. on September 6th, and delivered at 8:00 P.M. of the same day. Suit was filed the following day at 10:12 A.M. No notice or demand was served on Grove.

Defendant maintains that this action is prematurely brought by reason of the fact that a three-day notice was not given as required by paragraph 13 of the rental agreement, the pertinent provisions of which are as follows: "Termination of Agreement. Should the Lessee defer any payment more than thirty (30) days * * * as provided by this Agreement, or substantially violate any provision thereof, the Lessor may, after three days' notice, terminate this Agreement, take possession of the equipment without becoming liable for trespass, and recover all rental due, full damages for any injury to, and all expenses incurred in returning the equipment."

Plaintiffs contend that by virtue of the violation of the provision against subletting, defendant's possession was unlawful and notice was not required.

[1] In order to maintain an action for claim and delivery, plaintiff must be entitled to immediate and exclusive possession. *Garcia v. Gunn*, 119 Cal. 315, 317, 51 P. 684; *Sutton v. Stephan*, 101 Cal. 545, 548, 36 P. 106; *Commercial Discount Co. v. Cowen*, 18 Cal.2d 610, 613, 116 P.2d 599; *Davenport v. Alexander*, 53 Cal.App. 688, 692, 200 P. 771. Furthermore, plaintiff must have an unqualified right of possession and if there be any condition precedent or pre-

liminary act which must be executed before the plaintiff is entitled to that unqualified right, the action cannot be maintained. *People's Savings Bank v. Jones*, 114 Cal. 422, 426, 46 P. 278.

[2] The law is settled in this state that a violation by the lessee of a covenant against subletting or assigning does not ipso facto terminate or render void the lease. The lessor has the option of declaring a forfeiture of the lease or of ignoring the breach and treating it as subsisting. *People v. Klopstock*, 24 Cal.2d 897, 901, 151 P. 2d 641; *Chapman v. Great Western Gypsum Co.*, 216 Cal. 420, 427, 14 P.2d 758; *Buchanan v. Banta*, 204 Cal. 73, 76, 266 P. 547; *Garcia v. Gunn*, supra; *Northwestern Pacific R. R. Co. v. Consumers Rock & Cement Co.*, 50 Cal.App.2d 721, 723, 123 P.2d 872; *Licht v. Gallatin*, 84 Cal.App. 240, 245, 257 P. 914.

The *Northwestern Pacific Railroad Company* case is an action for unlawful detainer. In violation of a covenant in the lease the lessee assigned without the consent of the lessor who refused to recognize the validity of the assignment but did not serve notice terminating or declaring a forfeiture of the lease. The court stated, 50 Cal. App.2d at page 723, 123 P.2d 873, "If the lessor desired to stand upon the covenant against assignment, he could have given notice of his election to declare a forfeiture of the lease and could have sued for breach of the covenant. He could also have had his remedy in unlawful detainer if possession had been thereafter withheld following proper notice."

[3] The cases cited above relate to leases involving real property. However, the principles of law declared in those cases are equally applicable to a lease involving personal property since an estate for years is not real property but is a chattel real. It is regarded as part of the personal estate of the lessee. *Potts Drug Co. v. Benedict*, 156 Cal. 322, 328, 104 P. 432, 25 L.R.A., N.S., 609; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 539, 76 P. 243; *Guy v. Brennan*, 60 Cal.App. 452, 454, 213 P. 265; *Universal Pictures Corp. v. Roy Davidge Film Laboratory, Ltd.*, 7 Cal. App.2d 366, 369, 370, 45 P.2d 1028; *Dabney*

v. Edwards, 5 Cal.2d 1, 6, 7, 53 P.2d 962, 103 A.L.R. 822.

The case of First National Bank v. Thompson, 60 Cal.App.2d 79, 140 P.2d 75, relied upon by respondent, is not applicable to the facts herein. That case involved a conditional sales contract, the court holding that a sale by a conditional vendee without authority from the vendor constitutes a conversion and where the taking of the property is wrongful, no demand is legally necessary. It does not appear from the contract that notice of any character was required in order to authorize retaking of possession for violation of its terms.

The rule of law stated in Harpending v. Meyer, 55 Cal. 555, is not applicable. That case involved the conversion of jewelry belonging to plaintiff which had been deposited for safekeeping. It was a gratuitous bailment and there was no agreement between the parties requiring notice before the bailor could retake possession. The bailee pawned the jewelry with defendant and not having redeemed the pledge, defendant sold it. The court held that the defendant's possession was tortious and constituted a conversion, and where possession of property is obtained from one who had no right to transfer it, the right of action by the owner against the transferee accrues as soon as the latter acquires possession and no demand is necessary.

The case of Carstensen v. Gottesburen, 215 Cal. 258, 9 P.2d 831, was a claim and delivery action for the return of a fishing barge involves a bailment for hire. Plain-barge and involves a bailment for hire. Plaintiff leased a fishing barge to defendant and in violation of a provision in the agreement assigned a one-half interest in the lease. There was no clause in the contract between the parties providing for a forfeiture upon the breach of a covenant. The court held that plaintiffs were entitled to terminate the hiring and reclaim the barge under subdivision 1 of section 1931 of the Civil Code, which provides that the letter of a thing may terminate the hiring before the end of the term agreed upon "when the hirer uses or permits a use of the thing hired in a manner contrary to the agree-

ment of the parties." The court further held that the plaintiffs had made a sufficient demand for the return of the barge prior to bringing the action.

[4,5] In a contract of bailment the "rights, duties, and liabilities of the bailor and the bailee must be determined from the terms of the contract between the parties, whether express or implied. Where there is an express contract, the terms thereof control, since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose, increasing or diminishing their rights, and their express agreement will prevail against general principles of law applicable in the absence of such an agreement." 8 C.J.S., Bailments, page 255, § 22; 6 C.J. p. 1110, § 42; Jacobs v. Grossman, 310 Ill. 247, 141 N.E. 714, 715; Oklahoma Petroleum & Gas Co. v. Winship, 83 Okl. 146, 200 P. 844, 849; Bratt v. Poole, 105 Wash. 565, 178 P. 638, 639; Geis v. Mathes, 128 Kan. 753, 280 P. 759, 760; Locomotive Exchange, Inc. v. Rucker Bros., 106 Wash. 278, 179 P. 859, 860, 184 P. 848.

[6] In the instant case the parties made their own contract and imposed on each other the terms they chose, one of which was the provision for a three-day notice before the lessor could terminate the agreement in the event that the lessee should "substantially violate any provision thereof." The provision in the contract against subletting was a covenant and not a condition. The defendant's possession was not unlawful. Grove's violation of the covenant did not give plaintiffs the right to immediate possession, it gave them the right to possession only after notice given in accordance with the express provisions in the lease agreement. There was a preliminary act to be performed before plaintiffs were entitled to an unqualified right of possession, to wit, the serving of a three-day notice. No such notice was served and since plaintiffs did not have an unqualified right to immediate and exclusive possession they cannot maintain this claim and delivery action. People's Savings Bank v. Jones, *supra*.

Judgment reversed.

MOORE, Presiding Justice.

I concur with the opinion of Mr. Justice WILSON but think some vital distinctions should be more clearly defined.

Guerin's lease to Vergil Grove contained a provision against subleasing as follows: "No equipment shall be sublet by the Lessee, nor shall he assign or transfer any interest in this Agreement without written consent of the Lessor."

Also there was a forfeiture provision for a violation of any of the terms thereof as follows: "Should the Lessee defer any payment more than thirty (30) days, or become bankrupt, or fail to maintain and operate or to return the equipment as provided by this Agreement, or substantially violate any provision thereof, the Lessor may, after three days' notice, terminate this Agreement, take possession of the equipment without becoming liable for trespass, and recover all rental due, full damages for any injury to, and all expenses incurred in returning the equipment." In violation of the first quoted provision Grove subleased to Blair. Thereafter Guerin brought this claim and delivery action to regain possession and for damages. Concededly Guerin may recover possession of the equipment by reason of the sublease. The only undetermined question is the amount, if any, of the damages to which he is entitled against Blair for holding the chattel. Inasmuch as damages for detaining movable property are its usable rental value during the period of its wrongful detention (*Ferris v. Cooper*, 125 Cal.App. 234, 237, 13 P.2d 536), the amount thereof in the instant case is to be computed either (1) from the time Blair came into possession or (2) from the day Guerin served notice on him to return the equipment. This can be resolved only by determining whether Blair's possession was lawful or unlawful. If the latter gained possession lawfully, damages should be payable from the time Guerin notified Blair to return the equipment. If such possession was unlawful, damages should be computed from the day appellant acquired possession.

Whether Blair obtained possession lawfully must be determined by the extent of Grove's right, if any, lawfully to transfer

possession; and that in turn depends upon the construction of the language of the lease. If the above quoted provisions should be construed as conditions, a violation thereof would result in a termination of Grove's right possession of the equipment; if they are covenants, a violation would not terminate the lease but would merely give rise to a cause of action by Guerin against Grove for breach of covenant.

Pursuant to familiar rules of construction these provisions must be construed most strongly against Guerin for three reasons: (1) he drew the lease into which he could have incorporated such conditions as beyond doubt would terminate all rights of the lessee upon his violation of them; (2) the forfeiture clause is for the protection of the lessor and is therefore to be construed most strongly against him; (3) the construction which avoids forfeiture must be made if it is at all possible. *Ballard v. MacCallum*, 15 Cal.2d 439, 444, 101 P.2d 692; *Civil Code*, sec. 1654; *Ghirardelli v. Peninsula Properties Company*, 16 Cal.2d 494, 496, 107 P.2d 41; *Rest., Contracts*, sec. 236-D.

Whether the quoted provisions are conditions or covenants depends entirely upon the intent of the parties as manifested by their agreement. Such intent is indicated by the language they employed to evidence their understanding. If the anti-subleasing clause had been intended to operate an automatic termination of the lease there was no need to provide for the lapse of any time after service of notice, in fact no notice would have been necessary. Since the lease must be construed in its entirety (*Civil Code*, sec. 1641; *Code Civ.Proc.*, sec. 1858; *Ghirardelli v. Peninsula Properties Company*, supra), the provision against subleasing, in the light of the clause requiring three days' notice before termination, must be construed as a covenant for the breach of which an action would lie in favor of Guerin against Grove. However, such breach would not terminate Grove's lease and consequently would not deprive him of his right of possession without a prior strict compliance with the terms of the forfeiture provision. Inasmuch as there

was no allegation of a notice having been given by Guerin to Grove, it must be assumed that none was given, in which event the contractual relationship between Guerin and Grove continued.

By virtue of the language of the lease Guerin was not entitled to possession until three days after notice to Grove that the lease was terminated. Since Grove was the lawful possessor of the equipment until three days had expired after notice was served by Guerin, Grove could lawfully give possession to a third party even though he thereby became liable for breach of covenant. If he could lawfully give possession to Blair the latter could lawfully take possession. As against Grove, Blair's possession was lawful; and since Guerin could not deprive Grove of possession until three days after service of notice, then as against Guerin, Blair's possession was lawful from the day he acquired possession.

Damages would therefore be measured from the time Blair's possession became unlawful. This could have been fixed only by the telegraphic notice served on Blair late in the evening of the day before the action was commenced. The legal effect of such notice was that the service was on the day the suit was filed. Since the most reasonable construction of the lease leads to the conclusion that Guerin was entitled to possession only after the three days' notice to Grove and actual notice to Blair, to award him right to possession without his first giving such notice would make such provision a nullity. Guerin served no notice on Grove, and did not serve notice on Blair until the day this action was commenced. Having come lawfully into possession of the equipment, Blair could not "be sued for possession, unless a demand has been made upon him." *Commercial & Savings Bank v. Foster*, 210 Cal. 76, 82, 290 P. 583, 586.

It follows that the award of damages against appellant was error.

McCOMB, Justice.

I dissent.

As pointed out in the majority opinion, the contract of bailment prohibited Mr.

Grove from subletting the property covered by the contract. Hence the bailee received only a limited title to the property which was the subject of the bailment and he could not transfer any greater title to a third party than he himself had received, and when he attempted to do so his transferee received no title and held the property without any legal title and wrongfully. The situation is analogous to that in the case of *Carstensen v. Gottesburen*, 215 Cal. 258, 9 P.2d 831. At page 261 of such case, 9 P.2d at page 832, Mr. Chief Justice Waste, in speaking for our Supreme Court, had the following to say:

"Under the terms and provisions of the lease here involved, the barge was placed in the appellant's possession for *his* sole and exclusive use and operation as a fishing barge. That the parties intended confining its use and operation exclusively to the appellant is established by the clause in the instrument which precludes and prohibits the appellant from assigning the lease or subletting any part of the barge without having first procured the written consent of the respondents. They did not consent to an assignment of the lease, and therefore to permit of the use and operation of the barge by one not a party to the hiring (and one not acting as agent or employee of the lessee) is to permit 'a use of the thing hired in a manner contrary to the agreement of the parties' just as effectively and as completely as though the lessee had used the barge for illicit 'rum-running' purposes when the provisions of the lease required that it be engaged only as a fishing boat. Therefore, for the appellant to transfer the lease or any interest therein, to Sheldon, a stranger to the hiring, or to a corporation, a partnership or any other entity, having no connection therewith, when the lease by its terms forbade such a transfer and engaged only to permit of appellant's use of the barge, constituted, in our opinion, a positive violation of the terms of the hiring and permitted 'a use of the thing hired in a manner contrary to the agreement of the parties' within the meaning of subdivision 1 of section 1931, *supra*. This being so, the respondents, as lessors, were authorized by the cited section to terminate the hiring and reclaim the barge before the

end of the term agreed upon. The action of the trial court in decreeing a return of the barge to the respondents was therefore proper."

The applicable rule is thus stated in 8 C.J.S. (1938) Bailments, page 315, section 39(3):

"As a general rule, the bailor may recover possession of the subject matter of the bailment, or its value, from any person who has acquired possession by a wrongful act of the bailee, such as a sale, mortgage, pledge, or other transfer; and this right of the bailor may be enforced against one who purchases from the bailee in good faith and without notice of the bailor's title, the principle being that the bailee cannot transfer a greater right or a better title than he himself possesses, and that a person purchasing property from a stranger does so at his peril."

The cases involving leases of real property cited in the majority opinion are in my judgment inapplicable to a contract of bailment which pertains to personal property. It is my view that the unanimous opinion of this court filed June 3, 1948, reported in — Cal.App.2d —, 194 P.2d 74, 75, is correct and that the judgment should be affirmed. Such opinion reads as follows:

"McComb, Justice. From a judgment in favor of plaintiffs after trial before the court without a jury in a claim and delivery action, defendant appeals.

"The record supports the following facts:

"On January 8, 1946, plaintiffs leased a tractor and power unit control to Vergil Grove for a monthly rental of \$3,750. The lease contained a provision prohibiting the subletting of the equipment, and a condition No. 13, reading:

"Should the Lessee defer any payment more than 30 days or substantially violate any provision hereof, the Lessor may, after three days' notice, terminate this agreement, take possession of the equipment without becoming liable for trespass and recover all rental due, * * *."

"On January 15, 1946, in violation of the provision in the lease, Mr. Grove sublet the equipment to defendant, who took possession of it and paid Mr. Grove \$800 a month rental for two months. Thereafter plain-

tiffs located the equipment in defendant's possession, demanded its return on September 6, 1946, and on the following day filed the present claim and delivery action. The equipment was delivered to the sheriff of Los Angeles County on September 12, 1946, and thereafter judgment was entered in favor of plaintiffs in the present action for damages in the sum of \$5,120.

"Questions

"First: *Since plaintiffs had leased the equipment to Mr. Grove, who was rightfully in possession thereof, and who in turn, in violation of a provision in the lease, sublet it to defendant, were plaintiffs (a) estopped to assert their claim against defendant, and (b) was it a prerequisite to the accrual of plaintiffs' cause of action that they make demand upon defendant for the return of the property?*

"This question must be answered in the negative. [1] Where the possession of personal property is obtained in good faith or otherwise from a person who has no right to transfer such property, a right of action accrues against the transferee as soon as he acquires possession of the property, and it is not a prerequisite to the owner's filing a claim and delivery action that he make demand for his property. (*Harpending v. Meyer*, 55 Cal. 555, 558 et seq.)

"[2] The foregoing rule is applicable to the present case. By the very terms of the agreement of the lease under which Mr. Grove obtained possession of the property here involved, his right to possession was a limited one and he was prohibited from subleasing the property. Therefore, when he transferred it to defendant, defendant's possession was unlawful and it was unnecessary for plaintiffs to make a demand for the return of their equipment. (*First National Bank v. Thompson*, 60 Cal.App.2d 79, 82, 140 P.2d 75.)

"[3] Second: *Was it a prerequisite to plaintiffs' maintaining the present action that they give the three-day notice required by condition No. 13 in the lease between plaintiffs and Mr. Grove?*

"This question must also be answered in the negative. The present action is not predicated upon the lease between plain-

tiffs and Mr. Grove or for the breach of any condition thereof by defendant. It is based upon the fact that defendant is unlawfully in possession of property belonging to plaintiffs, hence the provision of the lease relative to notice is immaterial in this action.

"Davenport v. Alexander, 53 Cal.App. 688, 200 P. 771, relied on by defendant, is not here in point for the reason that in the cited case, defendant had come into possession of the personal property lawfully, and hence demand for its return was a prerequisite to a claim and delivery action. In the present case, defendant came into possession of the property unlawfully.

"Third: *Did the trial court commit prejudicial error in excluding (a) evidence that defendant had requested Mr. Grove to remove the equipment after he had had it for two months, and (b) the record of another suit in the Superior Court between plaintiffs and Mr. Grove involving the property in question in the present case?*

"This question must likewise be answered in the negative.

"[4] (a) Evidence that defendant had requested Mr. Grove to take possession of the equipment and that he in fact did not do so would not relieve defendant of liability for wrongfully having possession of plaintiffs' property. The proffered evidence was immaterial and therefore properly excluded.

"[5] (b) It is conceded that defendant was not a party to the suit between plaintiffs and Mr. Grove. Evidence was not introduced, nor has defendant pointed out in his briefs any reason why the record in another action to which defendant was not a party would be material or binding on defendant in this case. The trial court's ruling was correct.

"[6] Fourth: *Was the amount of damage awarded defendant excessive?*

"This question must be answered in the negative. The finding was supported by evidence which disclosed that the reasonable rental value of the equipment was \$800 per month; that defendant had possession from January 15, 1946, until September 12, 1946; that plaintiffs had received payment

for rentals to March 1, 1946; thus defendant was chargeable with the reasonable rental value of the equipment from March 1, 1946, to September 12, 1946, a period of six months and 12 days. Based on these facts, the judgment in the amount of \$5,120 was correct.

"The judgment is affirmed.

"Moore, P. J., and Wilson, J., concurred."



87 Cal.App.2d 140

MANTZOROS et al. v. STATE BOARD OF
EQUALIZATION et al.

WILKINSON et al. v. STATE BOARD OF
EQUALIZATION et al.

Civ. 13475, 13496.

District Court of Appeal, First District,
Division 2, California.

Aug. 6, 1948.

1. Statutes $\Rightarrow$ 190, 219, 220

Where language of statute is open to any doubt as to its proper interpretation, legislative and administrative construction is to be given great weight by courts in arriving at its proper meaning.

2. Intoxicating liquors $\Rightarrow$ 121

In statute regulating hours of sale of intoxicating liquor until six months after "cessation of hostilities", quoted words referred to formal declaration by President that hostilities had ceased, in view of administrative construction of statute with acquiescence of legislature and most liquor licensees and practical difficulty of determining exact date of cessation of active fighting. Gen.Laws, Act 3796, § 59.6.

See Words and Phrases, Permanent Edition, for all other definitions of "Cessation of Hostilities".

3. Constitutional law $\Rightarrow$ 62 Intoxicating liquors $\Rightarrow$ 15

Construing statute regulating hours of sale of intoxicating liquor until six months

after cessation of hostilities as referring to formal declaration by president that hostilities had ceased was not improper as delegating state legislative power to the president. Gen.Laws, Act 3796, § 59.6.

4. Intoxicating Liquors ⇨106(1)

Liquor licensee operating his business through employees is responsible to licensing authority and subject to disciplinary action for conduct of employees in exercise of such license.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Proceedings by George Mantzoros and another and by Guy Wilkinson and others for writs of mandate directing State Board of Equalization of the State of California and its members to refrain from taking disciplinary action against petitioners for violation of General Laws Act 3796, § 59.6. From orders directing issuance of peremptory writs of mandate, respondents appeal and the cases were consolidated on appeal.

Orders reversed.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

Thos. P. Kelleher, of San Francisco, for respondent Mantzoros.

Wm. E. Ferriter and Jas. C. Purcell, both of San Francisco, for respondent Wilkinson and others.

DOOLING, Justice.

In these two cases (consolidated on appeal for briefs, arguments and decision) the State Board of Equalization appeals from two orders directing the issuance of peremptory writs of mandate.

The order in the Wilkinson case directs the board and its members to refrain from imposing any sentence, suspension or penalty on petitioners. The petition shows that on December 12, 1946, the board made an order suspending petitioner's license for fifteen days because of violation of section 59.6 of the Alcoholic Beverage

Control Act, Gen.Laws, Act 3796, by serving persons on the licensed premises on August 28, 1946, at the hour of 1:30 a. m. In the Mantzoros case the board adopted a proposed decision proposing fifteen days suspension for violation of section 59.6 of the Alcoholic Beverage Control Act because one of respondents' employees, acting within the course of employment, had sold a bottle of whiskey to a patron in the licensed premises on May 23, 1946, at the hour of 10:10 p. m. The principal question argued is whether section 59.6 was still in force at the time of the two alleged violations.

Section 59.6 (Stats.1945, p. 1474) contains the following duration clause: "This section shall remain in effect until the ninety-first day after final adjournment of the Fifty-seventh Regular Session of the Legislature or *until six months after the cessation of hostilities in all wars in which the United States is now engaged, whichever first occurs.*" The italicized language is that in question.

The principal question presented on these appeals is whether the words "cessation of hostilities" should be interpreted to refer to the date upon which all active fighting in the wars referred to actually ended or the date when the President of the United States of America formally declared that all hostilities had ceased. If the latter, since the President's formal proclamation fixed the time of the cessation of hostilities as 12 o'clock noon on December 31, 1946, section 59.6 remained in force by its terms until June 30, 1947, and the two acts which resulted in the disciplinary action here under review occurred while that section was still in force and the sales were at hours forbidden by that section. On the other hand if section 59.6 was no longer in effect when these two sales were made the general law which was temporarily superseded by section 59.6 did not forbid them.

It was the view of the judge of the trial court that the cessation of hostilities referred to the end of active fighting and that section 59.6 was no longer in effect when the two sales were made. Were it not for the legislative and administrative

interpretation placed upon this language after the capitulation of Japan this construction would find strong support in decided cases. *Samuels v. United Seamen's Service*, 9 Cir., 165 F.2d 409; *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 2 Cir., 282 F. 976; and cf. *In re Blaney*, 30 Cal.2d 643, 656, 657, 184 P.2d 892.

However on September 25, 1945, the Attorney General of the State of California rendered an opinion on this question at the request of the member of the California Assembly from the Tenth Assembly District. (6 Ops.Cal.Atty.Gen. 132). This opinion mentions forty-seven 1945 enactments that contain a similar duration clause mentioning "cessation of hostilities." It also mentions thirteen enactments of 1945 or earlier, which with regard to duration expressly add as declared by the President or Congress of the United States or similar language to "cessation of hostilities." The conclusion is drawn that the legislative intent as to the 47 statutes that did not include the reference to a proclamation is the same as the 13 that have such reference, and that the 47 statutes remain in force until formal proclamation of cessation of hostilities or prior repeal by the Legislature. This opinion was filed both with the Senate and the Assembly at the special session of the Legislature in January, 1946, and by each house of the Legislature ordered printed in its Journal. Furthermore it is unquestioned that the State Board of Equalization accepted this opinion and acted upon it by enforcing the closing hours provided in section 59.6 upon its liquor licensees until June 30, 1947.

[1] It is a well settled rule of statutory construction that when the language of a statute is open to any doubt as to its proper interpretation legislative and administrative construction is to be given great weight by the courts in arriving at its proper meaning. *Mudd v. McColgan*, 30 Cal.2d 463, 470, 183 P.2d 10; *Coca-Cola Co. v. State Board of Equalization*, 25 Cal. 2d 918, 921, 156 P.2d 1; *Los Angeles County v. Superior Court*, 17 Cal.2d 707, 712, 112 P.2d 10; *People v. Southern Pac. Co.*, 209 Cal. 578, 594, 595, 290 P. 25;

Kaiser v. Hopkins, 6 Cal.2d 537, 540, 58 P.2d. 1278. The words here under consideration are not free from doubt. Even under the construction suggested by respondents what was the date on which all active fighting ceased? Was it August 14, 1945, at which time the orders were given to cease firing, or September 1, 1945, when the Japanese government formally surrendered on board the U. S. S. Missouri, or was it some other date when the last Japanese soldier in some remote island not knowing of the capitulation of his country fired the last shot at an American soldier, sailor or marine? It was with uncertainties of this sort in mind that the Supreme Court of the United States said in *United States v. Anderson*, 76 U.S. 56, 69, 70, 19 L.Ed. 615 (in construing an act of Congress allowing certain claims to be filed within two years "after the rebellion was suppressed"): "It is argued, as the rebellion was in point of fact suppressed when the last Confederate general surrendered to the National authority, that the limitation began to run from that date. If this were so, there is an end to the controversy; but did Congress mean, when it passed the statute in question, that the Union men of the South, whose interests are especially cared for by it, should, without any action by Congress or the Executive on the subject, take notice of the day that armed hostilities ceased between the contending parties * * * ? The inherent difficulty of determining such a matter, renders it certain that Congress did not intend to impose on this class of persons the necessity of deciding it for themselves."

[2] The inherent difficulty of determining the exact date of "the cessation of hostilities" is as great in this case. The legislative and administrative construction under which the closing hours of section 59.6 continued to be enforced until June 30, 1947, with the acquiescence of the Legislature, and with few exceptions of all of the liquor licensees and other citizens of the state amounts, under the circumstances, to the practical adoption of the President's official proclamation that December 31, 1946, was the date of the "cessation of hostilities." It had the advantage

of certainty which any other date lacked; and having been generally accepted and acted upon we are satisfied that it is our judicial duty to follow it.

[3] There is nothing to the argument that so to construe the statute is to delegate state legislative power to the President. 1 Sutherland, Statutory Construction, 3d ed. pp. 68-70; Brock v. Superior Court, 9 Cal.2d 291, 297, 298, 71 P.2d 209, 114 A.L.R. 127; Ex parte Gerino, 143 Cal. 412, 414, 415, 77 P. 166, 66 L.R.A. 249; Arwine v. Board of Medical Examiners, 151 Cal. 499, 503, 91 P. 319; In re Lasswell, 1 Cal.App.2d 183, 203, 36 P.2d 678.

[4] Counsel in the Mantzoros case advance the additional argument that under section 59.6 they cannot be held liable for the action of their employee in making a sale which was not shown to be known to or directed or authorized by them. It is to be noticed that the question in their case is not whether they are criminally liable for their employee's act, a question which we need not decide, but whether they can

be subjected to discipline by the Board of Equalization because their employee made a sale of liquor at an hour forbidden by that section. The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature. Even in the case of criminal statutes vicarious liability for the acts of employees is not unknown. In re Marley, 29 Cal.2d 525, 175 P.2d 832; In re Casperson, 69 Cal.App.2d 441, 159 P. 2d 88; People v. Schwartz, 28 Cal.App.2d 775, 70 P.2d 1017 and cf. Sandstrom v. California Horse Racing Board, 31 Cal.2d 401, 189 P.2d 17.

The orders appealed from are reversed.

NOURSE, P. J., and GOODELL, J., concur.

32 Cal.2d 372

In re BUCK'S ESTATE.

Sac. 5790.

Supreme Court of California, in Bank.

Aug. 10, 1948.

closely held, that there had been no sales of shares represented by trustees' certificates, and that legacy to unrelated beneficiary was separated into stock and money though testator was financially able to make a larger cash bequest.

1. Wills ⇨812

Where testator owned 40,000 shares of stock at time of executing will in which he gave 5,000 shares to each of his six children and 5,000 shares to unrelated beneficiary, but he later transferred 10,000 shares to his wife, whether ademption of 5,000 shares should be borne in toto by unrelated beneficiary depended on whether bequests of stock were general or specific.

2. Wills ⇨750

Whether "bequests" of stock were "general" or "specific" depended on whether testator intended to give a specific thing and that alone, or to give a bequest which, in any event, should be paid out of his general estate.

See Words and Phrases, Permanent Edition, for all other definitions of "General Bequest".

3. Wills ⇨750

Whether a bequest is specific or general is controlled by intent of testator at time will was drafted.

4. Wills ⇨486

Where executor, being in doubt as to whether there had been a partial ademption of certain bequests of stock, petitioned for instructions under statute, and determination of issue depended upon whether bequests were general or specific, extrinsic evidence was admissible to establish type of corporation and manner in which its shares were held, in absence of such information in will. Probate Code, § 588.

5. Wills ⇨754

Gifts to each of testator's six children of 5,000 shares of capital stock represented by trustees' certificates and of 5,000 shares similarly represented plus \$30,000 in cash to unrelated beneficiary were "specific bequests", in view of fact that stock was

6. Wills ⇨804

"Abatement of legacy" occurs where there is a deficiency of assets, and may take place where total amount of property described in a specific bequest exceeds that on hand at time of testator's death, as well as where deficiency is caused by existence of debts which must be paid before legacies. Probate Code, § 752.

See Words and Phrases, Permanent Edition, for all other definitions of "Abatement of Legacy".

7. Wills ⇨807

Under statute providing that legacies to spouse or kindred shall abate only after abatement of legacies to persons not related to testator, spouse or kindred have priority over strangers for protection of legacies whenever there is deficiency of assets, whether to pay debts, or to satisfy legacies, unless different intention is expressed in will. Probate Code, § 752.

8. Wills ⇨807

Under statute providing that legacies to spouse or kindred shall abate only after abatement of legacies to persons not related to testator, preference accorded to children could not be defeated unless it affirmatively and unequivocally appeared that such was testator's intent. Probate Code, § 752.

9. Wills ⇨804

Ordinarily, testator is deemed to have acted on belief that his estate would be sufficient to satisfy all legacies in full unless there has been some expression by testator to indicate an expectation of possible insufficiency of assets.

10. Wills ⇨806

Under statute giving spouse and kindred preference in case of abatement of

legacies unless different intention is expressed in will, a will which recited that children had been provided for by will of testator's mother, but that nevertheless testator gave each child 5,000 shares of capital stock, and which gave unrelated beneficiary 5,000 shares of stock and in addition thereto the sum of \$30,000 in cash, did not evidence an intention on part of testator to deprive children of their statutory preference in event of an insufficiency of stock to satisfy all bequests. Probate Code, § 752.

Appeal from Superior Court, Solano County; Harlow V. Greenwood, Judge.

Proceeding in the matter of the estate of Frank H. Buck, deceased, wherein the executor petitioned for instructions. From an order instructing executor that ademption of stock be borne in toto by Helen S. Peterson, the latter appeals.

Affirmed.

Prior opinion 186 P.2d 708.

Ira B. Langdon and George E. Frioux, both of Stockton, and M. Mitchell Bourquin, of San Francisco, for appellant.

Andrew F. Burke, of San Francisco, Francis C. McInnis, of Fairfield, and Hardin, Rank, Meltzer & Fletcher, of Oakland, for respondents.

GIBSON, Chief Justice.

The executor of the will of Frank H. Buck, being in doubt as to whether there had been a partial ademption of certain legacies, petitioned for instructions under section 588 of the Probate Code. The will bequeathed 30,000 shares of the Belridge Oil Company stock to the testator's six children, 5,000 shares of the same stock and \$30,000 in cash to Helen S. Peterson, certain cash and property to others, and the residue to his wife. When the will was executed Mr. Buck owned 40,000 shares of the stock, but he later transferred 10,000 of them to his wife and had only 30,000

shares when he died. The court determined that the bequests of stock were specific and made an order instructing the executor that the ademption of 5,000 shares was to be borne in toto by Miss Peterson, who was not related to the testator. She has appealed from that order.

The provisions of the will in question are as follows:

"Sixth. My children have all been provided for amply under the will of my mother, Annie S. Buck. Nevertheless, as a final and personal bequest, I give and bequeath to each of them Five Thousand (5,000) shares of the capital stock of the Belridge Oil Company, which shares are now represented in my estate by trustees' certificates. * * *

"Eighth. I give and bequeath to Helen S. Peterson, residing at the time of the execution of this will at Garden Towers, 15th Street, N.W., Washington, D.C., Five Thousand (5,000) shares of the capital stock of Belridge Oil Company, which shares are now represented by trustees' certificates, and in addition thereto, the sum of Thirty Thousand Dollars (\$30,000.00) in cash."

[1-3] The correctness of the trial court's order depends first upon whether the bequests of stock were general or specific. The question is whether the testator intended to give a specific thing and that alone, or to give a bequest which, in any event, should be paid out of his general estate. In determining whether a bequest is specific or general, the fundamental and controlling factor is the intent of the testator at the time the will was drafted. Estate of Jepson, 181 Cal. 745, 747, 186 P. 352; Estate of Jones, 60 Cal.App.2d 795, 798, 141 P.2d 764; Estate of Cline, 67 Cal. App.2d 800, 804, 155 P.2d 390.

Applying these rules to bequests of stocks, bonds and other securities, it has been held that a gift of a certain number of securities described by the name of the corporation, or by value or quantity, but not indicating any particular lot of such securities, will be construed as a general

bequest if there is nothing on the face of the will or in evidence of the surrounding circumstances, where admissible, to indicate that the testator intended a gift only of the securities owned by him. Estate of Jones, 60 Cal.App.2d 795, 141 P.2d 764; Tift v. Porter, 8 N.Y. 516; 4 Page on Wills, Lifetime Ed. [1941], § 1397; p. 122; see In re Wilson, 260 Pa. 407, 103 A. 880; 6 A.L.R. 1353, 1377; Maxim v. Maxim, 129 Me. 349, 152 A. 268, 73 A.L.R. 1250, 1255. It has been held, however, that where there are bequests of shares of a closely held corporation the nonpublic character of the shares bequeathed is evidence of an intent to make a specific gift. In re Security Trust Co., 221 N.Y. 213, 116 N.E. 1006; In re Kingsley's Will, Sur., 67 N.Y.S.2d 464; In re Dunigan's Will, 177 Misc. 212, 30 N.Y.S.2d 38; In re Strasenburg's Will, 136 Misc. 86, 242 N.Y.S. 447, 453; see In re Freeman's Will, 139 Misc. 301, 248 N.Y.S. 422.

[4] There is nothing in the will which shows the type of corporation or the manner in which its shares were held, and extrinsic evidence was admissible to establish these relevant facts. At the time of the execution of his will, on December 7, 1940, decedent was the owner of 40,000 shares of the Belridge Oil Company stock which were covered by a voting trust agreement and were represented by trustees' certificates. Of the 1,000,000 shares issued by the company, approximately 61% were contributed to the voting trust and were held by three families including that of the testator. The shares not in the trust were held in only thirty-three ownerships. None of the shares of the company had ever been traded in or listed on any stock exchange, and between the date of the creation of the voting trust in 1937 and the date of the testator's death in 1942, only 4,166 $\frac{1}{3}$ shares of stock had been sold, and there had been no sales of shares represented by trustees' certificates. The testator, as a director of the corporation and a trustee of the voting trust agreement, was fully aware of the nonpublic character of the stock, and it is reasonable to assume that when he executed his will he had in

mind the disposition of specific shares owned by him.

[5] In our opinion, the findings and conclusion of the trial court that the bequests of stock to the children and to appellant were specific are supported by the evidence. All of the stock was closely held, and the shares bequeathed were specifically referred to as being represented by trustees' certificates. Those bequeathed to the children were further identified as shares now "in my estate." The bequest of stock to appellant was coupled with a gift of \$30,000 in cash, and, since the testator was financially able to have made a larger cash bequest, the separation of the legacy into stock and money is an additional indication that he intended the bequest of stock to be specific. Fidelity Nat. Bank & Trust Co. v. Hovey, 319 Mo. 192, 5 S.W.2d 437, 73 A.L.R. 1228; Metcalf v. Framingham Parish, 128 Mass. 370; Douglass v. Douglass, 13 App.D.C. 21; New Albany Trust Co. v. Powell, 29 Ind.App. 494, 64 N.E. 640.

The case of Estate of Jones, 60 Cal.App. 2d 795, 141 P.2d 764, is clearly distinguishable since the securities there in question were unregistered bearer bonds listed on the public stock exchanges, and all of the surrounding circumstances indicated that the testator intended the bequests to be general in character.

[6,7] In view of the ademption to the extent of 5,000 shares, we must determine whether the legacies are to abate proportionately or whether there are preferred legatees. The trial court decreed that since appellant is a stranger in blood, the ademption should be borne entirely by her. Section 752 of the Probate Code provides that: "Unless a different intention is expressed in the will, abatement takes place in any class only as between legacies of that class, and *legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to the testator.*" (Italics added.) The part of the section italicized above was substituted by amendment in 1939, St.1939, p. 2292, for a clause which read as follows: "legacies to a

spouse or to kindred are chargeable only after legacies to persons not related to the testator."

Prior to the 1939 amendment there was some uncertainty as to whether the preference accorded to kindred was limited to a situation where the legacies could not be paid in full because of the depletion of assets due to the payment of debts. See *Estate of Apple*, 66 Cal. 432, 6 P. 7, which discussed the effect of §§ 1361 and 1362 of the Civil Code, and *Estate of Wever*, 12 Cal.App.2d 237, 55 P.2d 279, construing § 752 of the Probate Code which superseded the Civil Code sections. It is unnecessary to set out here the legislative history of the statute or to discuss the causes of the confusion since all uncertainty has been eliminated by the 1939 amendment. A legacy abates where there is a deficiency of assets (*Estate of Neistrath*, 66 Cal. 330, 5 P. 507; 4 Page on Wills, Lifetime Ed. [1941], § 1493, p. 313), and the abatement may take place where the total amount of property described in a specific bequest exceeds that on hand at the time of the testator's death, as well as where the deficiency is caused by the existence of debts which must be paid before legacies. 4 Page on Wills, Lifetime Ed. [1941], § 1493, p. 313; § 1500, pp. 333, 334. It is clear that, as the section now reads, a spouse or kindred are given priority over strangers for the protection of legacies whenever there is a deficiency of assets, whether to pay debts or to satisfy legacies, unless a different intention is expressed in the will.

[8,9] Appellant contends that such contrary intent is expressed by the division of shares into equal amounts and by the statement of the testator that "My children have all been provided for amply under the will of my mother. * * *" It has also been suggested that the testator showed a concern for appellant which was equal to or greater than that for his children by the provision bequeathing to her 5,000 shares of stock and "in addition thereto" \$30,000. It is argued that she could not receive the money "in addition" to the stock unless she received the stock.

As we have seen, extrinsic evidence was introduced on the general subject of the testator's intent, but our attention has not been called to any specific evidence which bears on this particular problem, and we do not find that "a different intention is expressed in the will" within the meaning of section 752. In order to defeat the preference accorded to the children under the statute, it must affirmatively and unequivocally appear that such was the testator's intent. The fact that appellant and each of the children were given the same number of shares can reasonably be construed to show only what the testator intended had there been enough stock in the estate to satisfy the bequests in full. Ordinarily a testator is deemed to have acted on the belief that his estate would be sufficient to satisfy all legacies in full unless there has been some expression by the testator to indicate an expectation on his part of a possible insufficiency of assets. In *Re McDonald's Estate*, 314 Ill.App. 148, 41 N.E.2d 128, 130; *Emery v. Bachelder*, 78 Me. 233, 3 A. 733, 735, 737; In *Re Weed's Will*, 213 Wis. 574, 252 N.W. 294, 296.

[10] Neither the fact that the testator gave each legatee the same amount of stock nor the fact that "in addition thereto" he made the cash provision for appellant shows that the testator intended to deprive his children of the preference accorded them by statute in the event there was not enough stock to satisfy all of the bequests. Nor do we find such an intent expressed in the reasons given by the testator for not making more generous provision for his children. He explained that they had been amply provided for by his mother, but he stated that "nevertheless, as a final and personal bequest I give and bequeath to each of them 5,000 shares of the capital stock of the Belridge Oil Company." He thus evidenced an intent that notwithstanding the provision which had been made for them by his mother, he desired to make each of them a personal gift of the stock. Certainly it cannot be said that he thereby intended to place his children in a less favorable position than that accorded them by statute.

The cases relied upon by appellant are clearly distinguishable. In *Estate of Fairfield*, 12 Cal.App.2d 30, 54 P.2d 739, it was held that the testator, in stating "I have made the above bequest to my friends * * * and especially wish them to have the property I have given them," expressed an intention to show a preference favoring them over relatives. In the *Estate of Greenwald*, 25 Cal.App.2d 657, 78 P.2d 232, the will contained language which showed that the testator had in mind the possibility that his estate might not have sufficient assets to pay all legacies and that in the event of sale of any of the property the proceeds should be divided proportionately between the beneficiaries. The court held that it sufficiently appeared from the language that the testator intended that all the legatees, without regard to kinship, should share proportionately in any assets available for distribution.

In our opinion the trial court in the present case properly determined that no intention was expressed in the will which precluded the application of the statutory provision relative to abatement.

The order is affirmed.

We concur:

SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER, and SPENCE,
JJ., concur.



32 Cal.2d 378

LOS ANGELES COUNTY v. SOUTHERN
CALIFORNIA TELEPHONE CO.

No. L. A. 19311.

Supreme Court of California, in Bank.
Aug. 13, 1948.

As Modified on Denial of Rehearing
Sept. 8, 1948.

1. Telegraphs and telephones ☞10(1)

Code section providing that telegraph or telephone corporations may construct

telegraph or telephone lines along and on any public road or highway, offers the grant of a franchise to a telephone company on acceptance by construction and operation of communication facilities. Civ. Code, § 536.

2. Statutes ☞159

A prior statute is not repealed by implication by a subsequent statute, unless the statutes are so repugnant that they cannot stand together.

3. Statutes ☞225½

Where the legislature considers two statutes at the same time, the legislature must have intended to give effect to both.

4. Telegraphs and telephones ☞4

Code section providing that telegraph or telephone corporations may construct telegraph lines or telephone lines along and on any public road or highway, and the Broughton Act providing that every franchise or privilege to erect or lay telegraph or telephone wires, except in case of interstate business, shall be granted on conditions provided in the act including condition of payment of two per cent of gross receipts, are not so repugnant as to require a determination that there was an implied repeal of the former by the Broughton Act. Civ.Code, § 536; Gen.Laws, Act 2720.

5. Telegraphs and telephones ☞10(1)

Telephone company, to which telephone lines had been conveyed, was entitled to use streets and highways in unincorporated areas of county by reason of its franchise under code section providing that telegraph or telephone corporations may construct telegraph lines or telephone lines along and on any public road or highway. Civ.Code, § 536.

6. Telegraphs and telephones ☞10(8)

Code section providing that telegraph or telephone corporations may construct telegraph lines or telephone lines along and on any public road or highway, is a grant to use public roads and highways so long as telegraph or telephone communication service is continued, and the acceptance of the franchise by a corporation involves an assumption of duty to furnish proper and

adequate communication service to the public. Civ.Code, § 536.

7. Constitutional law ⚡92

Telegraphs and telephones ⚡10(1)

Code section providing that telegraph or telephone corporations may construct telegraph lines or telephone lines along and on any public road or highway is a continuing offer extending to telephone and telegraph companies the use of highways, which offer, when accepted by construction and maintenance of lines, constitutes a binding contract based on adequate consideration, establishing a vested right which cannot be impaired by subsequent acts of the legislature. Civ.Code, § 536.

8. States ⚡119

Code section providing that telegraph or telephone corporations may construct telegraph lines or telephone lines along and on any public road or highway, does not violate constitutional provisions prohibiting a grant or donation of property by the state or a gift of any public money or thing of value to any individual, municipal or other corporation. Civ.Code, § 536; Const. art. 4, §§ 22, 31.

9. Constitutional law ⚡208(1), 211

Statutes ⚡67

The equal protection clause of the federal constitution and state constitutional provisions requiring all laws of a general nature to have a uniform operation, prohibiting the permanent grant of special privileges or immunities, and forbidding local or special laws granting any special or exclusive right, privilege or immunity, or where a general law can be made applicable, do not prevent classification by the legislature, nor require that statutes operate uniformly with respect to persons or things which are in fact different. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, §§ 11, 21; art. 4, § 25, subs. 19, 33.

10. Constitutional law ⚡208(1)

Statutes ⚡67

The test for determining validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under state prohi-

bitions against special legislation and the equal protection clause of the federal constitution. U.S.C.A.Const.Amend. 14; Const.Cal. art. 1, §§ 11, 21; art. 4, § 25.

11. Constitutional law ⚡205(6), 235

Statutes ⚡72, 76(1), 79(2)

Telegraphs and telephones ⚡4

Code section providing that telegraph or telephone corporations may construct telegraph lines or telephone lines along and on any public road or highway, does not violate the equal protection clause of the federal constitution, or provisions of the state constitution that all laws of a general nature shall have a uniform operation that no unalterable special privileges or immunities shall ever be granted, and that the legislature shall not pass local or special laws granting any special or exclusive right, privilege or immunity, or where a general law can be made applicable. Civ.Code, § 536; U.S.C.A.Const.Amend. 14; Const. Cal. art. 1, §§ 11, 21; art. 4, § 25, subs. 19, 33.

12. Constitutional law ⚡48

The rule that all presumptions are in favor of the validity of statutes and that a classification made by the legislature will not be overthrown by the courts unless it is palpably unreasonable, has added force when the statute has been accepted as valid for many years, and vast sums have been invested in reliance on the rights granted.

13. Courts ⚡93(2)

Where constitutionality of code section providing that telegraph or telephone corporations may construct telegraph lines or telephone lines along and on any public road or highway, had been impliedly upheld by many decisions of the Supreme Court, and in the few instances where a direct challenge has been made, the section had withstood the attack, and such decisions have been acquiesced in and acted on for more than 40 years, they became something akin to a rule of property which should not be disturbed in absence of the most compelling and cogent reasons. Civ.Code, § 536.

CARTER, J., dissenting.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action for an injunction by the County of Los Angeles against the Southern California Telephone Company, a corporation, to compel defendant to obtain a county franchise and to pay for the privilege of maintaining its lines and poles on streets and highways outside of incorporated areas. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

For prior opinion see 168 P.2d 207.

J. H. O'Connor, Harold W. Kennedy, County Counsel, S. V. O. Prichard, First Asst. County Counsel, A. Curtis Smith and Gerald G. Kelly, Deputy County Counsel, all of Los Angeles, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, Lawler, Felix & Hall and Oscar Lawler, all of Los Angeles, John W. Holmes, of Pasadena, and Francis N. Marshall, of San Francisco, O'Melveny & Myers, Louis W. Myers and Pierce Works, all of Los Angeles, Rodney K. Potter, of Beverly Hills, and Jackson W. Chance, of Los Angeles, as amici curiae on behalf of respondent.

GIBSON, Chief Justice.

By this action for an injunction, plaintiff county is seeking to compel defendant telephone company to obtain a county franchise and to pay for the privilege of maintaining its lines and poles on streets and highways outside of incorporated areas. Defendant claims it was granted

this privilege by section 536 of the Civil Code as amended in 1905,¹ and that it is not required to obtain a franchise from the county. The trial court determined that defendant had a valid franchise from the state and denied an injunction. The county has appealed from the judgment.

In the years 1903-1905, the county issued five franchises for telephone lines, and these were thereafter conveyed to the defendant telephone company. Three of the franchises terminated before this action was commenced, and a fourth expired before the trial. The fifth franchise by its terms is still in effect, but the area which it covers was expressly excluded from this controversy by the complaint. Only one of the franchises required the payment of a percentage of the gross receipts derived from the use of the privilege, and the company made the payments, as provided, until expiration of the period specified therein. The company and its predecessors, at least since 1909, have specifically relied on section 536 for their authority when applying for permits to locate or change poles or lines on the highway. Further, from 1905 until about the time of the filing of the complaint, except for six years, the county assessed and levied property taxes on the franchise claimed by defendant and its predecessors under that section.

The questions to be decided are: First, what is the effect of section 536? Second, was section 536 repealed by the Broughton Act?² Third, if section 536 is construed as granting a franchise to defendant, is it

¹Section 536 of the Civil Code as amended in 1905 provides that "Telegraph or telephone corporations may construct lines of telegraph, or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

²The Broughton Act (Stats.1905, p. 777, Deering's Gen.Laws, Act 2720) pro-

vides: "Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway * * * or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors * * * or other governing or legislative bodies of any county * * * except telegraph or telephone lines doing an interstate business * * * shall be granted upon the conditions in this act provided, and not otherwise." One of the conditions specified is the payment of 2% of the gross receipts.

unconstitutional (a) as being a gift in violation of sections 22 and 31 of article IV of the California Constitution or (b) as denying equal protection of the laws and constituting an invalid grant of special privileges in violation of the 14th Amendment to the federal Constitution and sections 11 and 21 of article I and section 25 of article IV of the California Constitution?

Section 536 was originally enacted at the time of the adoption of the codes in 1872, but similar provisions had existed for many years prior thereto. (See Stats. 1850, p. 369; Stats. 1857, p. 171.) When first enacted the section applied only to telegraph corporations. It made no mention of telephone companies, and it did not grant any rights to such companies prior to 1905, when the section was repealed and reenacted to apply to both telegraph and telephone corporations. See *Sunset Telephone and Telegraph Co. v. Pasadena*, 161 Cal. 265, 118 P. 796. As applied to telegraph companies, it has been held that section 536, as it existed prior to 1905, was effectual to grant a state franchise, and that the use of the highways, and the maintenance and operation of the telegraph system, constituted an acceptance of the provisions of the statute and resulted in a contract between the company and the state which was secured by the federal Constitution against impairment by subsequent state legislation. See *Western Union Telegraph Co. v. Hopkins*, 160 Cal. 106, 116 P. 557; *Western Union Tel. Co. v. Visalia*, 149 Cal. 744, 87 P. 1023; *Postal Telegraph Cable Co. v. Los Angeles*, 160 Cal. 129, 116 P. 566; *Sunset Telephone & Telegraph Co. v. Pomona*, 9 Cir., 172 F. 829, 837; *Postal Telegraph-Cable Co. v. Railroad Comm.*, 200 Cal. 463, 254 P. 258.

[1] The purpose of the change in 1905 was to add telephone corporations to the

section, and, except for this extension, there is nothing in the amendment to indicate any intention to alter the effect and operation of the statute.³ See *City of Salinas v. Pacific Tel. & Tel. Co.*, 72 Cal. App.2d 494, 497, 164 P.2d 905. In view of the construction given to this section as it existed prior to 1905, and the absence of other changes, it must be held that the intention was to offer the grant of a franchise to telephone as well as telegraph companies upon acceptance by the construction and operation of communication facilities.

[2, 3] A question has arisen, however, as to whether section 536 was repealed by the Broughton Act, which was adopted at the same session at which section 536 was amended. The act does not contain any provision expressly repealing that section, and it was not repealed by implication unless the statutes are so repugnant they cannot stand together. The Legislature was considering the statutes at the same time and must have intended to give effect to both. In *County of Inyo v. Hess*, 53 Cal.App. 415, 200 P. 373, it was held that section 536 was not repealed by the Broughton Act but that the statutes could operate in separate fields. The court said, 53 Cal.App. at page 425, 200 P. at page 377, "that under and by virtue of the provisions of section 536, Civil Code, telephone corporations are granted the right and privilege to use the public highways over which to construct and operate lines of telephone wires, free from any grant made by subordinate legislative bodies, and unrestricted by the provisions of the Broughton Act * * *." The court also declared that section 536 was intended as a legislative grant limited in operation to telegraph and telephone corporations, as distinguished from individuals. This construction is supported by the specific terms of the section which refers only to "telegraph or telephone corporations."

³ It has been held, however, that since section 536 did not confer any rights on telephone companies prior to its reenactment in 1905, the amended section did not grant such companies a franchise to use the streets of a city which pre-

viously had been given full control of its streets under a freeholders' charter. *Sunset Telephone & Telegraph Co. v. Pasadena*, 161 Cal. 265, 118 P. 796; *City of Salinas v. Pacific Tel. & Tel. Co.*, 72 Cal.App.2d 494, 164 P.2d 905.

The Broughton Act, unlike section 536, does not grant any right or privilege, nor does it purport to empower or authorize boards of supervisors to grant franchises or other privileges, but instead indicates an intent to limit and restrict the powers which may have been granted under other laws by specifying the procedure which must be followed and the conditions which must be imposed in the granting of any franchises by subordinate legislative bodies. The court stated in *Oro Electric Corp. v. Railroad Commission*, 169 Cal. 466, at pages 482, 483, 147 P. 118, at page 124, that "this act merely places restrictions upon the granting of franchises, where the power to grant such franchises exists otherwise. As was said in *Sunset Tel. & Tel. Co. v. Pasadena*, 161 Cal. 265, 272, 118 P. 796, 799, the 'whole purpose' of the act 'was to prescribe the method and conditions upon which the franchises included within its terms might be granted by the legislative body authorized by law to make the grant.' The act does not authorize any board or council to grant a franchise." See also *McGinnis v. Mayor and Common Council*, 153 Cal. 711, 713, 714, 96 P. 367; *City of San Diego v. Kerckhoff*, 49 Cal. App. 473, 482, 193 P. 801.

[4, 5] Since the Broughton Act is thus limited in operation to those franchises which subordinate legislative bodies are authorized to grant under other laws, it cannot be construed as applicable to statutory franchises which are not granted by such bodies but which, as in the case of the franchise involved here, are granted directly by the Legislature. The two statutes were enacted for separate purposes and occupy separate fields, and both can be given effect. There is, therefore, no such repugnance between the acts as would require a determination that there was

any implied repeal. Accordingly, defendant is entitled to use the streets and highways in unincorporated areas of the county, by reason of its franchise under section 536, unless that section, as claimed, is unconstitutional.

[6] The county contends that the legislature is prohibited by sections 22 and 31 of article IV of the California Constitution⁴ from granting a free franchise and that since no compensation is required to be paid for the rights acquired under section 536, the statute is unconstitutional. It does not follow, however, that because telephone and telegraph companies are permitted without charge to construct lines along the highways that the privilege granted is a gift. The franchise is conditioned not only on the establishment of lines by a telegraph or telephone corporation, but also, by necessary implication, on the continued operation of the system. The grant under section 536 must be construed in favor of the state. (Civ.Code, § 1069.) As so construed it must be held to be a grant to use public roads and highways so long as telegraph or telephone communication service is continued and that the acceptance of the franchise involves an assumption of the duty to furnish proper and adequate communication service to the public. Obviously, the state receives a substantial benefit from the continued operation of such a system, and the question is whether, notwithstanding that benefit, the grant comes within the Constitutional prohibition.

[7] Section 536 has been judicially construed by many decisions of this court, and it has been uniformly held that the statute is a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of

⁴ Article IV, section 22, provides that "no money shall ever be appropriated or drawn from the State treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a State institution, nor shall

any grant or donation of property ever be made thereto by the State."

Article IV, section 31, provides that "the Legislature shall have no power * * * to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever."

lines constitutes a binding contract based on adequate consideration, and that the vested right established thereby cannot be impaired by subsequent acts of the Legislature. *Western Union Tel. Co. v. City of Visalia*, 149 Cal. 744, 87 P. 1023; *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 116 P. 557; *Western Union Tel. Co. v. County of Los Angeles*, 160 Cal. 124, 116 P. 564; *Postal-Telegraph Cable Co. v. County of Los Angeles*, 160 Cal. 129, 116 P. 566; *Postal-Telegraph Cable Co. v. Los Angeles*, 164 Cal. 156, 128 P. 19; *Sunset Telephone & Telegraph Co. v. Pasadena*, 161 Cal. 265, 118 P. 796; *Postal-Telegraph Cable Co. v. Railroad Comm.*, 200 Cal. 463, 254 P. 258; see *People v. Turlock Home Telephone & Telegraph Co.*, 200 Cal. 546, 253 P. 1108; *County of Inyo v. Hess*, 53 Cal.App. 415, 200 P. 373; *State of California v. Marin Municipal Water Dist.*, 17 Cal.2d 699, 111 P.2d 651.

The nature of the rights and privileges arising from section 536, as interpreted by the cases just cited, is stated in *Postal-Telegraph Cable Co. v. Railroad Comm.*, 200 Cal. 463, at pages 472, 473, 254 P. 258, at page 261, as follows: "This section [536] constitutes a grant of a franchise which the state offered, and petitioner accepted by the construction of its lines. The rights acquired by the telegraph company, by accepting and availing itself of the provisions of the section, are vested rights which the Constitutions, both state and federal, protect. They cannot be taken away by the state, even though the Legislature should repeal the section, or by the people through a constitutional provision. * * * The finding of the respondent commission of the physical fact that petitioner was maintaining and operating its lines of telegraph over the roads and highways of the state establishes, as a matter of law and of fact, the proposition that it has accepted, and owns a state franchise for that purpose, which was offered to it by section 536, supra. * * * The grant, resulting from the acceptance of the state offer, constituted a contract between the telegraph company and the

state, secured by the Constitution of the United States against impairment by any state legislation." (See also *City of Beverly Hills v. Los Angeles*, 175 Cal. 311, 165 P. 924.)

The prevalence of legislative grants to public utilities of the privilege of using streets and highways is shown by the following statement in *State of California v. Marin Municipal Water Dist.*, 17 Cal.2d 699, 703, 111 P.2d 651, 654: "The right obtained by defendant from these sources is a right conferred by the legislature to construct and operate pipe lines along the public highways of the state. Such a grant by the state to a public utility * * * has always been considered a franchise by the courts of this state. The right granted to municipal corporations by the statute of 1923 to use the public highways was held a franchise in *Los Angeles v. South Gate*, 108 Cal.App. 398, 291 P. 654. The right granted to public utilities by article XI, section 19 of the * * * Constitution * * * was held a franchise in *San Jose Gas Co. v. January*, 57 Cal. 614. * * * The right granted to telephone and telegraph companies by * * * section 536 (Civil Code) * * * was held a franchise in *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 116 P. 557; *Sunset Telephone & Telegraph Co. v. Pasadena*, 161 Cal. 265, 118 P. 796; and *Postal Telegraph Cable Co. v. Los Angeles*, 164 Cal. 156, 128 P. 19. The right granted to irrigation districts by a 1923 statute * * * for power lines was held a franchise in *Winkie v. Turlock Irr. Dist.*, 24 Cal.App.2d 1, 74 P.2d 302."

The courts of other jurisdictions have held that the statutory offer of a franchise when accepted by the construction and operation of a public utility results in a valid contract secured by the federal Constitution against impairment. *New York Electric Lines v. Empire Subway*, 235 U.S. 179, 193, 35 S.Ct. 72, 59 L.Ed. 184, Ann.Cas. 1915A, 906; *City Railway Co. v. Citizens' Street Railroad Company*, 166 U.S. 557, 567, 17 S.Ct. 653, 41 L.Ed. 1114; *Chicago*

Gen. Ry. Co. v. City of Chicago, 176 Ill. 253, 259, 52 N.E. 880, 66 L.R.A. 959, 68 Am.St.Rep. 188; see *State v. Southwestern Bell Telephone Co.*, 338 Mo. 617, 92 S.W. 2d 612; *Arkansas State Highway Comm. v. Southwestern Bell Telephone Co.*, 206 Ark. 1099, 178 S.W.2d 1002.

The county seeks to avoid the effect of the long line of cases holding that the acceptance of the offer contained in section 536 and similar statutes resulted in a valid contract by asserting that those cases did not take into consideration the constitutional prohibition against gifts of public property and its historical background. It is argued that sections 22 and 31 of article IV of the state Constitution were enacted to prevent the waste of public funds and property by the appropriation of subsidies to railroads and other corporations, and that the privilege of using the highways for telephone lines is, in effect, a subsidy to a corporation operated for private profit. Although none of the opinions of this court construing section 536 discussed the possible effect of sections 22 and 31 of article IV, it would seem unlikely that the many judges and counsel participating in those case entirely overlooked the legality of the consideration involved, since that was an essential requisite in each case to the holding that the acceptance of the offer of a franchise resulted in a valid contract.

In support of its contention that a public benefit cannot be a valid consideration for the grant of a limited privilege to use the highways for the construction and maintenance of telephone lines, the county relies upon the case of *Higgins v. San Diego Water Company*, 118 Cal. 524, 45 P. 824, 50 P. 670, asserting that the consideration involved there is identical with that which must be urged to support the contract in the present case. The City of San Diego subleased from defendant water company its distributing system for the term of twenty years at a fixed monthly rental, and the company agreed as part of the consideration that it would construct a railroad line. The agreement was held to be invalid

on the ground that the charter of San Diego conferred no authority upon the council to expend any portion of the municipal funds in aiding the building of railroads. The court expressly declined to determine whether the contract violated the constitutional prohibition against gifts, and the decision therefore is not authority here. There is language in the opinion, however, which intimates that some of the evils which the constitutional restriction was designed to prevent were present in the transaction involved in that case.

Courts in other jurisdictions with similar constitutional prohibitions have held in factual situations comparable to that involved in the Higgins case that the general public benefit derived from the construction of a public utility system is insufficient consideration to support direct appropriations of public money, extensions of public credit, or outright grants of property. *Lord v. Denver*, 58 Colo. 1, 143 P. 284, L.R.A.1915 B, 306, Ann.Cas.1916C, 8; *Colorado Central R. Co. v. Lea*, 5 Colo. 192; *Southern Railway Co. v. Hartshorne*, 162 Ala. 491, 50 So. 139; *Stone v. State*, 223 Ala. 426, 136 So. 727. On the other hand, the only cases which have considered franchises of the character involved here hold that the grants are valid and do not contravene constitutional prohibitions against gifts. *State v. Southwestern Bell Telephone Co.*, 338 Mo. 617, 92 S.W.2d 612; *State v. Union Electric Co. of Missouri*, Mo.App., 142 S.W.2d 1099; *Arkansas State Highway Comm. v. Southwestern Bell Telephone Co.*, 206 Ark. 1099, 178 S.W.2d 1002.

There appears to be some basis for the distinction although it has not been pointed out in the cases. A franchise such as is authorized by section 536 is not an absolute grant in fee or an appropriation of money, but is merely a limited right to use the highways and only to the extent necessary for the furnishing of services to the public. Also, the privilege must be exercised "in such manner and at such points as not to incommode the public use of the road or highway." (Civil Code, §

536.) It is obvious that the right acquired by the company is of less substance than the transfers involved in the cited cases which condemn appropriations of money and grants in fee.

Moreover, the state is assured of a continuing benefit in return for the privileges granted under section 536, whereas this may not be true in transactions involving an outright appropriation or transfer in fee. The company must not only construct a telephone system but it must render service, and if it fails to do so the franchise terminates. Thus the state receives benefits during the life of the franchise, since in order to retain it the company must continue to serve the public. If and when the public benefit ceases and the franchise expires, the state is in as good a position as it was before the limited privilege was granted. The building of a public utility and the consequent benefit to the people may not be a sufficient consideration to support a grant in fee, but it does not follow that the benefit received from the construction and continued operation of a telephone system is not an adequate return for the use of the highways so long as the public service continues.

[8] Since the offer of a franchise in section 536, when accepted, results in a binding agreement supported by a valid consideration, there is no gift within the meaning of the constitutional prohibitions.

It is further urged that section 536, insofar as it applies only to corporations and not to individuals, improperly grants special privileges and invalidly discriminates in favor of corporations. It is asserted that the section violates the equal protection clause of the 14th Amendment to the

federal Constitution, and also that it is invalid under article I, sections 11 and 21, and article IV, section 25, subdivisions 19 and 33 of the state Constitution.⁵

[9] These provisions of the state and federal Constitutions do not prevent classification by the Legislature, nor do they require that statutes operate uniformly with respect to persons or things which are in fact different. *People v. Western Fruit Growers*, 22 Cal.2d 494, 140 P.2d 13; *McCreery v. McColgan*, 17 Cal.2d 555, 110 P.2d 1051, 133 A.L.R. 800; *In re Fuller*, 15 Cal.2d 425, 102 P.2d 321; *Bueneman v. City of Santa Barbara*, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895; *Tigner v. Texas*, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124, 130 A.L.R. 1321; *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025; *Radice v. New York*, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690; *Arkansas Natural Gas Co. v. Railroad Comm.*, 261 U.S. 379, 43 S.Ct. 387, 67 L.Ed. 705.

The problem presented by the difference in treatment accorded corporations and individuals under section 536 was directly passed upon in *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 116 P. 557; and *Postal Telegraph Cable Co. v. Los Angeles*, 160 Cal. 129, 116 P. 566, where the claim was made that section 536 was invalid because the offer of a franchise contained therein was limited to corporations. In the *Hopkins* case the court, in holding that there was no violation of the constitutional provisions relating to special legislation, said, 160 Cal. at page 122, 116 P. at page 564: "We may reasonably assume that good and sufficient reasons may be apparent to the Legislature why the right to ex-

⁵ Article I, section 11, provides: "All laws of a general nature shall have a uniform operation."

Article I, section 21, provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms,

shall not be granted to all citizens."

Article IV, section 25, provides: "The Legislature shall not pass local or special laws in any of the following enumerated cases * * * Nineteenth—Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity * * * Thirty-third—In all other cases where a general law can be made applicable."

clusively occupy portions of the public highways for the purposes specified should be confined to corporations organized and existing for the purpose of doing a telegraph business, and why such corporations constitute a class to which such a grant may properly be restricted without violating our constitutional provisions against special legislation. If it may reasonably be so assumed, the legislation must be upheld, for it is well settled that to warrant a court in adjudging legislation void on this ground it must clearly appear that there was no sufficient reason to warrant the legislative department in finding a difference and making the discrimination. Every presumption is in favor of the validity of an act of the Legislature, until its invalidity is made to appear."

[10] Although the Hopkins case makes no specific reference to the equal protection clause of the 14th Amendment, it is clear that the test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibitions against special legislation and the equal protection clause of the federal Constitution. *People v. Western Fruit Growers*, 22 Cal.2d 494, 506, 140 P.2d 13; see *McCreery v. McColgan*, 17 Cal.2d 555, 110 P.2d 1051, 133 A.L.R. 800; *In re Fuller*, 15 Cal.2d 425, 102 P.2d 321; *Bueneman v. City of Santa Barbara*, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895. In the *Western Fruit Growers* case the court, after noting the general rules on this subject, stated: "Problems of classification under the California constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be 'actually and palpably unreasonable and arbitrary', or

the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. [Citations.] When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification." 22 Cal.2d 494, 506, 140 P.2d 13, 20.

It is argued, however, that the portion of the opinion in the *Hopkins* case dealing with the assertedly invalid distinction between individuals and corporations was dictum for the reason that the telegraph company had commenced business and acquired rights under the Constitution of 1849, which contained no inhibition against special legislation. However, in the companion case of *Postal Telegraph Cable Co. v. Los Angeles*, 160 Cal. 129, 116 P. 566, decided at the same time and controlled by the *Hopkins* decision, the plaintiff company did not commence business or acquire any rights until after the adoption of the Constitution of 1879, and therefore the issue was necessarily before the court.

The reasons which may have motivated the enactment of section 536 were not discussed in the *Hopkins* case, but it must be presumed that the Legislature acted in response to a reasonable basis for classification and that the differentiation was based on adequate grounds if any such basis can reasonably be said to exist. There is ample justification for treating corporations differently from individuals in granting franchises for the operation of telephone and telegraph systems, and there is a reasonable basis for the classification of corporations as the sole recipients of the grant offered in section 536. Corporations are in a better position than individuals to finance and carry on statewide projects of this nature, they are more easily regulated and supervised, and they have much greater permanency of existence and can give better assurance of uninterrupted service. It may be that one of the purposes of sec-

tion 536 was to promote the establishment of statewide communication systems, and the use of corporate ownership and management may have been considered the best method of achieving that purpose.

Statutes similar to section 536, and applying to telephones and telegraphs or to railroads, exist in most of the other states of the Union, but no case has been found in which such a statute was held unconstitutional on the ground of improper discrimination. On the contrary, where the objection has been raised, the power to limit the granting of franchises has been upheld. In *Goddard v. Chicago & N. W. Ry. Co.*, 202 Ill. 362, 66 N.E. 1066, an act provided that a street railroad corporation might use the streets and highways outside of cities and towns with the consent of the county board, but did not authorize such use by individuals. It was held that the Legislature by limiting grants to incorporated companies did not violate the state or federal Constitutions. Other courts have held that banking, insurance and similar businesses may be restricted to corporations. See *Noble State Bank v. Haskell*, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A.,N.S., 1062, Ann.Cas.1912A, 487; *Shallenberger v. First State Bank*, 219 U.S. 114, 31 S.Ct. 189, 55 L.Ed. 117; *Engel v. O'Malley*, 219 U.S. 128, 31 S.Ct. 190, 55 L. Ed. 128; *Dillingham v. McLaughlin*, 264 U.S. 370, 373, 44 S.Ct. 362, 68 L.Ed. 742; *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 416, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189; *Commonwealth v. Vrooman*, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am.St.Rep. 603; *Brady v. Mattern*, 125 Iowa, 158, 100 S.W. 358, 106 Am.St.Rep. 291.

[11] There are general statements in *Frost v. Corporation Commission*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483, which, detached from their context, may appear to be out of harmony with the authorities cited above. The case, however, is clearly distinguishable. The legislation condemned in that decision exempted agricultural corporations issuing stock and organized for private gain, as well as true cooperatives,

from the requirement of making a showing of public necessity in order to obtain a permit to operate a cotton gin. Individuals and other corporations desiring to engage in the same business for profit were required to make the showing. The corporation involved in the *Frost* case was an agricultural company issuing stock and organized for private gain. The court intimated that true cooperatives might be properly exempted but held that, in view of the subject dealt with by the legislation, there was no substantial or relevant basis for the differentiation between an agricultural corporation of the type there involved and individuals or other corporations organized for profit. The subject involved in the *Frost* case is entirely different from that dealt with in section 536. As we have seen, there are sound purposes to be served in encouraging the corporate operation of telephone systems, and the classification complained of cannot, therefore, be said to be unreasonable or arbitrary.

[12] The rule that all presumptions are in favor of the validity of statutes and that a classification made by the Legislature will not be overthrown by the courts unless it is palpably unreasonable has added force when, as here, the statute has been accepted as valid for many years, and vast sums have been invested in reliance upon the rights granted. In *Willard v. Glenn-Colusa Irr. Dist.*, 201 Cal. 726, at pages 743, 744, 258 P. 959, at page 966, where attack was made on the constitutionality of section 55 of the California Irrigation District Act, and the court said: "It has been upon the statute books of this state for over 40 years. While its constitutionality has never been passed upon by this court, this question, so far as our knowledge goes, has never been raised. It is hardly possible that, in all the litigation that has been before the courts of this state regarding irrigation districts in their various ramifications, the validity of this provision of the statute would not have been attacked had there been any question of its constitutionality. The fact that no proceeding prior to the present one has ever been brought be-

fore this or any of the appellate courts of this state in which the constitutionality of this provision of the statute has been questioned is most convincing proof that the profession as a whole has regarded its validity unassailable."

[13] Stronger and even more convincing proof may be found in the legal history of section 536. Its provisions relating to telegraph companies have been in existence since 1872, and those applying to telephone companies have been in effect since 1905. The constitutionality of the section has been impliedly upheld by many decisions of this court, and in the few instances where a direct challenge has been made it has withstood the attack. These decisions have been acquiesced in and acted upon for more than forty years and have become something akin to a rule of property which should not be disturbed in the absence of the most compelling and cogent reasons. We find no such reasons here.

The judgment is affirmed.

SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

CARTER, Justice.

I dissent.

By permitting section 536 of the Civil Code and the Broughton Act to stand side by side, the majority opinion in effect affirms the holding in *Inyo County v. Hess*, 53 Cal.App. 415, 200 P. 373, that the two statutes have the effect of giving to telephone and telegraph corporations the right to erect and maintain lines along public highways and streets free of any burden whatsoever while every other person or association must comply with a number of regulations and pay money for the same right. Thus the majority perpetrates the type of special privilege conferred upon corporations which is reminiscent of the decade when this legislation was adopted.

In my opinion, this results in a violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution. While it is clear that the equal protection clause does not prevent a state Leg-

islature from enacting statutes which contain a "reasonable classification," it is equally clear that it does prevent the states from enacting laws which create unreasonable discrimination. The majority opinion asserts that the differentiation here involved is a "reasonable classification." To support this argument, eight cases are cited. *Goddard v. Chicago & N. W. Ry. Co.*, 202, Ill. 362, 66 N.E. 1066; *Noble State Bank v. Haskell*, 219 U.S. 104, 31 S.Ct. 186, 55 L. Ed. 112, 32 L.R.A., N.S., 1062, Ann.Cas.1912 A, 487; *Shallenberger v. First State Bank*, 219 U.S. 114, 31 S.Ct. 189, 55 L.Ed. 117; *Engle v. O'Malley*, 219 U.S. 128, 31 S.Ct. 190, 55 L.Ed. 128; *Dillingham v. McLaughlin*, 264 U.S. 370, 44 S.Ct. 362, 68 L.Ed. 742; *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189; *Commonwealth v. Vrooman*, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am.St.Rep. 603; *Brady v. Mattern*, 125 Iowa, 158, 100 N.W. 358, 106 Am.St.Rep. 291.

All eight of these cases involved statutes making distinctions between classes of the public. In all eight of the cases, the statutes were upheld as not violative of the constitution. But the basis of the holdings in seven of the eight cases was that the statutes constituted an exercise of the police power, so-called. This power of the states to make regulations which, while they abridge the rights of some of the citizens, are nevertheless necessary and justified in the interest of the general public, can be invoked only in cases where there is a danger to the general public. A classification may be validly made when it has a reasonable tendency to combat a specific evil. " * * * [T]o justify the imposition of a burden, there must be some connection of causation or responsibility between the person selected or the right impaired and the danger to the public welfare or the public burden which is sought to be avoided or relieved." (Freund, *Police Power*, 635.) This element of public danger was present in seven of the cases mentioned. In *Noble State Bank v. Haskell*, 219 U.S. 104, 31 S. Ct. 186, 189, 55 L.Ed. 112, 32 L.R.A., N.S., 1062, Ann.Cas.1912A, 487, the issue was whether anyone desiring to engage in the business of banking could be required to

form a corporation, submit to certain inspections and contribute to an insurance or guaranty fund. The evil which this regulation was designed to check was the frequent failure of individuals engaged in the banking business to meet their obligations, and the resulting insecurity of commercial paper, especially checks. The Supreme Court of the United States said: "When the * * * legislature declares * * * that incorporation, inspection, and the above-described co-operation are *necessary safeguards*, this court certainly cannot say that it is wrong." *Noble State Bank v. Haskell*, *supra*. [Emphasis added.] *Shallenberger v. First State Bank*, 219 U.S. 114, 31 S.Ct. 189, 55 L.Ed. 117, involved practically the same situation and is based on the same reasons as the *Noble State Bank* case. *Engel v. O'Malley*, 219 U.S. 128, 31 S.Ct. 190, 55 L.Ed. 128, and *Dillingham v. McLaughlin*, 264 U.S. 370, 44 S.Ct. 362, 68 L.Ed. 742, both involved control of a type of business apparently common to New York during the years of heavy immigration. There, individuals would act as depositaries of small savings deposits made by recent immigrants. A substantial number of these depositaries seems to have absconded with the money so deposited and, of course, the low-income, unsophisticated depositors were nearly helpless. To eliminate this danger and still enable this particular group of depositors to make their small deposits, various statutory enactments were passed which subjected these individual depositaries to rather strict regulations but exempted from the operation of the regulations banks duly incorporated. Failure on the part of the depositaries to comply with the regulations, such as putting up a bond and submitting to inspections, was made a misdemeanor. Statutes of this type were therefore obviously designed to check an evil and if any further test be needed, the criminal character of the statute is the best indication that the protection of the public was at its basis. In *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189, a statute imposing a number of regulations on insurance companies was attacked on the ground that it expressly exempted farmers' cooperative insurance associations from its

regulations. The provisions of the statute were regulatory only and it was held that the classification was entirely reasonable because the members of a cooperative farmers' insurance association are in a far better position to police their own organization than members of the public who deal with unincorporated and unregulated insurers.

The next two cases cited are not binding on this Court because they were decided by state courts. But they are equally based on the principle of protection of the public so that they are not only not binding but also inapplicable. *Commonwealth v. Vrooman*, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am.St.Rep. 603, was a criminal prosecution under a statute making it a misdemeanor for any person other than a corporation to engage in the insurance business. The decision upholding the distinction is based on the police power and the need of the public for protection. *Brady v. Mattern*, 125, Iowa 158, 100 N.W. 358, 106 Am.St. Rep. 291, was a petition for a writ of habeas corpus by a contractor who had been arrested after violating a statute which placed rather stringent controls on individual contractors and required them to put up bonds but exempted corporate contractors and building and loan associations from such controls. The petitioner attacked the constitutionality of the discrimination and the court based its refusal to grant the writ on the fact that the protection necessary to safeguard the public made the classification reasonable.

In the case at bar, there is no pretense that the discrimination is in any way designed to protect the general public from the risks involved if it is permitted to deal with unincorporated telephone and telegraph operators. The absence of this element renders section 536 of the Civil Code unconstitutional. It makes a distinction between private persons and partnerships on one side and telephone and telegraph corporations on the other. This distinction would result in a reasonable classification if public welfare were at all involved. Since public welfare is not involved, the distinction results in a discrimination prohibited by the equal protection clause of the Fourteenth Amendment.

The one case cited in the majority opinion which has not been dealt with does seem to state the rule that the policies behind legislation are not open to inquiry by the courts. *Goddard v. Chicago & N. W. Ry. Co.*, 202 Ill. 362, 66 N.E. 1066, 1067. In that case the argument was made that legislation which permitted a county board to issue permits for the construction of railroads to corporations only was in violation of the state and the federal constitutions. The court brushed this argument aside, saying: "The Legislature had power to limit the authority of the county board to grant a license to incorporated companies created * * * for the purpose of constructing and operating street railways, and it is not material what reason existed for prescribing the limit. It was a case for the exercise of the legislative judgment, with which we are not concerned." *Goddard v. Chicago & N. W. Ry. Co.*, *supra*. It is submitted that the court was clearly wrong in stating this flat rule. The moment a classification or discrimination is created, the question of whether it shall stand or fall is very much the concern of the courts. It is simply not true that the Legislature can exercise unlimited discretion when it creates such classifications. The majority opinion recognizes this and correctly states the rule that discriminatory legislation must fall unless reasonable and non-arbitrary. The *Goddard* case, in failing to recognize this rule, would therefore fall even under the view taken by the majority. Besides, being a state case it is not binding here and its persuasive force is dissipated by the case of *Frost v. Corporation Commission*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483, which controls the *Goddard* case as well as the case at bar.

The *Frost* case, *supra*, shows that the result reached by the majority is wrong. The distinction created by section 536, the Broughton Act and the decision in this case is not a reasonable classification: It is an unreasonable discrimination. The present case falls clearly within the rule of the *Frost* case as it is much stronger on the facts. In the *Frost* case, a statute required persons and non-agricultural corporations who wished to engage in the ginning of cotton to make a showing of public necessity

as a condition precedent to their being able to obtain a license. Cooperative associations were exempt from this requirement. Under the general laws of the state involved, a cooperative association was free to sell its services to the public and make a profit out of such dealings. The court held that the distinction created an unreasonable classification. "* * * the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, * * * it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences, having reasonable relation to the subject dealt with by the legislation." *Frost v. Corporation Commission*, *supra*, 278 U.S. at page 524, 49 S.Ct. at page 239.

In the case at bar, mere enumeration of some of the requirements set forth in the Broughton Act will show that a greater burden results in this case than that of showing a public necessity in the *Frost* case. Under the Broughton Act, a bidder for a franchise must—unless he is a telephone or telegraph corporation—submit sealed bids, must make immediate payment of a substantial sum if the franchise is struck off to him at the auction, must make an additional large payment within 24 hours, and must pay a tax of 2% on the gross receipts every year. There are other provisions, but those set forth show sufficiently the great disparity created between the privileges enjoyed by corporations under section 536 and those enjoyed by individuals and associations under the Broughton Act.

This classification is unreasonable and discriminatory because nothing is gained through it by anyone including the state, except the corporations which are exempt from the burdens of the Broughton Act. Operators other than those favored few are evidently just as acceptable to the Legislature, provided they pay for the privilege given free to those favored few. Just as in *Frost v. Corporation Commission*, su-

pra, both are engaged in exactly the same type of business, for the same purpose. Both would be public utilities. It is obvious, therefore, that no consideration of public welfare could have been in the back of the legislators' minds. No real reason for the classification is shown. The majority opinion indulges in conjecture as to what some of these reasons might have been. That, however, is not a proper solution. The Supreme Court of the United States has laid down the rule that the reasons for the classification must be apparent in order for it to have any chance of being sustained: "To assume that some unnamed public interest exists, which will sustain the discrimination, does not help the matter here; because the assumption can rest only upon surmise, with nothing concrete or explicit appearing to support it or to indicate a legislative intent to relate the exemption to any public purpose." *Colgate v. Harvey*, 296 U.S. 404, 425, 56 S.Ct. 252, 256, 80 L.Ed. 299, 102 A.L.R. 54. The last cited case involved income tax legislation under which income from investments within the state was favored over that derived from out-of-state investments. The state courts held that such a statute "might" have the purpose of encouraging investments within the state. The Supreme Court answered that contention in the words quoted supra. The suppositions made by the majority opinion in the case at bar are open to the same criticism.

Two more points are raised which purportedly lend support to the holding of the majority: One, that the question of constitutionality of these statutes has been before this court and has been decided and that therefore the classification and the subsequent reliance thereon became tantamount to a rule of property which this court should not disturb except for compelling reasons. Literally speaking, the statement that the constitutionality of the combined effect of these statutes has been before the Court is true. The statement, however, contains an ambiguous term: "Constitutionality". If this word can be construed to include the state constitution alone, the statement would be correct. *Western Union Tel. Co. v. Hopkins* and its companion cases, 160 Cal. 106 ff, 116 P. 557, did pass on

the question whether the California Constitution was violated. But the court expressly recognized that nothing more than one single section of the California Constitution had been raised by counsel. The court found that that section had not been violated (sec. 11, Art. I), and discussed one other aspect of the case under the California Constitution. The federal constitution was not mentioned. How a holding of this kind can result in a "rule of property" is very difficult to conceive. The federal question is before this Court for the first time in this case. There is no reason why it should not be squarely met.

The other contention is that no "compelling and cogent reasons" exist in this case for a change of the status of telephone and telegraph corporations under what they conceived the law to be. I believe that such reasons do exist. Under the majority holding the counties will receive no revenue out of franchises operated by telephone or telegraph corporations. In order to meet the requirements of the various budgets involved, the tax rate in those counties is therefore correspondingly higher than it would be if these corporations were subjected to the same duty to pay now resting on the balance of the operators. By subjecting telephone and telegraph corporations to the terms of the Broughton Act and by requiring them to make the payments called for by the act, the revenue of the counties will increase and the tax rate will decrease correspondingly. The result will be a higher operating cost for telephone and telegraph corporations. But, contrary to the contention made by these corporations, this will not have any "disastrous effects" on them. They are given the means of obtaining permission to charge higher rates (*Deering's Gen.Laws, Act 6386, sec. 61 ff.*) and will not, as they seem to contend, be driven into bankruptcy. The higher rates which telephone and telegraph corporations may then charge for their services will place the burden of paying for the use of public streets and highways where it belongs: On the subscribers to telephone and telegraph services rather than the taxpayers at large. That, in my opinion, is a reason sufficiently cogent and compelling to make a change, even if a

settled situation had existed up to now. Mere lapse of time will never breathe the breath of life into a statute void for unconstitutionality, and the attempt to uphold the statute on this ground evinces a fatal weakness in the basic concept upon which the majority opinion is predicated.

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States has been given renewed vigor by several recent decisions of the Supreme Court of the United States, and in view of this trend I do not anticipate that that Court will depart from its pronouncement in the Frost case which is in clear conflict with the holding of the majority in the case at bar.

It is, therefore, my opinion that the judgment should be reversed.

Rehearing denied; CARTER, J., dissenting.



32 Cal.2d 330

McFADDEN v. JORDAN.

No. S. F. 17775.

Supreme Court of California, in Bank.

Aug. 3, 1948.

1. Mandamus ⇨74(2)

Mandamus would be granted to prevent Secretary of State from submitting to voters a proposed initiative amendment to state Constitution which amounted substantially to revision rather than amendment of the Constitution. Const. art. 4, § 1; art. 18, § 2.

2. Constitutional law ⇨9(1)

Courts are zealous to preserve the right of initiative to the fullest tenable measure of spirit as well as letter. Const. art. 4, § 1.

3. Constitutional law ⇨9(1)

All doubt as to construction of pertinent provisions is to be resolved in favor of the initiative, and such legislation is to be given the same liberal construction as that afforded election statutes generally, but the interpretation must be reasonable and

courts must accept that intended by framers of the legislation so far as its intention can be ascertained. Const. art. 4, § 2.

4. Constitutional law ⇨8, 9(1)

A purported amendment to state Constitution, denominated "California Bill of Rights", comprising in a single new article of some 208 sub-sections, which would repeal or substantially alter at least 15 of the 25 articles of present Constitution and add at least four new topics, and which would effect greater changes than 1879 revision of constitution by greatly curtailing legislative and judicial functions especially in creation of Pension Commission having broad powers free from usual checks and balances, and which would create large scale pension system, legalize gaming, completely revise taxation system, provide for compensation of volunteer workers in political campaign, and reduce powers of cities, counties and courts, in addition to covering such diverse matters as ministers, mines, civic centers, fish, oleomargarine, liquor control and naturopaths, could not be submitted to electors as an "amendment" but was a "revision" which must be proposed by convention. Const. art. 4, § 1; art. 18, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Amendment" and "Revision".

5. Constitutional law ⇨9(1)

The initiative power applies only to proposing and adopting or rejecting of laws and amendments to Constitution, and does not extend to a constitutional revision. Const. art. 4, § 1; art. 18, § 2.

6. Constitutional law ⇨5

A constitutional amendment must be understood to have been drafted in the light of Supreme Court decision rendered long before it was adopted. Const. art. 4, § 1.

7. Constitutional law ⇨8, 9(1)

In determining whether proposed change of constitution is an "amendment" which may be submitted by initiative or a "revision" which must be proposed by convention, each situation must be resolved upon its own facts and change is not a

mere amendment whenever less than all sections of constitution are altered. Const. art. 4, § 1; art. 18, § 2.

8. Constitutional law ☞5

"Amendment" and "revision" of constitution are separate procedures each having a substantial field of application, not mere alternative procedures in the same field. Const. art. 4, § 1; art. 18, § 2.

9. Pleading ☞362(1)

Motion to strike portions of petition for writ of mandate would be denied where such portions did not affect grounds of court's conclusion allowing the writ and hence did not prejudice intervenors.

Petition by Arthur James McFadden against Frank M. Jordan, as Secretary of State of the State of California, for writ of mandate directing respondent not to submit a purported initiative amendment to the state Constitution, wherein proponents of the amendment intervened.

Peremptory writ issued.

Landels & Weigel, Stanley A. Weigel, Edward D. Landels, Tobriner & Lazarus, and Mathew O. Tobriner, all of San Francisco, and Samuel D. Thurman, Jr., Stanford University, for petitioner.

Lawrence W. Allen, of Los Angeles, Paul F. Fratessa, of San Francisco, William S. Sparks, Kenny & Cohn, Robert W. Kenny and Morris E. Cohn, all of Los Angeles, A. Brooks Berlin, of San Francisco, and Max Radin, of Berkeley, for intervenors.

Fred N. Howser, Atty. Gen., J. Francis O'Shea, Asst. Atty. Gen., and Leonard M. Friedman, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] Petitioner asks that this court by writ of mandate direct respondent Secretary of State of California not to submit to the electors, at the general election to be held on November 2, 1948, a "purported initiative amendment" to the state Constitution and "not to certify it to the Registrars of Voters and County Clerks in the

State, and * * * to desist from any act in aid of the submission of said purported initiative amendment to the electors." Since the issuance of the alternative writ the proponents of the measure, as intervenors, have filed, as in the nature of a return, a general demurrer, motion to strike, and an answer to the petition, and the Attorney General, on behalf of respondent, has filed, by way of a return, a demurrer and answer. As will appear from the text which follows, the issues raised by the answers and by the motion to strike are immaterial in relation to the ground of our decision, and, hence, are not discussed in detail. From an examination of the proposed measure, itself, considered in relation to the terms of our Constitution as now cast, we find it clear beyond question that, as urged by petitioner, the proposed initiative enactment amounts substantially to an attempted revision, rather than amendment, of our state Constitution; and that inasmuch as the Constitution specifies (Art. XVIII, § 2) that it may be revised by means of a constitutional convention but does not provide for revision by initiative measure, the writ must be granted.

[2-4] The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter. As said in *Gage v. Jordan*, (1944), 23 Cal.2d 794, 799, 147 P.2d 387, 390, "All doubt as to the construction of pertinent provisions is to be resolved in favor of the initiative and such legislation is to be given the same liberal construction as that afforded election statutes generally [citations]. However, the interpretation adopted must be reasonable and * * * it is the duty of the courts to accept that intended by the framers of the legislation, so far as its intention can be ascertained." The conclusion we have reached—that the proposed measure is revisory rather than amendatory in nature and that as such it is barred from the initiative upon any legally permissible construction of the pertinent constitutional provisions—is overwhelmingly impelled by the far reaching and multifarious substance of the measure itself and by

the terms of the present constitutional provisions relative to the initiative and to amendment and revision of the Constitution, which provisions are not only clear in themselves but have heretofore in controlling aspects been the subject of scrutiny and exposition by this court.

The only method provided in the Constitution by which it can be revised is set forth in section 2 of article XVIII. That section requires (1) a vote of two-thirds of the Legislature to recommend that the electors vote "for or against a Convention for that purpose"; (2) a vote in favor of such a convention, by a majority of the electors voting; (3) the calling of such a convention and the election by the people of delegates thereto; (4) the adoption by the convention of a proposed constitution; (5) ratification by the people of such constitution.

In *Livermore v. Waite* (1894), 102 Cal. 113, 117-119, 36 P. 424, 425, 25 L.R.A. 312, this court declared, "Article 18 of the constitution provides two methods by which changes may be effected in that instrument,—one by a convention of delegates chosen by the people for the express purpose of revising the entire instrument, and the other through the adoption by the people of propositions for specific amendments that have been previously submitted to it by two-thirds of the members of each branch of the legislature. [The provision for amendment by initiative was added in 1911, article IV, section 1.] It can be neither revised nor amended, except in the manner prescribed by itself, and the power which it has conferred upon the legislature in reference to proposed amendments, as well as to calling a convention, must be strictly pursued. Under the first of these methods the entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constitution of the United States. If, upon its submission to the people, it is adopted, it becomes the measure of authority for all the departments of government,—the organic law of the state,—to which every citizen must yield an acquiescent

obedience. * * * The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment * * * The constitution itself has been framed by delegates chosen by the people for that express purpose, and has been afterwards ratified by a vote of the people, at a special election held for that purpose; and the provision in article 18 that it can be revised only in the same manner, and after the people have had an opportunity to express their will in reference thereto, precludes the idea that it was the intention of the people, by the provision for amendments authorized in the first section of this article, to afford the means of effecting the same result which in the next section has been guarded with so much care and precision. The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicated the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (See also 5 Cal.Jur. 559-560, § 11; 16 C.J.S., Constitutional Law, § 7, Page 30-31, § 7; 11 Am.Jur. 629, § 25.)

[5, 6] The initiative power reserved by the people by amendment to the Constitution in 1911 (art. IV, § 1) applies only to the proposing and the adopting or rejecting of "laws and amendments to the Constitution" and does not purport to extend to a constitutional revision. That amendment was framed and adopted long after the decision in *Livermore v. Waite* (1894), supra, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312. By well established law it is to be understood to have been drafted in the light of the *Livermore* decision. (See 50 Am. Jur. 312, 313, §§ 321, 322.) As said in *Estate of Moffitt* (1908), 153 Cal. 359, 361, 95 P. 653, 654, 1025, 20 L.R.A., N.S., 207,

"[A] familiar and fundamental rule for the interpretation of a legislative statute is that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it." (See also, to the same effect, *In re Halcomb* (1942), 21 Cal.2d 126, 129, 130 P.2d 384, and cases there cited.) It is thus clear that a revision of the Constitution may be accomplished only through ratification by the people of a revised constitution proposed by a convention called for that purpose as outlined hereinabove. Consequently if the scope of the proposed initiative measure (hereinafter termed "the measure") now before us is so broad that if such measure became law a substantial revision of our present state Constitution would be effected, then the measure may not properly be submitted to the electorate until and unless it is first agreed upon by a constitutional convention, and the writ sought by petitioner should issue. (See *Livermore v. Waite* (1894), supra, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312.) Mandamus is a proper remedy. (*Gage v. Jordan*, (1944), supra, 23 Cal.2d 794, 800, 147 P.2d 387, and cases there cited.)

The measure proposes to add to our present Constitution "a new Article to be numbered Article XXXII thereof" and to consist of twelve separate sections (actually in the nature of separate articles) divided into some two hundred and eight subsections (actually in the nature of sections) set forth in more than twenty-one thousand words. The Constitution as now cast, with the amendments added since its original adoption is revised in 1879, contains twenty-five articles divided into some three hundred forty-seven sections expressed in approximately fifty-five thousand words. The provisions of the proposed measure may be summarized as follows:

Section 1 of the measure is entitled "Principles And Policy" and is divided into nine subsections. It states that "This article may be cited as the 'California Bill of Rights.'" It also contains declarations of various ethical, economic and governmental concepts and philosophies.

Section II is entitled "The California Pension Commission" and is divided into

eighteen subsections. It provides for the creation of a California Pension Commission of five members with terms of six years. The names and addresses of the persons who are to be the "first five commissioners" are explicitly set forth. Subsequent commissioners are to be elected and to be subject to recall. Commissioners are specifically declared to be "eligible for re-election." Each commissioner is to receive a salary of \$15,000 a year, plus travel expenses. Provision is made for appointment of a secretary to the commission and he is given certain duties and powers. The commission is authorized to appoint and to dismiss at pleasure other employes, and to establish offices; and it is directed to create and "continuously maintain, a pension and disability fund" which is to be used for the sole purpose of "pension payments, disability payments, salary or other payments that are, by this article, directed to be paid by the commission." The "books and accounts of the commission" are to be audited "without prior notice, four times each year" by a "person or state department" to be named by the governor.

Section III of the measure is entitled "Retirement Pension Payments" and contains thirty subsections. It directs that the pension commission shall from time to time fix a retirement age so that "of those citizens whose age is greater than the age so fixed, sufficient numbers may choose to qualify for pension payments, by retiring from the pursuit of gain, to the end that not more than five per cent of those persons over age 18 and below the pension age shall be involuntarily without gainful employment." Citizens over the pension or retirement age are to be Group "A"; those who are eighteen or more years of age and who are disabled and "permanently disqualified for normal gainful employment" are to be Group "B"; widows with children under eighteen are to be Group "C"; all other citizens eighteen years of age or over are to be Group "D." The commission is to pay to each person in the first three groups who has resided in this state for the immediately preceding ten years and who promises not to be employed for remuneration "in the production of goods or services for sale or for hire," a pension

of not less than \$100 a month through June, 1952, and of not less than \$130 a month thereafter. Group "D" citizens are to be paid by the commission not less than \$30 a week during temporary disability "for normal employment." If prices increase, the commission is to increase pension and disability payments proportionately. No part of any pension or disability payment is to be used "to support an able-bodied person in idleness except a recipient's spouse." The payments are to be exempt from attachment. Employment for gain disqualifies a pension recipient, but other income does not. The measure is not to "be construed to repeal or abrogate the provisions of" the present "old age security law of the welfare and institution code"; it makes no specific declaration as to whether it is intended that the provisions for payments to persons "permanently disqualified for normal gainful employment" and those who are suffering temporarily disability "for normal employment" shall affect the workmen's compensation "complete system" authorized by section 21, article XX, of the Constitution. Indians residing in this state are to receive the pension and disability payments and "shall be, entitled to qualify as electors of this state under the same conditions as other citizens." Ministers and other persons engaged solely in religious or charitable work "who shall have no other gainful occupation" are to receive the same pension as Group "A" persons, as also are teachers who have "served not less than 25 years in * * * accredited schools in this state." On the death of a pension recipient funeral expense of \$200 is to be paid to the mortuary of his choice. Each year any surplus in the pension fund may, if the commission wishes, be transferred into the "general fund of the state treasury"; deficits in the pension fund are to be made up out of the state's general fund. However, if a deficit exists "prior to the general election to be held in 1950 or prior to subsequent general elections," then the commission is "to place on the ballot, at the next succeeding general election, a proposed amendment

to this article which shall either provide the additional funds" to meet all payments required of the commission "without appropriations from the general fund, without assessing new taxes and without increasing the general taxes or the general tax rates, or else which shall provide for the issuance, by the state, of negotiable, self-liquidating, non-interest bearing bonds in sufficient amounts" to make up the deficit.

Section IV of the measure contains fifty subsections and is entitled "Wagering And Gaming." It gives to the pension commission jurisdiction to license for operation in this state and to supervise various types of gaming, wagering and lotteries, including horse racing. The licensees are to pay to the commission as "pension money" to be placed in the pension and disability fund, certain specified fees and also specified percentages of the receipts of the licensed operations.

Section V of the measure is entitled "Taxes" and contains sixteen subsections. It levies against "each person, firm, co-partnership or corporation residing or doing business in this state, except as otherwise provided by this article, a uniform tax, which shall consist of \$2 of each \$100 of the gross sums of money or values received by them in the course of business, trade, the practice of any profession, service or employment"; it appears that such language contemplates that the tax shall be collected on interstate and foreign as well as intrastate transactions.¹ Except as provided in the measure, such tax is to "be the only tax, license fee, or other fee that shall be levied or collected by the state, or by any political subdivision of the state, or by any county, city and county, city, or district," and no other tax "or license fee" is to be "levied against any home, or other real estate, or personal property or business enterprise" in the state. The gross receipts tax, sometimes in the proposed measure termed a gross income tax is to be administered and collected by the state board of equalization and is not to be used for pension and disability payments unless

¹ Such state levy upon receipts from interstate and foreign transactions, it is asserted on behalf of petitioner, is void

as in contravention of the United States Constitution. For reasons hereinafter stated we do not reach this question.

the fund provided for such payments "shall be temporarily insufficient." The tax is to be paid monthly to the respective county tax collectors and by them transferred to the state treasurer, and the "gift income" of charitable, religious, and certain other organizations is exempted. Penalties are imposed for nonpayment by taxpayers and for fraudulent returns. The proceeds of the tax are to be applied, first, to the support of "the public school system and the state university." The use to be made of the balance, if any, of the tax monies is not made clear, although it may be supposed that the budgets of the state and of its political subdivisions, insofar as they are not limited by other provisions of the measure hereinafter noticed, are intended to be met therefrom. Provision is made for the preparation of such budgets and for public scrutiny thereof, and it is declared that "No tax budget for the state or for any political subdivision of the state shall be for a sum greater than the corresponding budget for the year 1947," except upon a majority vote of the electorate.

Section VI is entitled "Oleomargarine," and contains only one subsection. It provides that oleomargarine, whether colored or not, may be sold and served in this state without a license and without the payment of a tax or fee.

Section VII, entitled "Pertaining To The Healing Arts," is set out in fifty-three subsections. It first creates the "California State Board of Naturopathic Examiners" and then states that "Except that all of the forms and branches of the healing arts or sciences that were entitled to be licensed under the law as it stood at the last day of December 1947 shall continue to be * * * under the jurisdiction and supervision of the issuing board, the jurisdiction and supervision over all persons having to do with teaching, practicing, conducting, applying or carrying on for hire, any form or branch, or any philosophy or technique of the healing arts, sciences, treatments, practices, applications, appliances and devices as now evolved or that may be evolved including preparations for, the making of, and the fitting of podoprosthetics, othontoprosthetics, other prosthetic or mechanical restorations, replace-

ments or devices intended as replacements, restorations or as health aids or supplements to the healing arts is vested in the state board of naturopathic examiners; provided except; any form of license issued by any other licensing board for the teaching, practicing or carrying on of any form or branch of the healing arts or sciences may likewise be issued by the state board of naturopathic examiners, and all licenses shall be under the sole jurisdiction and supervision of the issuing board." The board is to consist of "five examiners whose terms of office shall be five years" and whose compensation is provided, and the names and addresses of the persons who are to be the "first five examiners" are specifically listed. Subsequent examiners must hold the degree of "Doctor of Naturopathy" and are to be elected to the board by certain of the board's licensees. "Each examiner shall be eligible for reelection." The Attorney General is to be the board's legal adviser. The board is given broad power to supervise, regulate and discipline its licensees, and to employ and to dismiss at pleasure such "persons as may be necessary." Licensees and applicants for a license are to pay certain specified fees to the board. Fees and other money received by the board are to be used only for purposes authorized by the board. The board may also "determine what shall constitute an approved course of primary education and training, an approved college of naturopathy, or an approved course of study in any form or branch of the healing arts contemplated by this section." A naturopathic hospital or sanitarium may operate only with board approval. Licensees holding "major" or "special major" licenses from the board are to "have and be accorded at all times and in all circumstances the same and every right, prerogative and privilege accorded to physicians and/or surgeons licensed otherwise than by the board." The section provides, finally, that "No absence of a pupil from school for the purpose of having dental services rendered or for the purpose of receiving health treatments under the direction of any physician, doctor or practitioner of any recognized form of healing shall, by any educational or school

authority, be deemed an absence in computing average daily attendance."

Section VIII is entitled "Civic Centers" and contains five subsections. It declares that "There is a civic center at each and every public school building and grounds within the state," and grants to "Every non-profit, non-sectarian organization, club or association of electors of the state, formed for political, economic, educational, or moral activities," the right, "without the payment of any charge or fee," to use any "public school civic center" as a place of assembly and free discussion.²

Section IX contains three subsections and is entitled "Legislature, Elections, Committees." Subsection (1) provides for a reapportionment of the senate of this state. Subsection (2) prohibits cross filing at primary elections, provides that the legislature shall enact certain laws concerning primary elections, and specifically repeals present section 2½ of article II of the state Constitution. Subsection (3) has to do with the choosing of committees of the legislature.

Section X is entitled "Fish, Game, Public Lands and Waters," and contains five subsections. It sets out certain regulations of public lands and inland waters of the state, and bestows various powers and duties upon the Fish and Game Commission.

Section XI, entitled, "Surface Mining," is divided into nine subsections. It provides for the regulation of certain types of surface mining in this state, for the issuance of permits to operate, and for penalties for violation of the regulations.

Section XII completes the measure, is entitled "General," and contains nine subsections. Subsection (1) provides that the "state printer shall engrave, lithograph or print all printing" required under the measure, except that the pension commission may do its own printing, etc. Subsection (2) provides for submission to the electo-

rate of any "proposed amendment to this article, prepared by" the pension commission. Subsection (3) permits the reimbursement of a "volunteer worker in a political campaign" for expenses incurred; the source of reimbursement is not stated. Subsection (4) provides that "No injunction or writ of mandate, or other legal equitable process, shall ever issue or be maintained to interfere with the effectiveness or operation of this article, or to prevent or enjoin any provision of this article from going into effect or to prevent or seek to prevent the California Pension Commission from submitting to the electorate proposed amendments to this article in the manner herein set forth." Subsection (5) declares that "This article is self-executing," and prohibits the legislature from adopting any "legislation which, in even the slightest degree, limits or restricts" the provisions "of this article" or "purporting to facilitate" its operation. Subsection (6) provides that "in the event that in any action or proceeding * * * before any court of competent jurisdiction in the state * * *, there occurs, or is rendered, any decision or order which adversely, or at all, either affects this article or the administration thereof or affects the submission, by the pension commission, of any proposed amendment to this article, such decision or order shall have no effect until it shall have been" approved by the majority vote of the electorate. Subsection (7) repeals any portion of the present Constitution which "is in conflict with any of the provisions of this article." Subsection (8) defines various words used in the measure. Subsection (9) consists of severability clauses.

As previously mentioned the Constitution as now cast contains twenty-five articles divided into three hundred forty-seven sections. It is apparent that in mechanical composition the sections of the proposed measure correspond to articles of the Constitution and subsections of the measure to

² One of the attacks made upon the measure, which we have found unnecessary to discuss as a separate ground, is the claim that its self-styled title "California Bill of Rights," printed in large type on the initiative petitions, is misleading and in effect, a fraud upon the electorate, because of the widely hetero-

geneous subjects encompassed by the measure. It is to be noted that only this section (Section VIII) and section X, hereinafter summarized, do appear to relate to matters touched upon in the present constitutional "Declaration of Rights" as set forth in article I.

sections of the Constitution. Comparison of the provisions of the measure with those of our present Constitution indicates that the measure will, or under conceivable circumstances may, affect at least the following articles and sections of, and will add at least the following new subjects to, the present Constitution, all as respectively indicated:

1. Article I of our present Constitution is entitled "Declaration of Rights." Inasmuch as the measure (section I) declares that "This article may be cited as 'California Bill of Rights'" a misleading and confusing conflict in terminology of titles and related subject matter appears at the outset.

2. To what extent, if any, the present Declaration of Rights might be affected by the proposed blanket repeal of any portion of the present Constitution which "is in conflict with any of the provisions of" the new measure we do not now undertake to determine. Section 25 of article I, however, which has to do with public fishing rights in state public lands and waters, would appear to be at least enlarged upon by section X of the measure, which also treats of "Fish, Game, Public Lands and Waters"; section VIII of the measure also relates to, although it may not substantially alter, the rights declared in sections 9 (Liberty of Speech and of the Press) and 10 (Right to Assemble and to Petition) of article I.

3. Article II of the Constitution, which treats of the right of suffrage, is affected in at least two respects:

A. By the provision of section III of the measure that Indians "shall be entitled to qualify as electors."

B. By those provisions of section IX of the measure which regulate primary elections and expressly repeal section 2½ of article II.

4. Article III, which declares the distribution of the powers of government of this state into three separate departments—the legislative, the executive, and the judicial—will be affected in that the provisions of subsections (4) and (6) of section XII of the measure would limit judicial powers as they might "at all * * * affect" the

article or the "administration thereof" by the commissioners; such commissioners are given executive power (see section 8, also sections 6 and 7, article V, Constitution) to fill vacancies on their own board "for the unexpired term" (subsection (6) of section II); and the commission is given legislative power (see section 1, article XVIII and section 1, article IV, Constitution) to prepare "Any proposed amendment to this article" and "Any proposed amendment to this article, prepared by the California Pension Commission shall be submitted, by the Secretary of State, to the people at the first general election occurring subsequent to 130 days after an official announcement by said commission of the necessity for such amendments." In view of the broadly heterogeneous subjects covered by the article the scope of the proposed "amendments" which the commission could prepare and put to a vote appears almost, if not entirely, unlimited; and "volunteer workers" in behalf of such measures (or the election or reelection of commissioners, examiners, or apparently, any candidate approved by the commissioners for any political office) could be reimbursed for their expenses. (Section XII, subsection (3).)

5. Article IV of the Constitution deals with the state's legislative department. At least the following of its provisions will be affected, if not in some instances totally repealed, by the measure:

A. The initiative provisions of sections 1 and 1b of article IV, by the provisions of the measure (sections III, XII) vesting in the pension commission the power to propose and require a vote upon amendments to the measure, which proposed amendments as above indicated, could apparently cover an almost, if not entirely, unlimited scope in the field of government.

B. The budget and claims provisions of sections 1a and 34 of article IV, by the budget provisions of section V of the measure and by the provisions of section II, subsections (12) to (17) inclusive, giving the commission exclusive powers as to the handling and expenditure of funds.

C. The senate apportionment provisions of section 6 of article IV, by the apportion-

ment provisions of section IX of the measure.

D. The provisions of sections 20 and 21 of article IV to the effect that certain federal officers and also persons convicted of certain crimes shall not hold offices of profit under this state, by the provisions of sections II and VII naming the particular persons who are to be the original members of the pension commission and of the "Board of Naturopathic Examiners," respectively, regardless of whether at any time concerned any of them might be disqualified by any of the provisions of sections 20 and 21 of article IV of the Constitution, and by providing specifically in such sections II and VII, respectively, that "Commissioners" and "Each examiner" "shall be eligible for re-election."

E. The fiscal provisions of the two sections numbered 22 of article IV, and of sections 29, 34, and 34a of the same article, by the fiscal powers given in the measure to the pension commission (section II) and the "Board of Naturopathic Examiners" (section VII).

F. The provisions of section 25a of article IV, dealing with horse racing and betting, by provisions of section IV of the measure treating of the same subject.

G. The provisions of sections 25½ and 25⅔ of article IV which have to do with the Fish and Game Commission, by provisions of section X of the measure dealing with the same commission.

H. The lottery and bucketing provisions of article IV, section 26, by the wagering and gaming provisions of section IV of the measure.

I. The provisions of section 30 of article IV prohibiting public aid for sectarian purposes, by the provisions of section III of the measure which specifically grant pensions to ministers and other persons engaged in religious or charitable work "who shall have no other gainful occupation."

J. Provisions for the payment of retirement pensions, regardless of need therefore, to persons who have reached an age set by the proposed pension commission, and to other persons not presently the recipients of direct financial support from the taxpayers, would substantially affect, and

at least partially repeal, the proscription against the gift of public funds contained in section 31 of article IV, as well as affect section 22 of the same article.

K. Section 37 of article IV, having to do with legislative committees, by provisions of subsection (3) of section IX of the measure, concerning the same committees.

6. Article V of the Constitution treats of the executive department of this state. Sections II and VII of the measure would create a commission and a board which would be charged with carrying out and administering the provisions of the measure completely independent of control by the Governor. The same sections would also relate to his powers of appointment in case of vacancies in a public office, conferred by section 8 of article V. Section VII of the measure would add to the duties of the Attorney General as set forth in section 21 of article V, that of legal adviser to the "Board of Naturopathic Examiners."

7. Article VI of our present Constitution deals with the state's judicial department. As noted hereinabove, the provisions of subsections (4) and (6) of section XII of the measure, would limit materially the functions of the courts of this state and would effect a substantial change in balance of governmental power.

8. Article IX of the Constitution deals with education. Its provisions would be affected by the measure in at least the following respects:

A. By the provisions of section VII of the measure, changing the method of computing average daily attendance at public schools, and consequently the apportionment of school funds. (See section 6 of article IX.)

B. By the provisions of section V of the measure, entitled "Taxes," which in effect repeal the provisions of sections 6 and 6½ of article IX, having to do with school taxes and bonds.

C. By the provisions of section III of the measure, which grant pensions to school teachers.

D. By the provisions of section VIII of the measure, establishing civic centers at public school buildings, and granting rights to use such buildings.

9. Article XI of the Constitution has to do with the government of cities, counties, and towns. As pointed out by petitioner, the measure (Section V, entitled "Taxes") would destroy their power to tax (see section 12, article XI), and would restrict their powers by regulating their budgets and limiting their expenditures (see sections 18, 20 of article XI). Both city and county charters apparently would be abrogated in large measure, if not completely repealed, insofar as they relate to tax measures. (See section XII, subsection (7), hereinafter quoted.)

10. Article XIII dealing with revenue and taxation appears to be in effect entirely repealed by section V of the measure, entitled "Taxes," and by section XII, subsection (7), providing for a blanket repeal of "any section, subsection, sentence, clause or phrase of the constitution" which "is in conflict with any of the provisions of this article."

11. Article XIV of our present Constitution, which has to do with water and water rights, is enlarged by section X of the measure, which also treats of waters.

12. Article XVI deals with state indebtedness. Its provisions are altered by the provisions of section III of the measure for the issuance of bonds to meet deficits in the pension fund and by the taxing and budgeting provisions of section V of the measure.

13. Article XVIII, having to do with amending and revising the Constitution, is altered by the provisions of sections III and XII of the measure, which provide for submitting amendments to the "article" at the pleasure of the pension commission and in whatever form or substance proposed by them.

14. Article XX of the Constitution deals with miscellaneous subjects. Section 22 thereof, which has to do with intoxicating liquors, appears to be affected by certain provisions of section IV of the measure, which treat of the serving of liquor by gambling licensees.

15. Article XXIV of our present Constitution, which has to do with the state civil service system, would be altered by the exclusion from civil service of the assistants and employees of the pension com-

mission and of the "Board of Naturopathic Examiners" proposed to be established under sections II and VII of the measure.

16. The provisions of article XXVI of the Constitution, which deal with motor vehicle taxation and revenues would appear to be repealed in their entirety by the provisions of the "Taxes" section (Section V) of the measure, coupled with the blanket repeal provisions of subsection (7) of section XII.

17. A new subject would be added by the provisions of the measure which concern oleomargarine.

18. A second new subject would be added by the provisions as to the "Board of Naturopathic Examiners" and its functions.

19. A third new constitutional subject (new excepting insofar as it relates to the Declaration of Rights in article I) appears in the provisions establishing civic centers at public school buildings.

20. The provisions concerning surface mining, found in section XI of the measure, would add a fourth new subject to our Constitution.

21. The provisions of section XII of the measure, entitled "General," would add at least a fifth new subject—that of reimbursement of a "volunteer worker in a political campaign" for expenses incurred.

To recapitulate, at least fifteen of the twenty-five articles contained in our present Constitution would be either repealed in their entirety or substantially altered by the measure, a minimum of four (five, if the civic center provision be deemed new) new topics would be treated, and the functions of both the legislative and the judicial branches of our state government would be substantially curtailed.

Our review of the subjects covered by the measure and of its effect on the totality of our plan of government as now constituted does not purport to be exhaustive. It is amply sufficient, however, to demonstrate the wide and diverse range of subject matters proposed to be voted upon, and the revisional effect which it would necessarily have on our basic plan of government. The proposal is offered as a

single amendment but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all. Such an appeal might well be proper in voting on a revised constitution, proposed under the safeguards provided for such a procedure, but it goes beyond the legitimate scope of a single amendatory article. There is in the measure itself no attempt to enumerate the various and many articles and sections of our present Constitution which would be affected, altered, replaced, or repealed. It purports only to add one new article but its framers found it necessary to include the omnibus provision (subdivision (7) of section XII) that "If any section, subsection, sentence, clause or phrase of the constitution is in conflict with any of the provisions of this article, such section, subsection, sentence, clause or phrase is to the extent of such conflict hereby repealed."

Intervenors concede that, "In an initiative which has as broad a purpose as the 'California Bill of Rights,' many sections of the present Constitution are bound to be affected in some measure," but they urge that "The inclusion of several apparently unrelated subjects in a proposed constitutional amendment does not require the use of the method of revision set forth in article XVIII, section 2, of the Constitution to the exclusion of the use of the initiative provisions of the Constitution." To support their argument intervenors rely upon *Wright v. Jordan* (1923), 192 Cal. 704, 711, 221 P. 915; *Epperson v. Jordan* (1938), 12 Cal.2d 61, 68, 69, 82 P.2d 445; and *Brown v. Jordan* (1938), 12 Cal. 2d 75, 77, 78, 82 P.2d 450. But those cases do not undertake to determine that a substantial constitutional revision may be accomplished through the medium of a single initiative amendment. They hold, merely, that the express requirement of section 1

of article XVIII of the Constitution that, in the case of constitutional amendments proposed by the legislature, "Should more amendments than one be submitted at the same election they shall be so prepared and distinguished, by numbers or otherwise, that each can be voted on separately," does not apply to amendments proposed under the initiative process. In none of those cases did the proposed initiative enactment effect such extensive alterations in the basic plan and substance of our present Constitution, or at all approximate in coverage the variety of additional subjects or separate fields of governmental activity, as the measure now before us would encompass; and in none of those cases was the effect of section 2 of article XVIII, dealing with revision of the Constitution, mentioned.

[7,8] Intervenors concede also that "When our Constitution was framed different procedures were provided for amendments and revisions, and therefore some distinction between the two must have been contemplated." Certainly it cannot be solemnly announced as a general rule of thumb that an initiative measure which would affect all the articles of the Constitution would constitute a revision thereof, whereas a measure which would affect all except one (or all, less two-fifths) of the articles would thereby be reduced to the status of an amendment. Yet that is, in substance, the position taken by the intervenors. They urge that if any less than all sections of the Constitution are altered, and if any less than all old sections are discarded, the change is merely an amendment. We cannot accept such an arbitrary and strained minimization of difference between amend and revise. The differentiation required is not merely between two words; more accurately it is between two procedures and between their respective fields of application. Each procedure, if we follow elementary principles of statutory construction, must be understood to have a substantial field of application, not to be (as argued in intervenors' Answering Memorandum) a mere alternative procedure in the same field. Each of the two words, then, must be understood to denote, respectively, not only a pro-

cedure but also a field of application appropriate to its procedure. The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision. We find nothing whatsoever in the language of the initiative amendment of 1911 (Art. IV, § 1) to effect a breaking down of that difference. On the contrary, the distinction appears to be scrupulously preserved by the express declaration in the amendment (particularly in the light of the Livermore case as noted, *supra*) that the power to propose and vote on "amendments to the Constitution" is reserved directly to the people in initiative proceedings, while leaving unmentioned the power and the procedure relative to constitutional revision, which revisional power and procedure, it will be remembered, had already been specifically treated in section 2 of article XVIII. Intervenors' contention—that any change less than a total one is but amendatory—would reduce to the rubble of absurdity the bulwark so carefully erected and preserved. Each situation involving the question of amendment, as contrasted with revision, of the Constitution must, we think, be resolved upon its own facts. A case might, conceivably, be presented where the question would be close and where there would be occasion to undertake to define with nicety the line of demarcation; but we have no such case or occasion here.

The delegation of far reaching and mixed powers to the commission, largely, if not almost entirely in effect, unchecked, places such commission substantially beyond the system of checks and balances which heretofore has characterized our governmental plan. It will be remembered that the measure prescribes no qualifications for holding the office of commissioner, other than that the person "shall have been an elector of this state for two years next preceding his election"; he is, as of absolute right, eligible for re-election; the commission, itself, may fill vacancies for

unexpired terms; it has unlimited powers to propose and submit "amendments" to the "article"; every sentence and clause of our Constitution in conflict with the article is to "the extent of such conflict" repealed; the commission is given practically uncontrolled power over the funds collected, including, apparently, the substantially absolute power to give "reimbursement or compensation for expenses incurred by" a "volunteer worker in a political campaign"; the commission is given power to issue subpoenas and, apparently, to punish for contempt and subject persons "to the same penalties as if such disobedience or false swearing occurred in an action in the superior court." The governor, the legislature, and the courts are made powerless to remove a commissioner for any cause, or directly "to interfere with the effectiveness or operation of this article," apparently as construed by the commissioners; or, without approval by a vote at a general election "subsequent to 130 days after such decision or order shall become final," to enforce "any decision or order" of a court "in any action or proceeding in law or equity" "which adversely, or at all, either affects this article or the administration thereof or affects the submission, by the pension commission, of any proposed amendment to this article." Thus, in litigation anywhere within the vast sweep of the measure (from gamblers to ministers; from mines to civic centers; from fish to oleomargarine; from state courts to city budgets; from liquor control to senate reapportionment; from naturopaths to allopaths; from proposing constitutional amendments to reimbursing political campaign workers; and from taxes to pensions), our heretofore zealously guarded principle of justice equally available through the courts for poor and for rich, for weak and for strong, and for all of every station alike, would be fettered, if not discarded, and justice, in its final attainment, would depend not alone on the justness of the cause, not as of right on the verdict of a jury or on truth or law or equity, but on the political sagacity and acumen, and the financial ability, of the litigant to wage a successful political cam-

paign in defense of the judgment to which the court had found him entitled.

If the proponents of the measure, instead of relying on the guise of an additional article and a blanket repeal of every conflicting portion of the Constitution, had frankly recast the instrument in every detail in which it would be affected by the changes they seek—if they had recast it to accomplish exactly the ends they avowedly seek, neither more nor less—but to attain those ends by actually recasting all the affected sections and separately declaring the actual new articles, so that all the changes would fit in as integral parts of a coherent and consistent whole, then the fact of revision might be more obvious on the surface but it could be no more real in substance. As suggested by counsel for petitioner, one need only compare the changes wrought on the 1849 Constitution by the admittedly revised Constitution of 1879, with the changes sought to be impressed on the latter document by the pending measure, to make it altogether certain not alone that the new measure is revisory but also that the scope and depth and character of its proposed revision are more extensive than in the revision of 1879.

Applying the long established law to any tenable view of the facts which have been related, it is overwhelmingly certain that the measure now before us would constitute a revision of the Constitution rather than an amendment or "such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purposes for which it was framed." (*Livermore v. Waite* (1894), *supra*, 102 Cal. 113, 118-119, 36 P. 424, 25 L.R.A. 312). Indeed, as has been shown in some detail, the effect of adoption of the measure proposed, rather than to "within the lines of the original instrument" constitute "an improvement or better carry out the purpose for which it was framed," would be to substantially alter the purpose and to attain objectives clearly beyond the lines of the Constitution as now cast. Consequently, as is established by the *Livermore* case and by the other authorities cited hereinabove, such a revised Constitution, as a single measure,

may be submitted to the electorate only after it has been "agreed upon" by a constitutional convention called pursuant to the provisions of section 2 of article XVIII of the present Constitution.

It is to be noted that intervenors, in their reply memorandum, urge that the initiative amendment (Calif. Const., Art. IV, § 1) should in some way be construed to "give the people" the power to initiate directly a revision of, as well as amendments to, the Constitution. But intervenors actually do not seek to initiate the constitutional procedure for a revision (see Art. XVIII, § 2) by proposing through the initiative a measure calling a constitutional convention; rather do they seek to by-pass the convention altogether, thus setting up a wholly new and constitutionally unauthorized procedure for revision. They argue that there may be "a frustration of the will of the people by the legislature" through its neglect to call an authorized constitutional convention. It should be obvious to intervenors that if a legislature is not responsive to the will of the people, it lies in the power of the people to replace the members of that legislature. But whatever may be the rights of intervenors here, or of other groups, to initiate proceedings looking toward the end of a constitutional revision through authorized procedure, we are satisfied that the basic method of revision prescribed by article XVIII—revision through a constitutional convention (however called) and a subsequent vote of the people on the proposed revised Constitution—does not purport to be dispensed with, alternatively or otherwise, by section 1 of article IV, reserving the power to propose, and prescribing generally, the procedure for bringing to a vote, "laws and amendments to the Constitution."

[9] Because of our conclusion that the measure proposes a revision rather than an amendment of the Constitution it becomes unnecessary for us to either consider or decide the several other contentions advanced by the petitioner and argued by intervenors or respondent. The motion of intervenors to strike certain portions of the petition is directed at matters which, as previously indicated, do not affect the

ground on which we reach our conclusion; the inclusion of such matters, therefore, does not prejudice intervenors. Neither the answer of the intervenors nor that of respondent raises any issue of fact material to our conclusion. Other contentions advanced by intervenors for the first time in their reply memorandum, insofar as they are not specifically discussed above, are without persuasive force in any application to either the facts or the law which controllingly impel the conclusion we have reached.

The motion to strike is denied and the demurrers are overruled. Let the peremptory writ issue as prayed for.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.



87 Cal.App.2d 222

PEOPLE v. ALBRIGHT.

Cr. 2520.

District Court of Appeal, First District,
Division 1, California.

Aug. 17, 1948.

1. Criminal law ⇨414

In prosecution for transportation and possession of narcotics, where defendant on cross-examination elicited evidence that he was drunk, testimony of arresting officer that though defendant looked drunk he did not stagger like a drunk man, in response to district attorney's question, was admissible to show defendant's physical and mental condition when he made certain statements to the police.

2. Poisons ⇨9

In prosecution for transportation and possession of narcotics, evidence that on being asked what was in suitcase, defendant told police inspector that he had done eighteen months for the same thing that

was in there was admissible to show that defendant was aware of what suitcase contained.

3. Criminal law ⇨1035(3), 1037(1)

A claim of misconduct on part of district attorney or trial judge will not ordinarily be considered on appeal unless complaining party has properly called attention of court to alleged impropriety and assigned misconduct thereon.

4. Criminal law ⇨730(1)

Where act done or remark made by district attorney was of such character that harmful result could not be obviated by any retraction or instruction, the misconduct will furnish ground for reversal even though court may have taken immediate steps to correct any impression improperly conveyed to the jury.

5. Criminal law ⇨1037(1)

In prosecution for transportation and possession of narcotics, where testimony on cross-examination was admitted without objection, and questions could have been re-framed or eliminated and a proper cautionary instruction given to jury and error, if any, could have cured, claim of misconduct of district attorney would not be considered on appeal.

6. Criminal law ⇨1169(1)

In prosecution for transportation and possession of narcotics, jury's minds could not be deemed to have been inflamed by questions on cross-examination eliciting testimony that defendant knew what was in suitcase found in his possession and that he admitted a previous conviction for possessing its contents.

7. Criminal law ⇨1202(3)

Witnesses ⇨337(5)

In prosecution for transportation and possession of narcotics, wherein fourth count alleged a prior conviction and defendant admitted his previous conviction and servitude for felony, evidence referring to fact that defendant had suffered imprisonment for a similar offense was admissible to prove the fourth count, and evidence was admissible on other counts as impeaching testimony.

Appeal from Superior Court, Alameda County; O. D. Hamlin, Jr., Judge.

Anton Albright, also known as Antone Albright, also known as Anthony Albright was convicted of transportation and possession of narcotics and of possession of prohibited firearms capable of being concealed upon the person by one who had been convicted of a felony, and he appeals.

Judgment affirmed.

Benjamin F. Marlowe, of Concord, for appellant.

Fred N. Howser, Atty. Gen., and Benjamin B. Knight, Deputy Atty. Gen., for respondent.

WARD, Justice.

Defendant was convicted on three counts of violation of provisions of the Health and Safety Code covering transportation of marihuana, its possession, and the possession of opium and heroin; also on a fourth count, possession of prohibited firearms, capable of being concealed upon the person, by one who had been convicted of a felony. The information further alleged the conviction of a felony, namely, violation of the Federal Marihuana Tax Act, as a prior conviction with sentence served therefor. Defendant pleaded not guilty to the four counts of the information and stood mute on the prior conviction. The court directed that a denial be entered on behalf of the defendant on such conviction. According to the record, on the date of the trial defendant "admits having suffered the prior conviction."

Two contentions are presented on appeal: I. Competent Evidence is Insufficient to Support the Verdict. II. Prejudicial Misconduct of the District Attorney." Defendant explains the first point as follows: "While the evidence in its entirety would have been sufficient to sustain the verdict, the remaining evidence, after the proper exclusion of certain prejudicial testimony as shall hereinafter be set forth, is insufficient to sustain the verdict." The propriety of the admission of the testimony claimed to be prejudicial may be considered in conjunction with the alleged prejudicial misconduct of the district attorney. If the questions propounded by him were free from objection the charge of insufficiency of evi-

dence collapses. It is not necessary to relate all of the details introduced in evidence by the district attorney to prove this case, as defendant admits that if certain evidence be legally admissible it is sufficient to sustain the verdict.

[1,2] On cross examination defendant elicited certain evidence that at the time of his arrest he was drunk; other evidence was that at the time of his arrest he was under the influence of drugs. The district attorney asked the following question: "Just one question. Now, in recalling the defendant's condition at the time you placed him under arrest on the drunk charge, can you state whether or not the defendant was drunk or drugged, or do you know?" to which reply was made: "Well, he didn't stagger like a drunk man. He looked like he was drunk, but he didn't stagger like a drunk man." It was proper to show the physical as well as the mental condition of the accused when he made certain statements to the police. The following question and answer appear in the record:

"Q. What was the conversation that you heard between the defendant and Inspector Armstrong that day with reference to the case? A. They asked him what was in that suitcase, and he said he had done eighteen months for the same thing that was in there.

"Q. Was that the full extent of the conversation that you heard? A. Yes, sir." As evidence was introduced to prove the nature and character of the contents of the suitcase, it was proper to introduce evidence that tended to show that defendant was aware of what the suitcase contained. The record shows further testimony.

"Q. What was the conversation you had with the defendant at that time? A. I asked him if he had ever been in jail. He says, 'Yes.' Want me to continue?

"Q. Yes, please. A. And I said, 'What for?' So he turned around and he points at that suitcase. He says, 'For the same thing as in that suitcase.'

"Q. In the conversation had any mention of the contents of the suitcase been made? A. No, sir." Another witness had a conversation with defendant at a later period:

"Q. And during that time did you have any conversation with the defendant with reference to the contents of this brown suitcase? * * *

"The Witness: Yes, I will repeat it. I asked the defendant if that suitcase belonged to him, and he said 'No.' I asked him if he knew it came out of his car. He said he had been told it came out of his car. I asked him if he knew what was in it. He said * * * at that point he said, 'I done some time over that same sort of stuff, and I am not going to answer any more questions.' So that was the extent of the conversation at that time." Defendant testified that a woman put the suitcase in his car and that he never had in his possession anything like its contents.

[3-5] All of the foregoing testimony was introduced without objection by defendant. Appellant cites the following paragraph from *People v. MacDonald*, 167 Cal. 545, 551, 140 P. 256, 259: "But it has long been the rule in this court that a claim of misconduct on the part of the district attorney or the trial judge will not ordinarily be considered on appeal, unless the complaining party has promptly called the attention of the court to the alleged impropriety and assigned misconduct thereon. *People v. Shem Ah Fook*, 64 Cal. 382, 1 P. 347; *People v. Abbott*, 101 Cal. 645, 36 P. 129; *People v. Frigerio*, 107 Cal. 151, 40 P. 107; *People v. Kramer*, 117 Cal. 647, 49 P. 842; *People v. Osborn*, 12 Cal.App. 148, 106 P. 891; *People v. Walker*, 15 Cal.App. 400, 114 P. 1009. The reason for this rule is that the court should be given the opportunity to correct the irregularity or to prevent any prejudicial effect, if that be possible. There may, of course, be cases in which the act done or remark made is of such a character that a harmful result could not be obviated by any retraction or instruction. In such cases the misconduct will furnish ground for reversal, even though the court may have taken immediate steps to correct any impression improperly conveyed to the jury. *People v. Derwae*, 155 Cal. 592, 102 P. 266. For like reasons, the want of an assignment of misconduct should not affect appellant's rights, where such assignment could not have led to the curing of the

harm done." In the present case an objection and assignment of misconduct could have cured any error, if error occurred. The questions could have been reframed or eliminated and a proper cautionary instruction given to the jury.

[6] Defendant contends that the testimony had the effect of inflaming the minds of the jurors. The record does not so indicate. If in a case of this character, the minds of the jurors are inflamed by the mere presentation of the evidence, and passion usurps the place of reason, then practically all violators of the narcotic law of this state should be freed.

[7] The only other question necessary to consider is the reference to the fact that the defendant had suffered imprisonment for a similar offense. The record discloses the following:

"Mr. Burke [Deputy District Attorney]: Your Honor, before direct examination of the witness, it has been stipulated that the prior conviction alleged in the information for the purpose of charging the violation of the gun law is correct. That is, the defendant stipulates that the prior conviction was suffered as charged for the purpose of the fourth count of the information.

"Mr. Ferrario [Attorney for Defendant]: It has been stipulated, your Honor.

"The Court: You stipulate that that is correct?"

"Mr. Ferrario: Yes." On cross examination defendant admitted his previous conviction and servitude for a felony. Defendant's contention that he took the witness stand to explain his prior conviction is trivial and not substantiated by the record.

The evidence of the prior conviction was a part of the essential evidence to prove the fourth count. The evidence was admissible on the other counts as impeaching testimony. *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924. No prejudicial error appears in the record.

The judgment and order denying the motion for a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

87 Cal.App.2d 248

**Application of RAUER'S COLLECTION
CO., Inc.****RAUER'S COLLECTION CO., Inc. v.
HIGGINS et ux.**

No. 13765.

District Court of Appeal, First District,
Division 1, California.
Aug. 20, 1948.**1. Evidence ⇐43(3)**

On appeal from judgment denying petition to levy execution on a homestead, where petitioner claimed amount of homestead exemption was determinable under statute in effect when debt was incurred, District Court of Appeal would take judicial notice of record before court in former appeal in action wherein the judgment was obtained, in order to determine when the indebtedness was incurred. Civ.Code, §§ 1245-1258.

2. Statutes ⇐263, 265

Every statute will be construed to operate prospectively unless legislative intent to the contrary is clearly expressed, especially where retroactive operation of statute would impair obligations of contracts or interfere with vested rights.

3. Homestead ⇐6

The 1945 and 1947 amendments increasing amount of homestead exemption must be interpreted prospectively and not retroactively, and 1945 amendment did not increase amount of homestead exemption allowable as against a creditor existing before the amendment. Civ.Code, § 1260 as amended by St.1945, p. 1477, St.1947, p. 2482.

4. Appeal and error ⇐1178(6)

Where court merely found value of realty to be less than \$6,000, and debtor owners were entitled to homestead exemption of \$5,000, and judgment creditor appealed from orders denying petition to levy execution on homestead, case would be referred to trial court to fix value. Civ. Code, § 1260, as amended by St.1945, p. 1477, St.1947, p. 2482; Civ.Code, § 1252, 1254.

5. Homestead ⇐197, 200

On judgment creditor's petition to levy execution on homestead, trial court may take testimony to enable court to make the required finding as to value of homestead where the appraisers do not agree on value, or, if court is dissatisfied with appraisers' reports, it can require a new appraisal. Civ.Code, § 1260, as amended by St.1945, p. 1477, St.1947, p. 2482; Civ.Code, § 1252, 1254.

6. Husband and wife ⇐14(3)

Wife's interest in homestead held in joint tenancy is not liable for the husband's debts. Civ.Code, § 171.

7. Appeal and error ⇐1010(1)

Finding supported by substantial evidence would be sustained on appeal.

8. Husband and wife ⇐14(3), 249, 264

When property is conveyed to a husband and wife as joint tenants, the form of the conveyance destroys the statutory presumption that the property is community property, and the deed creates a joint tenancy in which the interests of husband and wife are separate property.

9. Husband and wife ⇐264

That realty was purchased with community funds did not overcome presumption arising from deed to husband and wife in joint tenancy that property was being held in joint tenancy and not as community property.

10. Evidence ⇐151(1)

On petition of husband's judgment creditor to levy execution on homestead, testimony of husband and wife was admissible to show intent when purchasing realty to take title as joint tenants and not to hold realty as community realty.

11. Appeal and error ⇐1050(1)

On petition of husband's judgment creditor to levy execution on homestead presenting issue whether husband and wife owned realty as joint tenants, or realty was community property, admission of testimony of agent who prepared declaration of homestead, that agent had therein described realty as "community property in joint tenancy" because of statement of an attorney that such description was prop-

er for realty held in joint tenancy by husband and wife was not prejudicial to creditor.

12. Husband and wife ⚭14(3), 263

On petition of husband's judgment creditor to levy execution on homestead presenting issue whether husband and wife owned realty as joint tenants or realty was community property, fact that an agent drew declaration of homestead describing realty as "community property in joint tenancy", and that agent did not direct the attention of the husband and wife to the description, was admissible on question of intent of husband and wife as to character of ownership.

13. Husband and wife ⚭14(3)

On petition of husband's judgment creditor to levy execution on homestead, evidence that deed to the realty was to husband and wife as joint tenants, and that husband and wife always considered the realty to be held as joint tenants rather than as community property, sustained finding that realty was held in joint tenancy and not held as community property.

14. Execution ⚭56

Joint tenancy ⚭4

Tenancy in common ⚭3

While all joint tenants are alive, execution may be had upon the interest of one of the joint tenants, and upon the purchase of the interest of that joint tenant at execution sale the joint tenancy is severed and the purchaser and other joint tenant or tenants become tenants in common.

15. Homestead ⚭84

A joint tenancy homestead does not increase the exemption from that of any other homestead. Civ.Code, § 1260, as amended by St.1945, p. 1477, St.1947, p. 2482.

16. Homestead ⚭81

A homestead does not depend upon the character of the title which the homestead claimant has, and a mere naked possession, without other title, may be impressed with the homestead characteristics.

17. Homestead ⚭1

The homestead right is not an estate in the land, but merely the privilege of ex-

emption from execution from such an estate as the holder occupies.

18. Homestead ⚭12

The declaration of homestead creates no new or additional title.

19. Homestead ⚭47

Declaration of homestead is subject to all rights in the property known to the person filing the declaration to exist.

20. Homestead ⚭66

Where husband and wife owned homesteaded realty as joint tenants, the interest of husband in excess of exemption was subject to execution sale on petition of husband's judgment creditor, with creditor being entitled to one half of the excess, and full exemption did not apply to husband's interest in realty rather than to realty itself. Civ.Code, §§ 1245-1258; § 1260, as amended by St.1945, p. 1477, St.1947, p. 2482.

21. Homestead ⚭200

On petition of judgment creditor to levy execution upon a homestead, amount of fees allowable to appraisers is discretionary with trial court except as restricted by statute limiting compensation to \$5.00 per day to each appraiser. Civ.Code, § 1258.

22. Homestead ⚭200

Allowance of \$15 to each of three appraisers appointed when judgment creditor petitioned to levy execution on a homestead was not excessive or an abuse of discretion. Civ.Code, § 1258.

23. Homestead ⚭200

Where appraisers were appointed when judgment creditor petitioned to levy execution on a homestead, trial court could make allowance of fees to appraisers without presentation of a bill by appraisers, and without considering any evidence other than appraisers' report.

24. Appeal and error ⚭226(2)

Where no objection was made in trial court to allowance of fees to appraisers appointed when judgment creditor petitioned to levy execution on a homestead, question whether allowance was erroneous was not before court on appeal.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Petition by Rauwer's Collection Company, Inc., a corporation, judgment creditor, for the appointment of appraisers to appraise homestead after levy of execution, against Claude C. Higgins and Anna Higgins, husband and wife. From an order denying petition, petitioner appeals.

Order reversed and cause remanded with instructions.

Jerome L. Schiller, of San Francisco, for appellant.

Frank V. Kington, of Redwood City, for respondents.

BRAY, Justice.

The superior court made an "Order Denying Petition to Levy Execution on Homestead" in a proceeding brought under the provisions of sections 1245 to 1258, inclusive, of the Civil Code. The petitioner therein appeals. The questions raised concern the effect of a certain declaration of homestead upon the property of respondents, who at all times herein mentioned were, and are, husband and wife.

In 1937 respondents Claude C. Higgins and Anna Higgins purchased with community funds certain real property in San Mateo County. The deed, dated July 28, 1937, and recorded December 4, 1937, conveyed the property to them as *joint tenants*, with the right of survivorship. Thereafter and on August 14, 1939, both respondents signed, and on August 15th recorded, a declaration of homestead on this property. The declaration states that Claude Higgins and Anna Higgins are husband and wife; that Claude is the head of a family, consisting of himself, his said wife, and their three minor children, all actually residing on the land (describing it); that it is their intention to use it as a home, and that they claim it, together with the dwelling house thereon, as a homestead; that the actual cash value of the premises is estimated to be \$4500; and that all of it is necessary for the use and enjoyment of the homestead;

"That the character of said property sought to be homesteaded is as follows: That the said real property is *the Community property in Joint-Tenancy* of the Declarants * * *" (Emphasis added.) No attack is made upon the validity of the declaration.

In 1940, petitioner, on an assigned claim, brought suit in the superior court of San Mateo County against respondent Claude Higgins. On December 10, 1945, judgment for approximately \$950 was rendered in favor of petitioner and against Claude. On appeal to this court, the judgment was affirmed.¹ On February 6, 1946, an abstract of the judgment was recorded in San Mateo County, and on July 16, 1947, execution was levied by the sheriff on the homesteaded property. The same day, petitioner, pursuant to the provisions of section 1245 of the Civil Code, applied to the superior court for the appointment of appraisers to value the property. Respondent Anna Higgins appeared and answered the petition, setting forth that she was not a party to the judgment; that the property was held in joint tenancy by her and Claude; that its value was less than \$6000; that it could not be divided without material injury to it; and asked that the petition be denied.

The court duly appointed three appraisers. On September 23, 1947, their reports were filed. They found that there were no liens or encumbrances of record and that the property could not be divided without material injury. No challenge of these findings is made. Two of the appraisers valued the property at \$5850, the third at \$4775. On September 29th petitioner moved the court to adopt the majority report of the appraisers and to direct a sale of the property under the writ of execution. This motion was resisted by respondent Anna. The court, in its order, found that the property was held in joint tenancy and "that the actual cash value of said real property is less than \$6000." It then denied the petition.

Amount of Exemption.

[1] The first question to be determined is the amount of homestead exemption to

¹ Rauwer's Law, etc., Co. v. Higgins, 76 Cal.App.2d 854, 174 P.2d 450.

be allowed. In 1939, when the homestead was declared, section 1260 of the Civil Code provided that the homestead exemption of the head of a family was \$5000 over liens and encumbrances at the time of any levy. In 1945, section 1260 was amended to allow an exemption of \$6000. Respondents contend, and the court apparently agreed, that the exemption to be applied is that of the date of recording the abstract of judgment, or \$6000. Petitioner contends that it is that of the date of incurring the indebtedness. The record on this appeal fails to disclose the date of the incurring of the indebtedness upon which this litigation is based. However, in the record before this court in the former appeal (see footnote p. 2) of which record this court may take judicial notice, the trial court found that an account was stated between the parties on June 2, 1939. At that time, as well as at the time of recording the declaration and in fact ever since 1872, the amount of homestead exemption for the head of a family was \$5000.

The question of the effect as to creditors then existing of an increase in the amount of the statutory homestead exemption has not been passed upon heretofore in this state. In the case of *Cohen v. Davis*, 20 Cal. 187, the court was considering the effect of an amendment in 1860 of the homestead laws of 1861. It held that to avail himself of the provisions of the later act it was necessary for an owner who had previously filed a declaration of homestead to file a new one after the 1860 act took effect, and that as the owner had failed to file such new declaration, his rights were measured by the earlier act. *Gluckauf v. Bliven*, 23 Cal. 312, is to the same effect. The holdings in both cases, however, are based upon the express wording of the act, which, in effect, stated that all persons holding homesteads had one year in which to file the new declaration of homestead provided by the act.

In *McNabb v. Byrnes*, 92 Cal.App. 337, 268 P. 428, the court was considering a complaint based upon a declaration of homestead made in 1922. Objection was made

that the declaration did not contain a statement that no former declaration of homestead had been made by the parties. In 1927, section 1263 of the Civil Code had been amended providing a new subdivision (5) which permitted such a statement to be made in the declaration. After holding that this was not a mandatory requirement, the court held that subdivision (5), which had been added after the declaration of homestead had been recorded, was "not retroactive in its effect." 92 Cal.App. page 342, 268 P. page 430.

That the increase in exemption cannot be given a retroactive interpretation, as it would be an impairment of the obligation of contracts, and that the creditor is entitled to rely upon the exemption statutes as of the time the obligation was incurred, is well established. *Medical Finance Ass'n v. Wood*, 20 Cal.App.2d Supp. 749, 63 P.2d 1219, and *Smith v. Hume*, 29 Cal.App.2d Supp. 747, 74 P.2d 566, dealt with the enactment in 1935 of section 690.24 of the Code of Civil Procedure, making a motor vehicle of a value less than \$100 exempt from execution. No such exemption had theretofore existed. In both cases it was held that to give a retroactive effect to this statute would be in violation of the state and federal Constitutions, as it would impair the obligation of contracts.

[2] In *The Queen*, D.C., 93 F. 834, it was held that a California statute exempting from execution seamen's wages not exceeding \$100, "as applied to previous contracts made with seamen, at a time when no such exemption is allowed, would materially lessen and impair the obligation of such contracts." 93 F. page 837. See also *In re Fox*, D.C., 16 F.Supp. 320, and *Waples on Homestead and Exemption* (1892), pp. 227-229.

"It is settled that every statute will be construed to operate prospectively unless the legislative intent to the contrary is clearly expressed. * * * The rule that a statute is presumed to operate prospectively only, unless an intent to the contrary clearly appears, is especially applicable to cases where retroactive operation of the statute would impair the obliga-

tions of contracts or interfere with vested rights.' Jones v. Union Oil Co., 1933, 218 Cal. 775, 777, 778, 25 P.2d 5, 6; to same effect People v. Allied Architects' Ass'n, 1927, 201 Cal. 428, 437, 257 P. 511.
* * *

"But even if a retroactive intent can be found in the statute, the application of the new exemption to executions issued on judgments based on pre-existing contracts is prevented by the provisions of the Constitutions of the United States (article 1, § 10) and of California (article 1, § 16), forbidding laws impairing the obligation of contracts. * * * Statutory provisions creating new, or increasing old, exemptions have been considered several times by the United States Supreme Court, and it has uniformly held that their application to executions based on pre-existing contracts would violate the provision of the Federal Constitution above referred to. Gunn v. Barry, 1872, 15 Wall. 610, 623, 21 L.Ed. 212; Edwards v. Kearzey, 1877, 96 U.S. 595, 24 L.Ed. 793; Bank of Minden v. Clement, 1921, 256 U.S. 126, 41 S.Ct. 408, 65 L.Ed. 857; W. B. Worthen Co. v. Thomas, 1934, 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344, 93 A.L.R. 173." Medical Finance Ass'n. v. Wood, supra, [20 Cal.App.2d Supp. 749, 63 P.2d 1220] 20 Cal.App.2d Supp. 749, 750, 751, 63 P.2d 1219.

"While it is competent for the legislature to change the form of remedy, if it can do so without impairing the obligation of contract, a statute increasing the exemption of debtors is void to the extent that it is applicable to contracts made prior to its enactment." 12 Cal.Jur. p. 333.

93 A.L.R. 178 states that "the now generally accepted view" is that the remedy is inseparable from the contract itself, and contracts not reduced to judgment are held to be substantially impaired by the authorization of a new or increased exemption.

[3] As a prospective and not a retroactive interpretation must be given to the 1945 amendment to section 1260, it is obvious that the exemption to which respondents are entitled is that which was in existence at the time of the creation of the debt upon which the judgment is founded, namely, \$5000.

Mention is made by respondents of the amendment of section 1260 in 1947, raising the homestead exemption to \$7500. This, like the 1945 amendment, cannot be given a retroactive effect so far as petitioner is concerned.

In holding that the amendment is not retroactive, we expressly are not holding, as petitioner would have us do, that to avail themselves of the increased exemption as to debts created, or contracts entered into, after the effective date of the amendment, it is necessary for the property owners who theretofore filed declarations of homestead to file new declarations.

Appraiser's Report.

[4, 5] The property cannot be sold unless the court finds from the appraiser's report that the land exceeds in value the sum of \$5000. Sec. 1254, Civ.Code. Here the court did not find the actual value of the property, merely finding that it is worth less than \$6000. Two of the appraisers valued the property at \$5850, which is more than the exemption. One appraiser valued it at \$4775, which is less than the exemption. It was the duty of the court to determine the value *from the report*. Sec. 1254, Civ.Code. In considering the adoption by the court of an appraiser's report made pursuant to the provisions of section 1252, Civil Code, without hearing on the report, the court in Lean v. Givens, 146 Cal. 739, at page 743, 81 P. 128 at page 130, 106 Am.St. Rep. 79, said: "The code does not require any notice or hearing after the report of the appraisers is filed. It seems to contemplate that the order for a sale, where the report is that the land cannot be divided, or for a partition, if it is divisible, is to be made by the court, ex parte, from an inspection of the report alone. Section 1254 provides that 'If, *from the report*, it appears to the judge that the land claimed exceeds in value the amount of the homestead exemption, and that it cannot be divided, he must make an order directing its sale under the execution.'" As the court failed to determine the value of the property, it is necessary that the case be referred to the court to fix such value "from the report." As the appraisers did not agree in their reports, it is possible that, although the

Code does not expressly provide such procedure, the court could hear evidence and from such evidence and the reports determine the value of the property. In *Stockton Sav. & Loan Bank v. Mello*, 201 Cal. 194, 256 P. 202, it was held that although there is no express provision for taking testimony concerning values at the hearing of the petition for appointment of appraisers, the court could take such testimony and could even determine value adversely to the petitioner. If the court has the power to do this without express statutory provision, and if, as set forth in *Brown v. Starr*, 75 Cal. 163, 16 P. 760, in the absence of statutory provision, it may provide the machinery to carry into effect a later report, it would follow that the court has the power, where the appraisers do not agree on values, to take testimony to enable the court to make the required finding. Or, if the court is dissatisfied with the reports before it, it has the right under its general powers to require that a new appraisal be made. In *Brown v. Starr*, supra, 75 Cal. 163, 16 P. 760, the appraisers reported that the homesteaded land could be divided without material injury. The court remanded the matter to the appraisers to make the division. The statute made no express provision requiring that the report of the division be confirmed, or even that any report be made. The Supreme Court held that it was a proper case for the lower court to supply the necessary machinery to put the report into effect, and went on to say 75 Cal. page 166, 16 P. 762: " * * * the proper course is for the appraisers to report their action as to the division, and for such report, after reasonable notice, to be confirmed if satisfactory to the court, and if not satisfactory, a third reference to be ordered, and so on until a report is obtained which is confirmed * * *." By analogy, the court here should either find the value of the property from the report already submitted, plus evidence if desired, and if it finds the value in excess of the exemption, order it sold, or, as said in the *Brown* case, if not satisfactory, refer the matter back to the appraisers for another valuation.

Joint Tenancy or Community Property.

[6, 7] This brings us to the question of whether the property is held by the parties in joint tenancy or is their community property. This becomes important for the reason that if it is held in joint tenancy, as the wife's interest is not liable for the husband's debts,² the creditor is entitled to levy upon half the value over the exemption, while, if it is community property, the community being liable for the husband's debts,³ the creditor is entitled to levy upon the entire interest over the exemption. The trial court found that the property was held in joint tenancy. If there is substantial evidence to support the finding we must affirm the court's action.

3 Cal.Jur. 10-Yr. Supp. 573, section 75, states: "The sufficiency of the evidence is generally a matter for the trial court or jury, and the findings or verdict will not lightly be set aside. Following the general rule, a finding of a trial court that property is either separate or community in character is binding and conclusive upon the appellate court, if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences. * * * Clearly, the determination of the trial court that the presumption has been overcome will not be disturbed on appeal if there is a substantial conflict in the evidence, or, although there is no conflict, if different inferences might fairly be drawn from the evidence. It is finally in each case a question of fact for the court or jury to determine whether the evidence is sufficient to overcome the presumption."

[8] The deed of the property was to husband and wife in joint tenancy. "When property is conveyed to a husband and wife as joint tenants the form of the conveyance is such as to destroy the statutory presumption that the property is community (*Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003), and that thereby such deed creates a joint tenancy in which the interests of husband and wife are separate property. *Young v. Young*, 126 Cal.App. 306, 14 P.2d 580." *Launer v. Griffin*, 60 Cal.App.2d 659, 664,

² Sec. 171, Civil Code.

³ 3 Cal.Jur. 10-Yr. Supp. 663; *Lesser*

v. Pomin, 3 Cal.App.2d 117, 39 P.2d 451.

141 P.2d 236, 238. “* * * a joint tenancy * * * is of necessity an expression of the intention to hold the property otherwise than as community property, * * *.” *Siberell v. Siberell*, 214 Cal. 767, 773, 7 P.2d 1003, 1005.

[9] To overcome this presumption, petitioner relies upon two points: (1) That the property was admittedly purchased with community funds, and (2) the peculiar statement in the declaration of homestead, that it “is the Community property in Joint-Tenancy of the Declarants.” As to the first point, the fact that the property was purchased with community funds does not in itself overcome the presumption. Most joint tenancies of husband and wife are purchased with community funds, and as said in *Siberell v. Siberell*, supra, 214 Cal. 767, 773, 7 P.2d 1003, “The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property, but instead as a joint tenancy with all the characteristics of such an estate.” The question of whether the property remains community property depends upon the intention of the parties when they acquired it. *Gilmour v. North Pasadena Land etc. Co.*, 178 Cal. 6, 171 P. 1066. The form of the conveyance is itself some evidence of the intent to change it from community property, and creates a rebuttable presumption to that effect. *Ibid.*, 178 Cal. page 8, 171 P. 1066; *Steere v. Barnett*, 54 Cal.App. 589, 591, 202 P. 166; *Jansen v. Jansen*, 127 Cal.App. 294, 298, 15 P.2d 777.

Both husband and wife testified that they intended the property to be held in joint tenancy rather than as community property. Petitioner contends this testimony is inadmissible. In the case of *Thomas v. Hoffman*, 122 Cal.App. 213, 9 P.2d 538, the court upheld the rejection of evidence that when the land in question was purchased the husband and wife made statements to a third person to the effect that the land was bought for her as separate property, that prior thereto, when another property was sold, the proceeds were so divided between

husband and wife that each took their share, and that the wife bought this property with the intent that it was to be her separate property. The court said, 122 Cal. App. page 217, 9 P.2d 539: “The first part of the offered proof was a self-serving declaration, and such a change from community to separate property is to be proved only by showing a definite present agreement to that effect. As to the second portion of the offer it was technically not sufficient, as no present positive agreement to that effect was offered to be proved, nor was it offered to be proved that the husband had any such intent.” At first blush this language seems to support petitioner’s contention. However, it is significant that the court indicated that “a definite present agreement” to make it separate property could be shown by the testimony of the wife. The ruling is based also on the failure to offer to show what the intent of the husband was. In the instant case, the intent of both husband and wife were shown.

[10] Moreover, that the testimony of both husband and wife as to their intent in this respect is admissible, is shown in *Gilmour v. North Pasadena Land etc. Co.*, supra, 178 Cal. 6, page 9, 171 P. 1066, page 1067, where the court says: “The intent accompanying the act is to be inferred by the court or jury from all the circumstances, and the party’s own testimony that he did not intend to make a gift, while competent, is not conclusive.” (Emphasis added.)

[11, 12] The second point relied upon by petitioner as proof that the property still retained its community aspect, is the phrase in the homestead declaration “Community property in Joint-Tenancy.” Just what that means is difficult to say. However, the real estate agent who prepared the declaration, testified that the language was his, and that he had not called the attention of the parties to that language. He was permitted to testify that he had been informed by an attorney that that was the way to draw a homestead on lands held in joint tenancy by husband and wife. If admission of his reason for drawing the instrument that way is error, it is without prejudice. The fact that he drew the declaration and did not direct the attention of the parties to it, was

admissible on the question of the intent of the owners of the property as to its character.

[13] The court had before it the presumption from the deed itself, that the property was being held in joint tenancy, and the testimony of the parties that they always so considered it. Against that evidence was the circumstance that it was purchased with community funds (although that circumstance was consistent either with the property being separate or community property, depending upon the intention of the parties) and the use of the words "community property" in the declaration. We cannot say as matter of law that the court was not correct in its determination that the evidence was not sufficient to overcome the presumption established by the joint tenancy deed. We think this issue was correctly determined by the trial court. Although the order must be reversed, as will hereafter appear, this issue need not be retried.

Homesteaded Joint Tenancy Property Not Entirely Exempt from Execution.

[14] Respondents contend that even the husband's interest in homesteaded joint tenancy property of husband and wife is exempt from execution on a judgment against the husband alone. That is not the law. "It is well settled in this and other states that, while all joint tenants are alive, execution may be had upon the interest of one of the joint tenants, and that upon the purchase of the interest of that joint tenant at execution sale the joint tenancy is severed and the purchaser and the other joint tenant or tenants become tenants in common. See cases collected and commented on in 111 A.L.R. 171; *Pepin v. Stricklin*, 114 Cal.App. 32, 299 P. 557; *Hilborn v. Soale*, 44 Cal.App. 115, 185 P. 982." *Zeigler v. Bonnell*, 52 Cal.App.2d 217, 219, 126 P.2d 118. Section 1238 of the Civil Code provides: "If the claimant be married, the homestead may be selected from the community property or the separate property of the husband or, subject to the provisions of section 1239,⁴ from the property held by the spouses as tenants in common or in joint tenancy or

from the separate property of the wife." (Emphasis added.)

Prior to 1929 there was no express provision allowing a spouse to declare a homestead on property of husband and wife held in joint tenancy. The general rule was that a homestead could not be declared on joint tenancy property. The courts, however, had established an exception to that rule, to the effect that the wife alone, or the husband and wife together, could make a valid declaration of homestead on the joint tenancy property. *Swan v. Walden*, 156 Cal. 195, 103 P. 931, 134 Am.St.Rep. 118, 20 Ann.Cas. 194; *Schoonover v. Birnbaum*, 148 Cal. 548, 83 P. 999; 13 Cal.Jur. pp. 451, 452. In 1929 section 1238 of the Civil Code was amended. This amendment was held in *Watson v. Peyton*, 10 Cal.2d 156, 159, 73 P.2d 906, to have followed the decisions in these cases and to provide, in effect, a statutory permission for a spouse to declare a homestead in property held in joint tenancy by husband and wife. The above quoted portion of section 1238 was adopted in 1937, and is specific on the subject.

[15, 16] A joint tenancy homestead does not increase the exemption from that of any other homestead. Section 1245 provides: "When an execution for the enforcement of a judgment * * *" (except in certain cases not relevant here) "is levied upon the homestead," the judgment creditor may take the necessary proceedings to have the property appraised, and if the appraisal values the property in excess of the exemption, to have it sold. In *Walton v. Walton*, 59 Cal.App.2d 26, 138 P.2d 54, this court discussed at some length the provisions providing for the sale of premises held in joint tenancy by husband and wife upon which the wife had impressed a homestead, in holding that the husband did not have the same rights to sell the property as a judgment creditor would. Respondents rely upon *Young v. Hessler*, 72 Cal.App.2d 67, 164 P.2d 65. There an abstract of judgment against the husband alone was recorded. About nine months thereafter, the wife recorded a declaration of homestead on property held

⁴ Section 1239, Civil Code, requires the consent of the wife, if the property

to be homesteaded is her separate property.

in joint tenancy by her and her husband. In holding that the judgment took priority over the homestead, and that the interest of the husband was subject to execution sale to satisfy the judgment, the court said, 72 Cal.App.2d page 69, 164 P.2d 66: "Such lien on the interest of Fred Hessler was therefore prior to the homestead declaration of his wife, Hazel, upon his interest since she did not file her declaration of homestead for record until March 20, 1942." Respondents argue "e converso" that if the wife's homestead declaration had been recorded prior to the recordation of the abstract of judgment, her homestead right would have prevailed. That is true, *up to the amount of the exemption*. But there is nothing in that case to justify respondents' contention that the husband's interest over and above the exemption cannot be levied upon.

In *Marelli v. Keating*, 208 Cal. 528, 282 P. 793, it was contended that homestead property, whatever its value, is not subject to attachment. The court said, 208 Cal. page 531, 282 P. 794: "The object of the homestead law is to protect the homesteader and those dependent upon him or her in the enjoyment of a domicile not exceeding \$5,000 in value, and to this end a liberal construction of the law and facts will be indulged by courts. When this object has been accomplished, courts will not suffer this salutary statute to be used as a shield behind which those who would deal unjustly with creditors may find refuge." In *Ruddell v. Warne*, 68 Cal.App.2d 600, 157 P.2d 428, the court was considering what was apparently community property homesteaded by the wife, and which had been levied upon under a judgment against the husband. The court stated, 68 Cal.App.2d page 602, 157 P.2d 429: "The protection afforded by a declaration of homestead is limited to \$5000 in value and when the homesteaded property is enhanced in value any excess over the statutory limit of \$5000 is subject to the claims of the creditors of the owner." In *Yager v. Yager*, 7 Cal.2d 213, 60 P.2d 422, 106 A.L.R. 664, the court was considering the effect on a homestead on community property declared by a second wife, of a judgment for unpaid alimony thereafter obtained by a first wife

against the husband. The court expressly recognized the fact that the excess over the homestead exemption could be reached, for it expressed the problem in the following language, 7 Cal.2d page 218, 60 P.2d 425, 106 A.L.R. 664: "This brings us to the most serious question involved on this appeal, is the homestead of the debtor and his second wife declared on their community property subject to execution sale (*except as it exceeds in value \$5,000*) upon a judgment for alimony or support of a former wife and child? We are of the view that such an exception from freedom from forced sale should not be read into section 1241, Civil Code, in the absence of an express provision therefor." (Emphasis added.)

Exemption Applies to the Property, Not to Husband's Interest.

[16, 17] At argument, the suggestion was made that the full exemption applied to the interest of the husband in the property, rather than to the property itself, so that in effect, the property would have to be worth over \$10,000 before it could be sold to satisfy petitioner's judgment. This contention overlooks the fact that the exemption is of the homesteaded property rather than the husband's interest therein. As said in *Bell v. Wilson*, 172 Cal. 123, 126, 155 P. 625, 626: "Again, as was long ago decided in this state, the homestead in no wise depends upon the character of the title which the homestead claimant has. A mere naked possession, without other title, may be impressed with the homestead characteristic. *Spencer v. Geissman*, 37 Cal. 96, 99 Am.Dec. 248." " * * * the homestead right is not an estate in the *land*, but a mere *privilege* of exemption from execution of such estate as the holder occupies." *Arighi v. Rule & Sons, Inc.*, 41 Cal.App.2d 852, 855, 107 P.2d 970, 972. In *Alabama Power Co. v. Cornelius*, 211 Ala. 245, 100 So. 207, in considering a homestead on land held in tenancy in common the court said, 100 So. page 209: "True, as suggested in brief of counsel for appellee, a tenant in common is entitled to a homestead exemption to the land held in common, but this does not give each owner the right to claim the full exemption to the joint property. The home-

stead is not increased on account of their fractional interests in the land, so as to make up in quantity what is wanting in extent of ownership. *Snedecor v. Freeman*, 71 Ala. 140; *Campbell v. Noble*, 145 Ala. 233, 41 So. 745. The result is each of these plaintiffs would be entitled to an exemption not in excess of \$1,000 in value each, and not to the extent of \$2,000 each." In *Russell v. Laugharn*, 9 Cir., 20 F.2d 95, in a bankruptcy proceeding against a wife the court found that the community interest in the property homesteaded under California laws was two-thirds, and the wife's separate interest was one-third. It then held that the \$5000 exemption should be apportioned between the community and separate interests in the same ratio. We are not concerned here with the apportionment between husband and wife of the \$5000 exemption, but only with the husband's interest in the property, over and above the exemption.

In *Estate of Davidson*, 159 Cal. 98, 115 P. 49, the court pointed out that a wife could not declare a homestead upon the husband's interest alone in property held by them as joint tenants. She could, however, declare a homestead on the land in its entirety.

The exemption, therefore, applies to the entirety of the land, rather than to any interest therein, and hence there can be only one exemption. Thus, if the property brings at a sale a sum in excess of \$5000, the sum of \$5000 is exempt and the creditor is entitled to be paid only out of the husband's portion of the excess, which would be one-half of that excess, if any.

[18-20] "A declaration of homestead creates no new or additional title." *Smith v. Bangham*, 156 Cal. 359, at page 365, 104 P. 689, at page 693, 28 L.R.A., N.S., 522. " * * * a declaration of homestead is subject to all rights in the property known by the person filing the declaration to exist." 156 Cal. page 367, 104 P. page 693. This is

so even though it has been held that the estate of a wife in joint tenancy is "distinct from the estate of the husband." *Vandall v. Teague*, 142 Cal. 471, 474, 76 P. 35, 36. The above principle, applied to the facts of this case, requires the holding that the interest of the husband in joint tenancy property is subject to execution sale (under proceedings as provided in the homestead statutes) if such property is valued in excess of the statutory exemption.

Order for Costs Correct.

[21-24] At the time of appointing the appraisers the court ordered the deposit by petitioner of the sum of \$50 to cover costs. In its "Order Denying Petition to Levy Execution on Homestead," the court ordered this sum paid out as follows: \$5 to the court reporter and \$15 each to the appraisers. Petitioner contends that this order was erroneous because no bill was presented by the appraisers, nor evidence taken as to the "reasonableness of this disbursement." The allowance of fees to the appraisers was a matter entirely in the discretion of the court, except that section 1258 of the Civil Code limits the compensation to \$5 per day to each appraiser. It would seem hardly necessary to say that a superior court judge should be able to determine generally, from his experience in such matters, the amount of time required for an appraisal of this kind, without the necessity of evidence, other than the report itself. We cannot say that the amount allowed here was excessive, or that the court abused its discretion. Moreover, no objection was made in the trial court to this allocation of the costs.

The order appealed from is reversed for the limited purposes herein indicated, and the cause is remanded to the trial court with instructions to proceed in accordance with the views herein expressed.

PETERS, P. J., and WARD, J., concur.

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BERNHEIMER v. BERNHEIMER.

BERNHEIMER et al. v. JEWISH MEMORIAL HOSPITAL ASS'N.

Civ. 16264.

District Court of Appeal, Second District,
Division 1, California.

Aug. 19, 1948.

As Amended Sept. 2, 1948.

Rehearing Denied Sept. 7, 1948.

1. Parties 40(2)

The "interest" entitling person to intervene in suit must be in matter in litigation, proper to be determined therein, and of such present, direct and immediate character that intervenor will either gain or lose by direct legal effect of judgment. Code Civ.Proc. § 387.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest".

2. Parties 47

An intervenor cannot be permitted to broaden scope or function of special proceeding by urging claims or contentions which have their proper forum elsewhere.

3. Parties 40(2)

To authorize intervention in suit, intervenor's "interest" therein must be created by claim to demand or some part thereof in suit or by claim to or lien on property or some part thereof which is subject of litigation. Code Civ.Proc. § 387.

4. Parties 38

Generally, rights asserted by one seeking to intervene in suit must be such as may conveniently be determined in such suit, and issues presented must be such as will not retard principal suit or change original parties' position, to authorize intervention.

5. Divorce 73

A charitable hospital association's interest in husband's divorce suit as beneficiary of two-thirds of corpus of testamentary trust for husband's benefit in default of lawful issue of his body was not of such present, direct and immediate character that association would either gain or lose by direct effect of judgment, as required to authorize intervention by association, though suit was

brought for purpose of making plaintiff's only child by another woman than defendant lawful issue under law of state wherein testatrix resided; association's interest under trust being remote and contingent on many factors other than such child's legitimacy. Code Civ.Proc. § 387.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Earle J. Bernheimer against Sally Wright Bernheimer for a divorce, in which the Jewish Memorial Hospital Association filed a petition to intervene. From orders denying the petition and a rehearing thereon, petitioner appeals.

Affirmed.

Loeb & Loeb, of Los Angeles (H. F. Birnbaum, of Los Angeles, of counsel), for appellant.

Earle J. Bernheimer and Gold & Needleman, of Beverly Hills, for respondents.

YORK, Presiding Justice.

This is an appeal from an order denying a petition to intervene in a divorce action, and also from an order denying a rehearing therein.

The complaint for divorce was filed by plaintiff husband on January 9, 1947, and pleads two causes of action: (1) extreme cruelty prior to separation which is alleged to have occurred on April 3, 1941, and (2) desertion.

The amended answer of defendant wife denies the two causes of action and alleges two affirmative defenses: (1) entry of a final judgment of divorce between the parties in the State of Missouri in 1943, and (2) estoppel, based upon plaintiff's subsequent remarriage to one Verone Odegard.

Said divorce action has been set for trial on October 5, 1948.

The petition for intervention under section 387 of the Code of Civil Procedure alleges:

(a) The petitioner, hereinafter referred to as appellant, is a Missouri charitable corporation, and, as such, operates a hospital in Kansas City, Missouri.

(b) Plaintiff's mother died testate in Missouri and established a testamentary trust:

1. Plaintiff receives the income for life and the right to receive \$15,000 per annum from corpus.

2. After termination of the trust the corpus goes to the "lawful issue of the body" of plaintiff.

3. In default of such lawful issue, two-thirds of the corpus goes to appellant.

The trust has a present value of more than \$750,000.

(c) An action for declaratory relief in Missouri resulted in the following findings of fact and conclusions of law:

1. Plaintiff married defendant shortly before his mother's death, having been divorced twice previously;

2. Plaintiff and defendant entered into a property settlement agreement, and thereafter became residents of California;

3. On January 28, 1942, plaintiff obtained a Mexican divorce in violation of an injunction of the Superior Court of Los Angeles County;

4. Thereafter he married Verone Odegard in Nevada, and a son, (Earle Jr.) was born to them on February 9, 1942;

5. On July 28, 1943, plaintiff agreed to pay defendant \$85,000 within ten days after the entry of a subsequent decree of divorce in her favor; on August 21, 1943, defendant obtained a divorce in Missouri, in which proceeding plaintiff appeared and filed his answer;

6. On August 21, 1943, a second marriage ceremony was performed in Reno, Nevada, between Verone (Odegard) Bernheimer and plaintiff;

7. Both the Mexican and Missouri divorces were invalid because plaintiff and defendant were citizens and residents of California.

8. Under the law of Missouri, which governs the testamentary trust, Earle, Jr., is not plaintiff's lawful issue.

(d) Plaintiff has no living issue except Earle, Jr., and has brought the instant action for the purpose and with the intent of

making Earle, Jr. lawful issue under Missouri law. Earle, Jr. is already legitimate under section 230 of the Civil Code of California, in which State he and his father reside.

(e) Appellant, as a charity, is under a duty to protect its valuable property right as residuary beneficiary under the trust, and desires to intervene in order to bring to the attention of the court three additional defenses to the plaintiff's cause of action, which are available to defendant, and which she has not pleaded:

1. Estoppel arising out of the Mexican divorce.

2. Recrimination under Sec. 111 and 122 of the Civil Code.

3. Laches under subd. 3, section 124, Civil Code. Appellant here urges that it "has the right to intervene on two independent grounds specifically granted by section 387 of the Code of Civil Procedure: *first*, that it has an interest in the success of the defendant, and *second*, that it has an interest in the matter in litigation."

[1] "Section 387 of the Code of Civil Procedure is the statute which authorizes intervention in an action by one who was not originally a party thereto. It provides that 'at any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding.' In *Elliott v. Superior Court*, 168 Cal. 727, at 734, 145 P. 101, 105, it is declared that 'The interest mentioned in the Code which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment'. In *Isaacs v. Jones*, 121 Cal. 257, at 261, 53 P. 793, 794, 1101, it is said that the 'interest' specified in the above-mentioned section of the Code 'must be direct, and not consequential, and it must be an interest which is proper to be determined in the action in which the intervention is sought'. To the same effect are the decisions in *LaMesa* etc. *Irr. Dist. v. Halley*, 195 Cal. 739, 741,

235 P. 999; Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co., 111 Cal.App. 707, 710, 296 P. 942, and City of Alhambra v. Jacob Beam Realty Co., [138] (Cal. App.) [251], 31 P.2d 1052." Estate of Olcese, 1 Cal.App.2d 72, 78, 36 P.2d 215, 217.

[2] And in *People v. Brophy*, 49 Cal. App.2d 15, 34, 120 P.2d 946, 957, it was stated by this court: "And the interest which entitles a party to intervene must be an interest in the matter in litigation in the suit *as originally* brought, and of such a present, direct and immediate character that the intervener will either gain or lose by the direct effect of the judgment. *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 661, 91 P.2d 599; *La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Halley*, 195 Cal. 739, 235 P. 999; *McNeil v. Morgan*, 157 Cal. 373, 108 P. 69. An intervener cannot be permitted to broaden the scope or function of such special proceeding by urging claims or contentions which have their proper forum elsewhere. *Wright v. Jordon*, 192 Cal. 704, 221 P. 915." (Emphasis included.)

[3] In *Isaacs v. Jones*, 39 Cal.App.2d 88, 90, 102 P.2d 434, it is stated, quoting from *Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co.*, 111 Cal.App. 707, 296 P. 942, 943: "The interest mentioned in the statute, which entitled a party to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. * * * To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation."

[4] " * * * generally, the rights asserted must be such as may conveniently be determined in the controversy, and the issues presented must be such as will not retard the principal suit or change the position of the original parties." (20 Cal.Jur. p. 517, sec. 23.)

With respect to the propriety of third parties intervening in an action for divorce,

the following appears in 17 Am.Jur. p. 292, sec. 276: "Persons other than the parties to the marriage or those who represent them in the suit in case of some legal disability are not ordinarily proper parties to a divorce action, in the absence of some statutory provision authorizing others to be made parties, unless, in addition to a decree of divorce, the plaintiff seeks an adjudication of property rights or a division of the property, in which case third persons who have or claim to have an interest in the property involved are proper parties. There are instances also in which the grantee of the party defendant in a divorce action has been permitted to be made the party defendant for the purpose of contesting the validity of a conveyance claimed to have been in fraud of the plaintiff's marital rights. *In no event, however, do third persons have the right to be heard upon the question of the plaintiff's right to a divorce.* Third parties, as a general rule, have no right to intervene in a divorce action in the absence of statute, unless they have, or claim to have, an interest in property involved in the divorce action. Even though divorce proceedings may incidentally affect third persons, such proceedings are considered as involving only the right of the two spouses, as to which a third person has no legal right to be heard."

[5] The instant action is one for divorce alone, no property rights of any nature are involved therein. And while appellant alleges its interest is simply "to protect its property rights which *might* be affected by a change in the status of the plaintiff as a result of the outcome of this proceeding", it seeks by its petition in intervention to become a party to the divorce action itself in order to interpose certain defenses which the defendant has not seen fit to allege in her amended answer.

In justification of its petition to intervene, appellant argues that "the creation of an heir, where none existed, results in direct loss because it puts the legatee's vested property rights in jeopardy. * * * if defendant prevails, it will mean that the plaintiff does not have the status enabling him to make Earle, Jr. his lawful issue under Missouri Law. * * * The father

is acting in the interests of his son. The son's rights are wholly dependent upon his father's success in obtaining a valid divorce from the father's third wife in order to be able to effect a valid marriage to the son's mother."

Turning to the allegations in the petition with respect to the terms of the testamentary trust, it appears that the net income from the trust is payable to the son, Earle J. Bernheimer, during his lifetime and after his death to his lawful issue for maintenance, education welfare and advantage; that in addition to net income said son is entitled to receive out of the corpus not to exceed \$15,000 per annum; that after the death of the son, the corpus of the trust is to be distributed to his issue at the times and in the manner specified; that the trust shall terminate, among other events, when there is no longer living either said son or any issue of said son under 40 years of age; that at such end of the trust, if there then be no living issue of said son, two-thirds of all property then remaining in said trust shall be given to Menorah Hospital Association, for the construction and/or operation of an addition to Menorah Hospital, to be named Bertha and Jerome Bernheimer Memorial."

It is apparently the theory of appellant that in the protection of the above named property rights, it shall resort to every possible means to hinder plaintiff from procuring a valid divorce from defendant, and thereby prevent Earle, Jr. from ever attaining the status of lawful issue under the terms of the trust.

Appellant further maintains that it comes within the purview of section 387 of the Code of Civil Procedure, because it is interested in the success of the defendant in the divorce action.

Even though defendant prevails in this action, the appellant's interest under the testamentary trust hereinbefore referred to is remote and contingent upon many factors other than the legitimacy of the child Earle Jr. in the State of Missouri. In the circumstances here presented, the interest asserted by appellant is not "of such a present, direct and immediate character

that the intervener will either gain or lose by the direct effect of the judgment." *People v. Brophy*, supra.

For the reasons stated, the orders appealed from are, and each of them is, affirmed.

DORAN, and WHITE, JJ., concur.



87 Cal.App.2d 294

PAGE et ux. v. ACE VAN & STORAGE CO.
et al.

Civ. 3928.

District Court of Appeal, Fourth District,
California.

Aug. 26, 1948.

1. Appeal and error ⇨931(1)

For purposes of plaintiffs' appeal from judgment for them in accordance with values of rugs stored by them in defendants' warehouse, as set forth in storage contracts, appellate court must assume that defendants breached their agreement to store rugs in vault and were guilty of negligence resulting in loss of rugs by theft, as alleged in complaint.

2. Appeal and error ⇨1008(1)

Whether contracts for storage of oriental rugs in warehouse improperly attempted to limit warehousemen's liability for loss thereof to value stated by owner in contracts was fact question for trial court under evidence, in owner's action against warehousemen for actual value of rugs after theft thereof from warehouse.

3. Contracts ⇨114

Warehousemen ⇨24(7)

A storage contract, fixing agreed valuation of property stored in warehouse for purpose of fixing storage charges and measuring warehousemen's liability for loss of property, is not invalid as limiting warehousemen's liability for loss caused by their negligence. Gen. Laws; Act 9059, § 3.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Herrmann G. Page and wife against the Ace Van & Storage Company, a corporation, and others, to recover the value of four rugs stored by plaintiff wife in defendants' warehouse. From a judgment for plaintiffs in an unsatisfactory amount, they appeal.

Affirmed.

Garfield & Garfield, of San Diego, for appellants.

Ruel Liggett, of San Diego, for respondents.

BARNARD, Presiding Justice.

The plaintiffs sued to recover the value of four rugs stored by Mrs. Page in the defendants' warehouse.

In November, 1944, defendants' driver picked up these rugs at plaintiffs' home. At this time Mrs. Page signed two instruments, copies of which were given to her. The first is a "work order" containing a number of descriptive blank spaces, a few of which are filled in. Near the top of the instrument, conspicuously enclosed in a box and in clear type, appears the following:

"Unless a greater value is stated herein in writing the depositor declares that the value in case of loss, or damage, whether arising out of the storage, transportation, packing, unpacking, or handling of the goods, and the liability of this Company for any cause for which it may be liable, for each or any piece or package or the contents thereof, does not exceed and is limited to 10¢ per pound, and a maximum value of \$25.00 for any one piece or package upon which declared or agreed value the rates are based, such depositor having been given the opportunity to declare a higher valuation without limitation, in case of loss or damage from any cause which would make the Company liable and to pay the higher rates based thereon."

This is followed by a certificate that the undersigned agrees to the above and has authority to act, with a line for the signature of the "shipper." This was signed by Mrs. Page. The other document, called an

"inventory," contains at the top the shipper's name and address, etc., and then four entries, each reading "Oriental rug," with its size and the word "used." Eight inches below those entries, and being the only other thing on the document, appears the same language as that above quoted, with the same certificate of agreement and authority and a line for the signature of the owner. This was also signed by Mrs. Page. In the middle of the eight-inch blank space someone has written in pencil the word "vault."

A day or two later, Mrs. Page went to the defendants' office where she signed and was given a copy of a third document labeled "Warehouse Receipt and Contract," which was also signed by the defendants. This document acknowledged receipt of these four "used" oriental rugs and set forth ten short paragraphs, containing less than half a page, stating the agreements between the parties. The second and longest of these paragraphs is as follows:

"It is agreed that the storage rate charged is based upon the value of the goods, plus the space occupied, and for the purpose of fixing such rate the depositor hereby expressly represents and warrants that the value of such goods, in case of loss or damage, whether arising out of storage, transportation, packing, unpacking or handling of the goods, and the liability of this Company for any cause for which it may be liable for each or any piece or package or the contents thereof, does not exceed and is limited to 10¢ per pound and a maximum value of \$25.00 for any one piece or package, upon which declared or agreed value the rates are based, such depositor having been given the opportunity to declare a higher valuation without limitation, in case of loss or damage from any cause which would make the Company liable and to pay the higher rates based thereon. The Company shall only be liable for failure to use ordinary care and then only upon the basis of the above agreed valuation of said goods."

The eighth paragraph reads: "No person is authorized to make any other agreement or condition on behalf of the Company." Below, in a blank marked "Section," appears the word "vault" written in ink.

Mrs. Page demanded the rugs in April, 1946, at which time they could not be found. Sometime prior to that date, the defendants' warehouse had been broken into and a number of things stolen and it is supposed that these rugs were among the articles taken. The fact that these rugs were missing was not ascertained until demand for them was made.

The complaint in this action set up two counts, one for conversion and one for negligence. The defendants admitted the storage and failure to redeliver, failed to deny negligence, denied the amount of the damage, and pleaded the contractual provision with respect to the value of the property.

Mrs. Page testified that when the driver came to get the rugs he admired them, that "I admitted that they were pretty nice and that I valued them pretty highly," that she did not discuss with the driver the value of the rugs in dollars and cents, and that nothing was said about the value when she went to the office a day or two later. She also testified that she asked for the best type of storage available; that they assured her the vault was safe and the best they had; that she said she wanted them in a vault and not hanging; that they said they rolled rugs in moth-proofed paper and placed them in a vault; that "My idea of a vault was a big vault like they put silverware and such as that in"; and that "I assumed that it was a regular steel vault." The defendant Carlstrom, owner of the business, testified that they had what is called a rug vault, in which all rugs were placed; that this was a separate room with sliding doors, containing pigeon holes about two feet in diameter by fifteen feet in depth; that this was a rug vault; and that it was always referred to as a vault.

The court, sitting without a jury, found that the reasonable value of these rugs was \$2180; that they were not placed in a vault but were placed in a rug compartment in this warehouse; that negligence was admitted by the answer; and that at the time of storing these goods Mrs. Page had signed the storage receipt and contract on which was plainly printed the agreement first above quoted. As conclusions of law, it was found that the plaintiffs were entitled to judgment in accordance with the

value set forth in these contracts, together with the amounts of storage paid by the plaintiffs. From the judgment so entered, the plaintiffs have appealed.

[1,2] The appellants contend that the court erred in limiting their recovery to the value set forth in the warehouse receipt and contract and the two other instruments, since the respondents breached their agreement by failing to store their rugs in a vault, since they were negligent, and since they knew the nature of these rugs and should have realized their value. While the evidence with respect to storage in a vault is not too convincing it must be assumed for the purposes of this appeal that the respondents breached their agreement and were also guilty of negligence. Their liability is conceded and the sole question presented is whether the court was justified in measuring the extent of that liability by the contract of the parties or whether it must be held, as a matter of law, that the contract improperly attempted to limit the liability of the respondents. As we view the question was one of fact for the trial court. While Mrs. Page told the driver that she valued the rugs highly no amount was then named, and nothing was said when she called at the office. While these rugs were listed as oriental rugs it is a well-known fact that there is a very wide range in the value of rugs which are commonly thus designated. Notwithstanding this fact, Mrs. Page named no higher valuation and secured a lower rate of storage by expressly declaring in three instruments that the value did not exceed the amount named therein. This declared value and agreement to abide thereby in case of loss was not only plainly printed, as found by the court, but it appears on the instruments, the originals of which are before us, to be conspicuously set forth and in two of them they are the only things which Mrs. Page signed.

[3] Section 3 of the Warehouse Receipts Act (Deering's Gen. Laws, Act 9059) provides that a warehouseman may insert in a receipt any terms and conditions provided they are not contrary to the act and that they do not impair his obligation to exercise such care as a reasonably careful

man would exercise in regard to similar goods of his own. Not only does the value of goods have a relation to the degree of care which a reasonable man gives to his own goods, but it was here expressly stated that it was being used as a basis for the fixing of charges. The validity of a contract for this purpose is well recognized in transportation cases, especially where the shipper has an opportunity to secure greater coverage by paying a higher rate. *Franklin v. Southern Pac. Co.*, 203 Cal. 680, 265 P. 936, 59 A.L.R. 118; *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 P. 603, 11 L.R.A.,N.S., 811, 12 Ann.Cas. 1118. In the latter case it was held that a contract fixing an agreed valuation on the property was one for the purpose of fixing transportation charges and of measuring the responsibility of the carrier in case of loss, and that it was not a contract limiting liability within the meaning of a statute forbidding such an agreement. This reasoning and construction was applied to a warehouse case in *McMullin v. Lyon Fireproof Storage Co.*, 74 Cal.App. 87, 239 P. 422.

The appellants rely particularly on *England v. Lyon Fireproof Storage Co.*, 94 Cal.App. 562, 271 P. 532, and *Wilson v. Crown Transfer etc. Co.*, 201 Cal. 701, 258 P. 596. Those cases, while involving somewhat different facts, recognize the principles to which we have referred. While there is some language in the *England* case which supports appellants' contention the essential question was there treated as one of fact rather than one of law. In that case, the court set aside the portion of the judgment covering certain household goods, the value of which was not made known to the defendant, and upheld the portion covering the value of certain liquor, which was later delivered, on the ground that the evidence sufficiently supported the fact that its value was made known. It was also held that the court properly refused to give an instruction to the effect that a limitation of value placed in the first warehouse

receipt applied to and was controlling with reference to the boxes containing the whiskey.

In the *Wilson* case the court affirmed a judgment in favor of the plaintiff, distinguishing that case on the facts from a former case in which a limitation on the amount of liability had been upheld for the reason that notice of the limitation was plainly printed on the face of the receipt, which was extremely brief, and that the owner of the goods had presumptively read it and was bound by it. In the *Wilson* case it was pointed out that different facts there appeared; that the notice of limitation of value in the receipt was in small type and merely a part of a large amount of printed matter; that there was evidence that the defendant was notified of the true value of the goods at the time they were left for storage, and at least on one occasion thereafter; that no demand was ever made for any increased rate of storage; that no receipt was given to the owner until eighteen months after the goods were stored; and that it was not error for the court to refuse to instruct the jury that the owners were conclusively presumed to know the contents of the warehouse receipt, and that their right to recover was conclusively controlled by its provisions.

Both of the cases thus relied on treat the question which is controlling here as one of fact and we find nothing in those cases to support the contention here made that it must be held, as a matter of law, that the valuation thus agreed on in the three instruments was not controlling or that the evidence here is entirely insufficient to support the court's finding that the value of these rugs was agreed upon, with the implied finding that the agreement was fairly entered into. The question was one of fact and the evidence is sufficient to support the findings made.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

87 Cal.App.2d 264

IMPERIAL IRR. DIST. v. VARNEY et al.
Civ. No. 3911.District Court of Appeal, Fourth District,
California.
Aug. 20, 1948.**Waters and water courses** ⇨231

Where bonds were issued pursuant to statute for installation of a sanitary sewer and were made a lien on realty, deeds obtained by irrigation district through sales of realty for nonpayment of assessments levied by district did not extinguish the liens of bonds, and bondholder, upon receipt of deeds after due foreclosure of bonds, would own realty as tenant in common with district. Health and Safety Code, § 4700 et seq.; Streets and Highways Code, § 6400 et seq.; Water Code, § 26300.

Appeal from Superior Court, Imperial County; Pat R. Parker, Judge.

Action by Imperial Irrigation District against George Varney, as treasurer of Imperial County, J. C. Hickey and others, to enjoin foreclosure of bonds constituting a lien on realty and to quiet title against the liens. From an adverse judgment, plaintiff appeals.

Affirmed.

Harry W. Horton and George R. Kirk, both of El Centro, for appellant.

Clarence J. Walker, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is a quiet title action involving a number of lots in the city of Westmorland.

The plaintiff claims title under various deeds obtained through sales of the lots for nonpayment of assessments levied by the irrigation district. These deeds were taken, respectively, in the years 1935, 1937, 1938, 1939, 1941, 1942 and 1945. In each instance, the deed was given for one year's delinquency, being the latest available year, but a number of prior delinquencies existed, some of these delinquencies being prior to 1932.

The defendant Hickey was the owner of a number of bonds issued on June 23, 1932, for the installation of a sanitary sewer system, and made a lien on these lots. These bonds were issued under the provisions of the Improvement Act of 1911, Streets and Highways Code § 6400 et seq., and were ordered by the Westmorland Sanitary District under the provisions of the Sanitary District Act of 1923. (Act 7105, Deering's Gen.Laws. Now Sec. 4700 et seq., Health and Safety Code.) These bonds being in various stages of delinquency on May 1, 1946, the county treasurer gave written notice of foreclosure proceedings if payments were not made within six months, pursuant to section 68 of the Improvement Act of 1911, as amended, (Stats. 1933, p. 2390) now section 6501, Streets and Highways Code.

On October 11, 1946, the plaintiff brought this action to enjoin the defendants from proceeding with the foreclosure of these bonds and to quiet its title against the liens of said bonds. The court found that the plaintiff is the owner of these properties subject to the effect of the liens of these respective bonds and the due foreclosure thereof, and concluded that these bonds represented a lien on the property with the right on the part of the defendant Hickey, upon his receiving deeds after due foreclosure of the bonds, to hold and own the property as a tenant in common with the plaintiff "under an ownership now known as the parity rule." Judgment was entered accordingly, from which the plaintiff has appealed.

The appellant contends that its respective deeds extinguished the liens of the bonds held by the respondent Hickey and conveyed absolute title to the lots to the irrigation district. It is pointed out that section 48 of the California Irrigation District Act (Act 3854, Deering's Gen.Laws) and now section 26300 of the Water Code, has at all times material here provided that such a deed, conveying property to an irrigation district for the nonpayment of assessments, shall convey an absolute title "free of all encumbrances." It is argued that this eliminates any difference with respect to the times involved, due to a change

in statutes, as mentioned in *Smith v. Adiego*, 54 Cal.App.2d 230, 129 P.2d 953. It is further argued that the parity rule, as applied in *La Mesa Lemon Grove & Spring Valley Irrigation Dist. v. Hornbeck*, 216 Cal. 730, 17 P.2d 143, is not here applicable since that case was decided on the ground that property thus acquired by an irrigation district, through an assessment deed, was not impressed with a public trust, and because the effect of that decision has been overruled by three later cases holding that all property of an irrigation district is owned and held in a governmental capacity. The three later cases, which it is thus contended have overruled the *La Mesa* case, are *El Camino Irr. Dist. v. El Camino Land Corp.*, 12 Cal.2d 378, 85 P.2d 123; *Moody v. Provident Irrigation District*, 12 Cal.2d 389, 85 P.2d 128, and *Anderson-Cottonwood Irr. Dist. v. Klukkert*, 13 Cal.2d 191, 88 P.2d 685.

As we read the three cited cases they have not overruled the effect of the decision in the *La Mesa* case in the respects which are material here. These cases have decided a question which was expressly reserved in the *La Mesa* case, namely, whether nonoperative property held by an irrigation district under a mere tax title may be subsequently assessed for general taxes. The fact that it has been later decided that property thus acquired by an irrigation district was not subject to subsequent taxation, or that such title as is acquired is held in a governmental capacity, is in no way controlling on the question as to the nature of the title acquired by the district through an assessment sale, and at a time when other liens exist in favor of other state agencies.

In the *La Mesa* case, it was first concluded that under our system of taxation liens in favor of county and municipal corporations and special assessments by state agencies for public purposes are all on an equality, and that in case of delinquency a deed to any one of these agencies will not obliterate existing liens in favor of any or all of the others, unless such a result was compelled by the provisions of what was then section 3804a of the Political Code. That section provided that any uncollected tax or assessment might, under

some circumstances, be cancelled by order of the Board of Supervisors or other governing board.

It was then held that nothing in section 3804a compelled such a result. One reason given was that in order for one such agency to be in a position to compel the cancellation of an existing lien in favor of another agency, the property in question must have been property which was impressed with the public purpose committed by law to the agency applying for the cancellation. The reason for this was that one such agency could not be permitted to take property, under its lien, the use of which was essential to another agency in carrying out the very public purpose for which it was formed. This naturally applies only to operative property and not to property held under a mere tax title and taken to secure required revenue and not for permanent public use. The fact, as later determined, that even nonoperative property acquired through a tax title is not subject to future general taxation, is not controlling.

Moreover, the *La Mesa* case further held on other grounds that section 3804a did not compel a conclusion other and different from the general conclusion that the liens of these various state agencies are on an equality and that a deed to one will not obliterate existing liens of the others. It was held that property acquired in a tax sale does not thereby become impressed with a public trust, in the sense there being considered, and in the absence of being put through a different procedure for that purpose; that sections 47 and 48 of the irrigation law do not, as would be required, specifically declare that such a title extinguishes the claim of other agencies of the state; that the clause in section 48 of the irrigation law providing that such a deed shall convey title to the irrigation district "free of all encumbrances" does not have the effect of extinguishing the existing liens of other agencies of the state; and that such a deed to a state agency for delinquent taxes or assessments does not, of itself and necessarily, destroy existing liens in favor of other state agencies. It was then pointed out that this construction harmonizes section 48 of the irrigation law with portions of the various special acts under which the

various state agencies operate. Among these other special acts is the Improvement Act of 1911, which provides that the bonds issued thereunder shall remain a lien upon the property until they are paid.

We conclude that the rule applied in the La Mesa case has not been overruled, so far as material here, by the other decisions relied on and that the trial court here properly applied the parity rule. *Cate v. Bourzac*, 74 Cal.App.2d 422, 168 P.2d 971. This conclusion is confirmed by the reasoning in *Monheit v. Cigna*, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995, which also supports the conclusion that a different rule is not here applicable because of the dates of the various assessments and deeds here involved.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



In re BURNISON'S ESTATE.

No. 13617.

District Court of Appeal, First District,
Division 2, California.

Aug. 18, 1948.

Hearing Granted Oct. 14, 1948.*

1. Wills ☞

The right of "testamentary disposition" is not an inherent right, or a right of citizenship, or a constitutional right, but is wholly statutory. Probate Code, § 27.

See Words and Phrases, Permanent Edition, for all other definitions of "Testamentary Disposition".

2. Descent and distribution ☞ Wills ☞

Rights of succession to property of a deceased, whether by will, or by intestacy, are statutory, and state legislature is not forbidden by federal constitution to limit, condition, or even abolish power of testamentary disposition over property within its jurisdiction. Probate Code, § 27.

3. United States ☞65

"State" within California statute providing that a testamentary disposition may be made to the "state", to counties, to municipal corporations, and to certain others means only California and does not include the United States and hence purported will reciting "I give all I own & possess to the United States government" could not be given effect. Probate Code, § 27, Code Civ.Proc. § 1858.

See Words and Phrases, Permanent Edition, for all other definitions of "State".

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Gust Burnison, also called Gustav Burnison, deceased, wherein Joe Burnison and others petitioned for distribution of whole estate to themselves. The petition was opposed by Phil C. Katz, as Public Administrator of the City and County of San Francisco, and by the United States of America. From an order denying the petition for distribution, the petitioners appeal.

Reversed.

Harry N. Grover and Everett H. Roan, both of San Francisco, for appellant.

Geo. T. Washington, Asst. Sol. Gen. of United States, of Washington, D. C., Frank J. Hennessy U. S. Atty., and Robert B. McMillan Asst. U. S. Atty., both of San Francisco, and John T. Fowler Atty., Dept. of Justice, of Washington, D. C., for respondent.

GOODELL, Justice.

The decedent, a resident of San Francisco, left a will reading as follows:

"June 30 1932
205 - 3rd St
San Francisco California

This is my last Will & Wish

That I give all I own & possess to The United States government U.S.A.
The beneficiary shall be executor
My body shall be cremated after death
Signed Gust Burnison
Approved July 27 1944"

The testator left personal property appraised at \$22,668.70. His heirs at law are three brothers, a sister, and thirteen nieces and nephews, all of whom petitioned for distribution of the whole estate to themselves on the ground that "the United States of America is not authorized by statute or otherwise to take under a will" executed in California by a resident of this state. The United States filed written objections thereto which the court sustained. From the order denying the petition for distribution the heirs appeal.

[1] "At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes." *Estate of Walker*, 110 Cal. 387, 390, 42 P. 815, 1082, 30 L.R.A. 460, 52 Am.St.Rep. 104.

[2] "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." *Irving Trust Co. v. Day*, 314 U.S. 556, 62 S.Ct. 398, 401, 86 L.Ed. 1734, 137 A.L.R. 1093.

[3] By section 27 of the Probate Code our legislature has prescribed "Who may take by will" as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

The Government argues that the phrase "A testamentary disposition may be made to the state" may be interpreted as including the United States. While it is true that historians and other writers frequently adopt the literary or rhetorical expression and speak of the nation as "the state", the draftsmen of legislation as a rule choose language for its definiteness rather than its elegance. Surely if the legislature had intended to include the Federal Government it would have named it. As aptly said in *United States v. Cooper Corporation*, 312 U.S. 600, 606, 61 S.Ct. 742, 744, 85 L.Ed. 1071, "'the ordinary dignities of speech would have led' to its mention by name." Moreover, the collocation of "the state" is with "counties" and "municipal corporations", an obvious incongruity if the Government's argument were adopted.

That "the state" means only California is clear from the legislative history of section 27, which prior to 1931 was section 1275 of the Civil Code. The original section contained the provision "that no corporation can take under a will, unless expressly authorized by statute so to take."

In 1881 the legislature adopted "An Act to authorize the several counties, cities and counties, cities and towns of this State, * * * to receive property by gift, bequest, and devise, * * *" (Stats. 1881 p. 2). In 1905 an amendment carried "counties" and "municipal corporations" into section 1275, and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 27). Clearly when "counties" and "municipal corporations" were thus added, those words went into section 1275 with the same geographical meaning which the act of 1881 had expressly given them, and which they had worn for twenty-four years. In 1931, then, when the legislature added "the state" in connection with "counties" and "municipal corporations" it could not have meant any state other than California.

The case of *United States v. Fox*, 94 U.S. 315, 24 L.Ed. 192, is directly in point. The testator, a resident of the state of New York, devised and bequeathed all his property to the Government of the United States. The statute of New York provided that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question was as to "the validity of a devise to the United States of real estate situated in the State of New York". The Supreme Court held, as the state court had, 52 N.Y. 530, 11 Am.Rep. 751, that this question had to be determined by the laws of New York. The court, speaking through Mr. Justice, Field, said: "The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. * * * A devise to the United States of real property situated in that State is, therefore, void."

True the New York law spoke only of devisees of real property while the instant case deals with a bequest of personalty.

The reasoning of the *Fox* case, however, based as it is on the right of a state to say who can, and who cannot, take by the will of one of its residents, applies with equal force to this case. Indeed the Supreme Court as recently as 1942 in the *Irving Trust Co.* case, *supra*, cited the *Fox* case as supporting its broad statement, already quoted, that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

The Government's contention that if the state law should be construed as invalidating the bequest "serious constitutional questions would arise" is answered by the *Irving Trust Co.* case. Its claim that, assuming "that the *Fox* case cannot be distinguished, it must be regarded as over-

ruled", is answered by the court's citation of it as recently as 1942.

It is not necessary to decide whether, the words "authorized by statute" found in the last sentence of section 27 mean a statute of this state only, or one of any state, or an act of the Congress, for the Government says in its brief that "Various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses" and then frankly concedes that "On the other hand, no Federal statute of general application has purported to authorize the United States to so acquire property."

The Government relies chiefly on *Estate of Hendrix*, 77 Cal.App.2d 647, 176 P.2d 398, 400, and incorporates into its brief the brief it filed in that case. The bequest there was to the "United States Veterans Administration", an agency of the Government. For the reason appearing in the *Hendrix* opinion the questions presented in that case and in this are quite dissimilar. This bequest is to the United States of America, without qualification. It is not to any agency of the Government, incorporated or unincorporated, or to the Government as trustee, or for any particular purpose or use, charitable, benevolent or otherwise. It is in the same general form as was the devise in the *Fox* case, hence the question presented is simply whether the United States *eo nomine* can take by will under our statute. To answer it otherwise than in the negative would be "to insert what has been omitted" from the statute (Sec. 1858, Code Civ.Proc.).

The Government relies, also, on *Dickson v. United States*, 125 Mass. 311, 28 Am. Rep. 230, where the court held valid a devise and bequest to the United States of America. In distinguishing the *Fox* case the court said that that case "proceeded upon the ground that the law of New York allowed real estate to be devised only to natural persons and to corporations established by the Legislature of that state." The court then said "The statutes of this Commonwealth, where the testator had his domicile, and part of his real estate lay, make no restriction as to who may be

devises or legatees * * *." The California statute, as we have seen, contains definite restrictions.

The order appealed from is reversed.

NOURSE, P. J., and GRIFFEN, J., pro tem., concur.



87 Cal.App.2d 226

FORRESTER et ux. v. HOOVER HOTEL & INVESTMENT CO.

Civ. 16077.

District Court of Appeal, Second District,
Division 1, California.

Aug. 17, 1948.

Hearing Denied Oct. 14, 1948.

1. Landlord and tenant ⇨164(1, 6, 7)

Generally, a landlord is not liable for injuries to tenant resulting from latent defect in premises, in absence of proof of knowledge and concealment on his part.

2. Landlord and tenant ⇨169(11)

Where evidence failed to disclose knowledge on landlord's part of any defect existing at time of letting, and it was undisputed that wall bed functioned normally and appeared to tenants to be in good condition for a period of fourteen months prior to when wall bed fell and injured tenant evidence was insufficient for jury on issue whether landlord had knowledge of latent defect in wall bed at time of letting furnished apartment.

3. Landlord and tenant ⇨164(1)

A landlord is not liable to tenant for injuries due to a defective condition or faulty construction of demised premises, in absence of fraud, concealment or covenant in lease. Civ.Code, §§ 1714, 1833, 1861a, 1862, 1955.

4. Landlord and tenant ⇨164(1, 6)

Even if there be a liability attaching to landlord for injuries to tenant due to a defective condition or faulty construction of demised premises upon an implied war-

ranty that completely furnished apartment and its appointments are suitable for occupancy in their condition at the time, such liability would be confined to condition of premises at beginning of term, and not to conditions which, unknown to landlord subsequently arise. Civ.Code, §§ 1714, 1833, 1861a, 1862, 1955.

5. Landlord and tenant ⇨164(1, 6)

Where injury to tenant caused by falling of wall bed did not occur until some fourteen months after tenant went into possession of furnished apartment, during all of which time bed appeared to be in good condition and was safely usable, landlord could not be held liable for tenant's injury on theory of breach of implied warranty that furniture was fit for use, in absence of proof that landlord had knowledge of defect in the bed. Civ.Code, §§ 1714, 1833, 1861a, 1862, 1955.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Richard G. Forrester and Nellie Pauline Forrester, his wife, against Hoover Hotel & Investment Company to recover for personal injuries to plaintiff wife caused by falling of wall bed in a furnished apartment rented by plaintiffs from defendant. From judgment for plaintiffs, the defendant appeals.

Reversed.

Sidney A. Moss, of Los Angeles (Henry F. Walker, of Los Angeles, of counsel), for appellant.

Forrest A. Betts, of Los Angeles (Gerald F. Smith, Jr., of Los Angeles, of counsel), for respondents.

WHITE, Justice.

This is an appeal by defendant landlord from a judgment entered upon the verdict of a jury in favor of plaintiff tenants, husband and wife, in an action for damages for personal injuries to the wife caused by the falling of a wall bed in a furnished apartment.

The complaint charged that plaintiffs were tenants under a month-to-month tenancy of an apartment which, "among other

rooms, includes a living room containing a wall bed which was specifically provided by defendants for the use and benefit of plaintiffs. That the defendants and each of them had so carelessly, negligently and wrongfully equipped, maintained and repaired said wall bed that while said plaintiff was in the act of lowering said wall bed from its upright position to a horizontal position, said wall bed became detached from its fastenings and fell upon and struck the said plaintiff Nellie Pauline Forrester." The answer contained a general denial and the affirmative defense of contributory negligence.

The cause was submitted to the jury under instructions to the effect that the landlord was not liable for injuries resulting from defects which could be discovered by reasonable inspection, nor for latent defects unknown to him. The jury was advised, "But if when the premises are delivered to the tenant the landlord knows of some unsafe condition in or on the same, and if that condition is not then known to the tenant and is not such as would be discovered by a person of ordinary prudence making a reasonable inspection of the premises, and if the landlord fails to inform the tenant of that condition, * * * the landlord's failure to disclose the danger is actionable negligence." No instructions were given or requested upon the theory (hereinafter discussed) of breach of implied warranty that the furniture was fit for use. *Fisher v. Pennington*, 116 Cal.App. 248, 2 P.2d 518.

Defendant landlord purchased the apartment house in April, 1943. Prior thereto the plaintiffs had become tenants therein, occupying apartment 307. In October, 1943, they moved to apartment 206, which they were occupying at the time of the accident, December 2, 1944, some 14 months later. Both apartment 307 and apartment 206 were equipped with the same type of bed and plaintiff wife was familiar with the operation of such type of bed, although she knew nothing about its construction. During the 14 months after they moved into apartment 206 until the happening of the accident the bed was used without any indication that it was

defective in any way. There was no showing that repairs had ever been made to the bed or its attachments or that the landlord had any actual knowledge that its installation was other than in the approved manner.

The bed was a folding bed with the head thereof attached to the door of a closet, the door being pivoted at its top by fittings and a prong or pin in the door and door frame, and pivoted at the bottom by a fixed pivot attached to the bottom of the door and resting in a socket set in the floor. The foot end of the bed could be raised and the bed thus folded up against the door, and while in that position the door could be revolved to move the bed into or out of the closet.

The accident involved the upper pivoting device. This consisted of a metal plate fastened to the top of the door, with an attached upright prong or pin. Another metal plate was inset flush with the top door frame and fastened thereto with three screws. This plate contained a hole into which the upright prong or pin of the door attachment fitted loosely so that it could turn easily. When plaintiff wife attempted to lower the bed at the time of the accident the upper metal plate (attached to the door frame) and the three screws were pulled from the door frame; as testified by one of the plaintiffs, "the whole works came out."

There was expert testimony to the effect that the bed was not installed in the "approved" manner, in that the screws holding the plate to the top door frame were inadequate. There was, however, no evidence that the landlord, who purchased the building in 1943, had any knowledge of the alleged defect.

[1,2] Relying upon the general rule that a landlord is not liable for injuries to a tenant resulting from a latent defect in the premises, in the absence of proof of knowledge and concealment on his part, appellant urges that the trial court erred in denying his motions for nonsuit, judgment notwithstanding the verdict, and for a new trial; pointing out that the trial proceeded solely upon the theory of negligence; that there was no claim by plead-

ing or proof of any warranty, express or implied that the landlord, at the time of the letting, knew of the claimed defect in the bed and failed to disclose to the tenant. It is appellant's contention that the evidence fails to disclose knowledge on the part of the landlord of any defect existing at the time of the letting. This contention must be sustained. It is undisputed that the wall-bed functioned normally and appeared to the tenants to be in good condition for a period of 14 months prior to the accident. The sole ground upon which respondent seeks to sustain the implied finding of knowledge and concealment on the part of the landlord is based on the following set of facts: When the plaintiffs moved into apartment 206, plaintiff Mrs. Forrester and the then manager of the apartment house executed a "Standard Apartment Contract and Inventory", which contained the provision that "The tenant hereby acknowledges receipt in good condition of the above listed furniture and equipment of said apartment, * * *." The furniture so received was indicated by pencil check marks opposite the items of a printed list. The agreement was in duplicate, the original retained by the landlord and the carbon copy by the tenant. A pencil check mark appeared opposite the item "O'stuffed Bed" on the original contract offered in evidence by the defendant landlord, while a corresponding mark did not appear on the tenant's carbon copy, also in evidence. It is urged by respondent that the jury was entitled to believe that the check mark opposite "O'stuffed Bed" was an afterthought, placed there for the purpose of proving that the tenant acknowledged receipt of the bed in good condition, and that therefrom the jury could infer guilty knowledge on the part of the landlord that the bed was not in good condition, since the tenant testified. This contention must be rejected. While the jury might believe that the check mark was added subsequent to the execution of the contract or after the accident had occurred, such belief affords no basis for an inference that at the time of the letting the landlord had knowledge of a latent defective condition of the wall-bed and concealed the fact from the tenant. At the

time plaintiffs moved into the apartment Mrs. Forrester was shown the apartment by the then manager of the building, who checked off the items of furniture and equipment on the printed inventory. There was no "O'stuffed Bed" in the apartment, but, as Mrs. Forrester stated, "only a wall-bed." It may well be that only for this reason the item was not checked off by the manager at the time. Mrs. Forrester testified in part:

"Q. Did you check anything other than the usual dishes and so forth? A. That is all."

Furthermore, the undisputed evidence is that at the time of the letting and for 14 months thereafter the bed appeared to be in good condition. Mrs. Forrester testified that she saw nothing out of the ordinary about the bed at the time she moved in, nor at any time thereafter.

It must therefore be held that there was presented no substantial evidence upon which the jury could base a finding that the defendant landlord had knowledge of a latent defect in the bed at the time of the letting. The judgment therefore cannot stand, unless respondents' contention that the verdict and judgment may be upheld on the theory of warranty, although there be no showing of knowledge and concealment on the part of the landlord, can be sustained.

In support of this contention respondents rely upon the case of *Fisher v. Pennington*, 116 Cal.App. 248, 2 P.2d 518, 520, in which it was held that a folding bed similar to the one involved in the case now under consideration was personal property. In the cited case the court said: "The renting of the bed, personal property, attached to the door, real property, presents a mixed contract of hiring of personalty and realty. If the article furnished or supplied is connected or attached with another article or contrivance only incidental to the use of the article furnished, then it is reasonable to conclude that the hirer or renter warrants, not only the article furnished, but the incidental articles connected therewith and necessary to its proper use." The court held that to the extent that the door was a necessary adjunct of

the bed, it could, so far as the facts there involved were concerned, be considered as personalty.

In the following language the landlord was held liable without discussion of any question of knowledge or concealment:

"Personal property, let to a hirer or renter, must be put into condition fit for its intended purpose or use. Civ.Code, § 1955. Furniture supplied to the renter of a furnished apartment imposes on the owner a liability 'for all damages caused to him by the defects or vices of the thing deposited.' Civ.Code, § 1833. In the renting of a furnished apartment there is an implied warranty that the furniture is fit for use or occupation. * * *

"* * * A hotel keeper is required to keep the furniture in good repair and this irrespective of whether the rental is for one day or one month. The same rule should and does apply to an apartment house keeper. 36 Cor.Jur. 48. Keepers of furnished apartments have the same lien upon baggage, etc., as the hotel keepers. See Civ.Code, §§ 1861a, 1862. Every person is responsible by his want of ordinary care in the management of his property for an injury sustained by the use of such property except in cases where the user has brought injury upon himself. See Civ.Code, § 1714. By the rental contract plaintiffs were conveyed an estate in the demised premises and they were entitled to the use and enjoyment of their habitation. A tort-feasor is liable notwithstanding the existence of a contract. If the cause of action arises from a breach of duty growing out of a contract it is *ex delicto*.

"In omitting to perform a duty imposed under the law, namely, to supply a bed safe to sleep in, appellant was guilty of negligence. It is not necessary in this case to invoke the doctrine of *res ipsa loquitur*."

[3] We are persuaded that to hold the landlord liable upon warranty for any injury resulting from a latent defect in the equipment or furnishings leased with a furnished apartment would be to make the landlord virtually an insurer of the safety of the tenant. We are satisfied that the

correct rule, supported in this state by a long line of decisions, is that a landlord is not liable to the tenant for injuries due to a defective condition or faulty construction of the demised premises, in the absence of fraud, concealment or covenant in the lease, *Shotwell v. Bloom*, 60 Cal.App.2d 303, 309, 140 P.2d 728; *Colburn v. Shuravlev*, 24 Cal.App.2d 298, 299, 74 P.2d 1060.

We are not unmindful of the rule prevailing in some jurisdictions, that one who leases for a short term of a few days, weeks or months, a fully furnished house or apartment supposedly equipped for immediate occupancy as a dwelling without the necessity of any fitting up or furnishing by the tenant, impliedly agrees that the house or apartment and its appointments are suitable for occupation in their condition at the time. *Hacker v. Nitschke*, 310 Mass. 754, 39 N.E.2d 644, 139 A.L.R. 257. See annotation in 139 A.L.R. 257, 261. But in the case of *Bolieau v. Traiser*, 253 Mass. 346, 148 N.E. 809, it was emphasized that the warranty of habitability of premises leased furnished is implied only with regard to the state of the premises at the beginning of the tenancy, and does not cover defects which arise later.

It is to be noted that in the case of *Fisher v. Pennington*, *supra*, relied upon by respondents, the injury was sustained during the first month of the tenancy, while in the Massachusetts cases cited above application of the rule contended for by respondents is limited to the condition of the furniture or premises at the inception of the tenancy.

[4,5] In the case at bar the accident occurred some 14 months after the tenants went into possession, during all of which time the bed appeared to be in good condition and was safely usable. If, upon the authority of *Fisher v. Pennington*, *supra*, there be a liability attaching to the landlord upon an implied warranty that where a completely furnished apartment is rented, it is impliedly agreed that the apartment and its appointments are suitable for occupancy in their condition at the time, then we hold that such liability under the theories advanced in the last-cited case is

confined to the condition of the premises at the beginning of the term and not to conditions which, unknown to the lessor, subsequently arise. In the case with which we are here concerned, as heretofore noted, respondents detected no defect in the bed, its construction or attachment to the door. Any defect was therefore latent, and according to the testimony was equally unknown to the appellant landlord.

For the foregoing reasons the judgment is reversed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting



87 Cal.App.2d 288

PRIMM et al. v. JOYCE et al.
Civ. 16467.

District Court of Appeal, Second District,
Division 1, California.
Aug. 26, 1948.

1. Landlord and tenant ⇨76(4)

In lessor's unlawful detainer action based on lessee's violation of lease provision against subletting of demised premises, burden was on lessee to prove affirmative defense of waiver of violation by preponderance of the evidence.

2. Estoppel ⇨54

Knowledge sufficient to operate as an estoppel must be actual, and not merely presumptive.

3. Principal and agent ⇨178(1)

Notice to agent is notice to principal only as to things within scope of agency.

4. Principal and agent ⇨182

In lessor's unlawful detainer action based on lessee's violation of lease provision against subletting demised premises, evidence was insufficient to establish even ostensible agency between lessor and his secretary and auditor to extent that knowledge of secretary of alleged violation was knowledge of lessor.

5. Evidence ⇨54

An inference must be founded on a fact legally proved, and may not be based on an inference much less a suspicion. Code Civ.Proc. § 1960.

6. Landlord and tenant ⇨76(4)

In lessor's unlawful detainer action based on defendant's violation of lease provision against subletting, evidence was insufficient to sustain finding that lessor or his secretary-auditor, if an agent accepted rent with such knowledge as would estop lessor from asserting admitted violation.

Appeal from Superior Court, Los Angeles County; Paul Nourse, Judge.

Unlawful detainer action by E. J. Primm and Josephine Primm against Albert M. Joyce and Harry Mills. From the judgment, plaintiffs appeal.

Judgment reversed, and cause remanded with directions.

Samuel L. Rummell and Gavin Morse Craig, both of Los Angeles, for appellants.

Max Burwitz, of Newport Beach, for respondent Albert M. Joyce.

Hahn & Hahn, of Pasadena, for respondent Harry Mills.

DORAN, Justice.

This is an appeal from the judgment in an action for unlawful detainer.

As recited by appellants, "a prima facie case for plaintiff was stipulated to by defendant Joyce. The Court ruled that the pleadings made out a prima facie case unless defendant established his affirmative defenses set forth in his answer. To this ruling defendant Joyce acquiesced and the trial proceeded in accordance therewith."

The facts which are not disputed are briefly summarized by appellant as follows:

"On November 8, 1946, plaintiffs and defendant Joyce executed a written instrument by the terms of which plaintiffs leased to Joyce certain described real prop-

erty in the City of Pasadena, California, for a period of five years. The lease provided among other things by paragraph Twelve thereof that the lessee was not to assign the lease or to sublet any part of the premises without lessors' consent with certain exceptions which admittedly do not apply to the facts of this case. Defendant Joyce entered into possession of the premises under the lease and thereafter in violation of the provisions of paragraph Twelve thereof sublet a portion of the premises to defendant Mills without consent of plaintiffs. A notice in compliance with law was served upon defendants requiring them to surrender possession of said premises within three days and declaring plaintiffs' election to declare a forfeiture of the lease." Defendant failed to vacate and the within action was filed.

More particularly, as pointed out by appellant, the court found that all of the material allegations of the complaint were true and, "all of the allegations and denials of the answer by defendant Joyce were found to be untrue, except that the Court found to be true the allegations of paragraph I of defendants' third, further and separate defense, to-wit, 'that plaintiffs on or about April 1, 1947, had notice and knowledge of said sublease, accepted the benefits of said lease by accepting the rent 'on or about the 15th day of the months of April, May, June, July, August and September, 1947.'" The action was filed on October 1, 1947.

It is contended on appeal that the findings are unsupported by the evidence and in particular that, "there was no evidence in support of the above finding concerning notice and knowledge by plaintiffs of the sublease."

Paragraph 12 of the lease which defendant is alleged to have violated is as follows:

"Twelfth: It is agreed that the lessee shall not assign this lease nor any rights thereunder, nor sublet the premises or any part thereof, save and except the structures now upon said premises as hereinbefore set forth, without the written consent of the lessor first had obtained." The lease was dated November 8, 1946.

Defendant admitted the violation and in that connection testified as follows:

"The Court: Mr. Joyce, when did you sublet this metal building that you moved on, about April, as alleged in the complaint? A. I believe it was sometime in March.

"Q. And what was the nature or character of the business which was conducted there? A. It was general food, hamburgers and hot dogs, and so forth.

"Q. What name was the business there conducted under? A. Under the name of 'Hi Junior.'

"Q. 'Hi Junior' hotdogs, or something like that? A. 'Hi Junior' was the name of the stand. It was the child of my brain, I just thought that I would reverse Junior Hi to Hi Junior.

"Q. Did you have anything to do with the operation of these premises? A. Yes, sir, I ran it.

"Q. To whom did you sublet it? A. To Harry Mills.

"Q. You ran it for Harry Mills, then? A. No, your Honor, I had people running it for me and I found that due to illness I couldn't possibly make the trip from Balboa every day, and Mr. Mills—I met him and he was looking for a stand or so-called concession like some that I have at the beach, and we couldn't make a deal through some sublease of mine down there, and we told him about this up here at Pasadena and he liked it, and that was when we subleased it to him.

"Q. After you sub-leased it you did not go back on the premises to run it? A. No, not to run it.

"Q. Did you tell Mr. or Mrs. Primm anything about that? A. No, your Honor, I did not.

"Q. Who paid the rent after that to the Primms, you or your sub-lessee? A. I did, your Honor.

"Q. Do you know that they were ever around there and saw Mr. Mills running it? A. Well, I assume that they were.

"Q. Well to your own knowledge, were they ever around there to see Mr. Mills running it? A. No, not to my knowledge. I wasn't up there very often."

It will be seen then from the foregoing that the property was leased in November, 1946, and violated by defendant the following March.

It is respondents' contention that plaintiffs' conduct thereafter amounted to a waiver and constituted an estoppel. The defense is based on a single word contained in a letter from a Mr. Schroeder who was lessor's "secretary, auditor," which letter is as follows:

"April 1, 1947

"Albert M. Joyce

"Box 658

"Balboa, California

"Dear Mr. Joyce,

"Your check in the amount of \$300 was returned by our bank, marked 'insufficient funds'. I immediately thought there was possibly an error so I had our bank call the Allen and Cole Branch of the Bank of America and they informed us that no mistake had been made and that the check at this time was not good. I would appreciate hearing from you at once.

"Also, when I called the Sycamore Number at the Station they informed me that you were not operating any part of the corner and they did not know when you would be back in Pasadena.

"Very truly yours,

"Primm Investment & Loan Co.

"WHS:hrt /s/ W. H. Schroeder"

The Paragraph in the above letter which reads, "Also, when I called the Sycamore Number at the Station they informed me that you were not operating any part of the corner and they did not know when you would be back in Pasadena," and in particular the word "operating," respondent contends is evidence of knowledge on the part of Mr. Schroeder that the premises had been sublet; that such knowledge on the part of Mr. Schroeder was "imputable to Primm and that the receipt of rent from Joyce thereafter constituted a waiver."

[1-3] There can be no dispute as to the law that the burden was on defendant to prove the affirmative defense in this case the waiver. Nor can there be any disagreement with the proposition that knowledge sufficient to operate as an estoppel must be actual and not merely presump-

tive. And it should be emphasized that the law is well settled that notice to an agent is notice to the principal only as to those things within the scope of the agency.

There is not a scintilla of evidence in the record that Schroeder was any more than a secretary and auditor as described by both. Mr. Primm testified in part as follows:

"The Court: Who took charge of your business affairs when you were away, Mr. Primm? A. My office did and Mr. Schroeder was in charge.

"Q. By Mr. Hurwitz: Did Mr. Schroeder have any authority to deal with the property in your absence? A. No."

"Q. Mr. Schroeder testified as follows:

"Q. Mr. Schroeder, you are employed by Mr. Primm? A. Yes sir.

"Q. That is in the capacity of auditor and secretary? A. Well, I would say auditor.

"Q. Now, Mr. Schroeder, were you familiar with this lease which is the subject of this law suit? A. In the collection of rent, yes, I was. But as far as the provisions of the lease, no."

[4] The record is destitute of any evidence that Mr. Schroeder was Mr. Primm's agent with authority to deal with any of Mr. Schroeder's property except to collect the rents; the evidence is insufficient to establish even an ostensible agency to the extent that knowledge of the agent is knowledge of the principal as contended for by respondent.

[5] Respondent argues that the court disbelieved Mr. Primm and Mr. Schroeder. But, assuming this to be a fact, what then is left upon which to base a conclusion or inference that either or both had actual knowledge and intended a waiver? An inference must be founded on fact legally proved. (Section 1960, Code Civ.Proc.) An inference may not be based on an inference much less a suspicion. Respondents' argument in this regard is specious and is unconvincing. There is nothing in the testimony of either witness that justifies respondents' assertion that the trial court found that there was an agency "based on the testimony of Schroeder and

Primm, both of whom contradicted themselves as to the scope of authority and the Trial Court had discretion to determine which portions of their testimony he believes." Nor does the record justify the further argument that, "In view of their contradictions, it would be impossible for the trial court to believe everything they had said."

At the conclusion of the trial appears the following:

"The Court: He is a business man and working for Mr. Primm, collecting rents. When he says that someone is not operating a hot dog stand he means that he is not in it any more and someone else is, and that is what 'operating' means.

"Mr. Schroeder, as far as I am concerned, is Mr. Primm, and I do not want to hear any more argument on it."

The only evidence on the subject was Mr. Schroeder's testimony as to what was intended by the use of the word "operating" which is as follows:

"The Court: You used the word 'operating'. In your letter you say you learned that he was not operating any part of the corner. What did you mean? A. I meant that he wasn't there working."

That the word "operating" has numerous meanings according to the sense in which it is used there can be no question. Mr. Schroeder testified as to what was meant and intended by the word as used in the letter and, as above noted, the trial judge stated substantially the same thing. Nevertheless, the court continued: "Mr. Schroeder, as far as I am concerned, is Mr. Primm"; yet, neither as a matter of fact nor as a matter of law, is there anything in the record to support such a conclusion.

[6] The testimony of the defendant affirmatively establishes the fact that the contract was violated by defendant wilfully, knowingly and intentionally. Notwithstanding this flagrant culpability defendant seeks relief by resorting to an equitable defense and bases such effort on the argument that plaintiff approved of and waived the admitted violation. As heretofore noted in substance, the burden was on defendant to establish such an affirmative defense by a preponderance of

the evidence. That defendant has failed to meet this elementary legal retirement there can be no question. The findings of fact are unsupported by the evidence and the conclusions of law are therefore unwarranted.

For the foregoing reasons, the judgment is reversed and the cause remanded with directions to enter judgment for plaintiff.

YORK, P. J., and WHITE, J., concur.



87 Cal.App.2d 275

PEOPLE v. WEATHERFORD.

Cr. 4233.

District Court of Appeal, Second District,
Division 1, California.

Aug. 23, 1948.

Rehearing Denied Sept. 2, 1948.

Hearing Denied Sept. 20, 1948.

1. Criminal law Ⓒ997

The common-law remedy of *coram nobis* to review judgment of conviction is at best extremely limited in scope.

2. Criminal law Ⓒ997

Alleged erroneous instructions were merely "irregularities" occurring at the trial, reviewable on appeal from conviction, and were not properly reviewable on motion to vacate judgment of conviction in the nature of a writ of error *coram nobis*, notwithstanding defendant's insistence that because of instructions there was a denial of due process of law and therefore a loss of jurisdiction to render valid judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Irregularity".

3. Criminal law Ⓒ822(1)

Instructions must be read and considered as a whole.

4. Criminal law Ⓒ822(4)

Instructions, when considered as whole, were not erroneous as in effect charging that defendant killed the deceased.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Jackson M. Weatherford was convicted of murder, and, upon denial of his motion to vacate the judgment of conviction, which had been affirmed on appeal, he appeals.

Affirmed.

See, also, 176 P.2d 382.

James R. Jaffray and Ben Van Tress, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and William E. Simpson, Dist. Atty., and Jerre J. Sullivan and Robert Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondent.

DORAN, Justice.

The present controversy concerning responsibility for the murder of Mary Annette Struck on April 5, 1943, has been before the courts on several different occasions. The defendant's first conviction of murder, with punishment fixed at life imprisonment, was reversed in *People v. Weatherford*, 27 Cal.2d 401, 164 P.2d 753. After a second trial of the appellant, a similar verdict of guilty was returned on June 14, 1946, which conviction was affirmed in *People v. Weatherford*, 78 Cal.App.2d 669, 178 P.2d 816. The Supreme Court denied appellant's petition for a hearing.

On January 8, 1948, the appellant filed in the superior court notice of a "Motion to Set Aside Judgment," on the ground that "said judgment was rendered and entered in violation of the Constitution of the United States and the Constitution of the State of California, and is void." More explicitly, appellant contended that "the Court has no right or power to instruct the jury on questions of fact, that when a Court does do that, from the moment of the instruction * * * a defendant is denied his constitutional right, he is denied due process of law and from then on every act is void." There was a demurrer to the motion, on the ground that it was not shown that appellant did not have a trial on the merits, that no extrinsic fraud, coercion or duress was alleged, and that the questions presented were moot, having been raised and adjudicated in *People v. Weatherford*,

78 Cal.App.2d 669, 178 P.2d 816. On January 26, 1948, the trial court sustained the demurrer, and, "on its merits," denied appellant's motion to vacate the judgment. The present appeal is from that order.

According to appellant's brief, "when the trial court instructs the jury in language which inevitably instructs them that the defendant killed the deceased, there has been such a departure from due process of law that the trial court thereupon lost jurisdiction to proceed to judgment"; that the judgment entered "is void on the face of the record, and may be directly attacked by a motion to vacate, and such motion is not impeded by proceedings for new trial or by appeal."

Appellant's opening brief apparently treats the motion to vacate the conviction as in the nature of a writ of error coram nobis, although the motion was not so designated, and cites *People v. Gilbert*, 25 Cal.2d 422, 444, 154 P.2d 657, 658 where the court says: "This judgment * * * shall not preclude either defendant * * * from applying * * * in the superior court for * * * coram nobis." However, the brief concedes that "It is not the province of the court on coram nobis * * * to review mere errors properly reviewable on appeal," quoting from *In re Steve*, 73 Cal.App.2d 697, 714, 167 P.2d 243, and from *People v. Egan*, 73 Cal.App.2d 894, 899, 167 P.2d 766, 769, the latter case stating that "The writ may not be used to cure irregularities occurring at the trial except in such circumstances of extrinsic fraud which actually deprived the petitioner of a trial on the merits." The motion is likewise so treated in respondent's brief which states that "a motion to vacate a judgment in a criminal case upon grounds which made such motion the equivalent of a writ of error coram nobis, must be regarded as a part of the proceedings in the criminal case; and that an order denying an application for relief in the nature of coram nobis is an appealable order," citing *In re Paiva*, 1948, 31 Cal.2d 503, 190 P.2d 604, and *People v. Darcy*, 79 Cal.App.2d 683, 180 P.2d 752, 754. The *Darcy* case also states that: "It is settled law * * * that the writ of error coram nobis 'never issues to correct an error of law nor * * * to

redress an irregularity occurring at the trial, such as misconduct of the jury, or of the court, or of any officer of the court (except under circumstances amounting to extrinsic fraud, which in effect deprived the petitioner of a trial upon the merits).’ ”

[1,2] It is clearly evident from the cases cited and other decisions bearing on this point, that the common law remedy of *coram nobis* is, at best, extremely limited in scope. It also seems clear that, in the instant case the matters complained of, namely, the giving of alleged erroneous instructions to the jury, are, in the language of the cited cases, merely irregularities occurring at the trial, reviewable on appeal from the conviction but not properly cognizable by way of *coram nobis*. And this, notwithstanding appellant’s insistence that because of the court’s instructions there was a denial of due process and therefore a loss of jurisdiction to render valid judgment. As pointed out in the respondent’s brief, no extrinsic fraud, duress or mistake, or anything of that nature, is alleged either in appellant’s motion to vacate the judgment or in the briefs filed on this appeal. And, in any event, the record fails to sustain the contentions therein made. There is no showing of any denial of due process either in respect to the giving of instructions, or otherwise.

[3,4] The proposition that instructions must be read and considered as a whole needs no citation of authorities. Yet, appellant’s contention that the trial judge in effect charged that “defendant did kill the deceased,” is predicated entirely upon a forced interpretation of certain isolated phrases culled from the instructions given. Even a superficial examination of the charge as a whole reveals that the contention is without merit. The instructions,

which were detailed and precise, charged that the jurors were “the sole and exclusive judges of the weight of evidence,” and in the usual terms, treated such matters as presumption of innocence, burden of proof, circumstantial evidence, etc.

The language used in *People v. Smith*, 217 Cal. 267, 272, 18 P.2d 329, 330, and in *People v. Smith*, 218 Cal. 484, 486, 24 P.2d 166, is directly applicable to the present controversy. The defendant had there, as here, been convicted of murder, and thereafter twice appealed from denial of motions to annul the judgment. In the first *Smith* appeal, the Supreme Court said: “We have examined the proceedings and say unhesitatingly that there is not a scintilla of merit in the showing made on the delayed motion * * *. We would be justified in dismissing the proceedings, but have concluded that in the circumstances of the case we should affirm the order.” In 218 Cal. 484, 486, 24 P.2d 166, 167, the court further said: “If the appellant may assign as grounds for separate appeals specific questions which he may have presented upon his appeal (from the judgment), and in some instances which he did actually raise, upon the denial of a motion to set aside the indictment and annul the judgment after said judgment has become final, * * * there would scarcely be a procedural finality to criminal cases. * * * Substantial rights are not denied where the person charged had a full and fair opportunity to invoke every privilege or right which the law accords to the accused, and where no deceit or fraud has been practiced upon him. Certainly no substantial right was violated by the trial court’s disposal of appellant’s motion.”

The order appealed from is affirmed.

YORK, P. J., and WHITE, J., concur.

32 Cal.2d 478

In re BRADY'S ESTATE.

COBBY v. ADAMS et al.

No. S. F. 17553.

Supreme Court of California, in Bank.

Aug. 30, 1948.

Wills ⇐358

Minute order merely denying petition for production of alleged will for probate and passing on no other issue was not an appealable order. Probate Code, § 1240.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceedings in the matter of the estate of Edward R. Brady, deceased, wherein Emma L. Cobby filed petition against Russell R. Adams, and another, for production and probate of an alleged will. From an order denying the petition, petitioner appeals.

Appeal dismissed.

For prior opinion, see 188 P.2d 531.

Joseph A. Brown, of San Francisco, for appellant.

George M. Naus and Harold B. Lerner, both of San Francisco, for respondents.

GIBSON, Chief Justice.

More than eleven years after the intestate distribution of decedent's estate petitioner, a sister, commenced this proceeding to require the surviving administrator of the estate to produce a document alleged to be the last will of the decedent and for probate of that document as his will. The trial court ordered that the petition "for production of will be denied," and this appeal followed.

After Mr. Brady's death a number of papers, some holographic and some typewritten, concerned with the testamentary disposition of his estate, were discovered. All of these were given directly to the attorney who was handling the affairs of the estate or where handed to the administrator, who then turned them over to the attorney. It is not entirely clear what happened to these papers, but in 1937 the attorney, since deceased, gave some of

them to decedent's secretary. The alleged will relied on here, however, was not among them. At the close of the testimony the court ordered a search of the deceased attorney's papers, and a continuance was granted for that purpose, but no will was discovered.

Thereafter the following minute order, which is the one appealed from here, was entered: "Heretofore submitted the court ordered Petn. of Emma L. Cobby for production of will be denied; evidence insufficient as to existence of will."

Petitioner contends that there was ample proof of the existence and contents of the alleged will to require its admission to probate and that the minute order is void because there were not sufficient findings to support an order denying probate of the will. These arguments are all predicated on the assumption that the court, in making the minute order, refused probate of a lost or destroyed will. The minute order, however, is a denial merely of the petition "for production of will," and it does not purport to determine the sufficiency of the evidence to sustain the probate of a lost or destroyed will, and the question whether the alleged will should be admitted to probate is still undetermined. The court merely refused to order the production of a document which it found was not shown to be in existence.

An order refusing to require the production of a testamentary document is not listed as an appealable order in section 1240 of the Probate Code. The present order is, therefore, not appealable (see *Howard v. Superior Court*, 25 Cal.2d 784, 787, 154 P.2d 849; *In re Estate of O'Dea*, 15 Cal.2d 637, 638, 104 P.2d 368; *In re Guardianship of Leach*, 29 Cal.2d 535, 539, 176 P.2d 369; *In re Estate of Green*, 25 Cal.2d 535, 545, 154 P.2d 692), and the appeal must be dismissed. *Collins v. Corse*, 8 Cal.2d 123, 124, 64 P.2d 137; *In re Guardianship of Lyle*, 77 Cal.App.2d 159, 161, 174 P.2d 910.

The appeal is dismissed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

32 Cal.2d 488

**In re Accusation by WALKER.
S. F. 17752.**

Supreme Court of California, In Bank.

Aug. 30, 1948.

Rehearing Denied Sept. 27, 1948.

1. Attorney and client ☞36(1)

Under statutes relating to disciplinary authority of courts, Supreme Court has same power to entertain disciplinary proceedings against attorneys which it possessed prior to the adoption of act adopting a new procedure for instituting disciplinary proceedings, despite possible duplication between independent proceedings before Supreme Court and others instituted before the state bar. Business and Professions Code, §§ 6075-6087, 6100-6118.

2. Attorney and client ☞52

An accusation filed in Supreme Court against an attorney may be properly dismissed unless it appears from accusation that accuser has set forth specific charges which, if proved, would constitute grounds for disciplinary action, that same specific charges had been previously presented in written form to state bar for purpose of invoking its disciplinary powers, and that following such presentation to state bar, it has arbitrarily failed or refused to grant a hearing on such specific charges or has arbitrarily failed or refused after a hearing, to take appropriate action. Business and Professions Code, §§ 6075-6087, 6100-6118.

3. Attorney and client ☞52

Allegations of accusation filed in Supreme Court that affiant had previously interviewed secretary of state bar association, and was informed that secretary could take no action, that a sub-committee hearing was held on one item, and that secretary recommended against a hearing concerning the attorney mentioned in accusation, did not show either that the same specific charges made in accusation had been previously presented in written form to state bar to invoke its disciplinary powers, or that bar arbitrarily failed to grant hearing on such specific charges, or to take appropriate action after hearing, and accusation would therefore be dismissed by Supreme Court, regardless of whether

accusation set forth charges which if proved would constitute grounds for disciplinary action. Business and Professions Code, §§ 6075-6087, 6100-6118.

Proceeding by Claudia Louise Walker seeking disciplinary action against members of the state bar.

Accusation dismissed.

BY THE COURT.

Claudia Louise Walker has filed an "Accusation for Disbarment" charging alleged unprofessional conduct against four attorneys-at-law. She seeks to have this court exercise, without prior recommendation from the Board of Governors of The State Bar, the disciplinary powers set forth in sections 6100 to 6118 of the Business and Professions Code. We have concluded that this proceeding should be dismissed without prejudice and, as this appears to be the first proceeding of this nature which has been filed in this court or any other court since the adoption of the State Bar Act (Stats.1927, chap. 34; now Bus. & Prof.Code, section 6000 et seq.), we deem it appropriate to state the reasons for such dismissal.

Prior to the adoption of the State Bar Act, proceedings seeking disciplinary action against members of the bar could be instituted only in the courts. With the adoption of that act, an entirely new procedure for instituting such disciplinary proceedings was adopted, which procedure is now set forth in sections 6075 to 6087 of the Business and Professions Code. While it is specified that the new procedure shall "provide a complete alternative and cumulative method of hearing and determining accusations against members of the State Bar" (sec. 6075), and that nothing in said sections "shall be construed as limiting or altering the powers of the courts of this State to disbar or discipline members of the bar as this power existed prior to the enactment of Chapter 34 of the Statutes of 1927, relating to the State Bar of California" (section 6087), such new procedure has, since 1927, been generally accepted as the normal procedure for the hearing of all accusations against

members of the bar. Rules of procedure have been adopted under the authority of section 6086, and an orderly and efficient method has been established for conducting hearings in disciplinary proceedings. After such hearings the Board of Governors of The State Bar has "the power to recommend to the Supreme Court the disbarment or suspension from practice of members" (section 6078).

[1,2] Under the above mentioned sections 6100 to 6118, this court obviously has the same powers which it previously possessed independently to entertain disciplinary proceedings despite possible duplication between such proceedings and others instituted before The State Bar, but we are of the view that as a matter of policy this court should not exercise those powers unless and until the accuser has followed the normal procedure by first invoking the disciplinary powers of The State Bar. (Bus. & Prof.Code, secs. 6075-6087.) More specifically, we believe it proper to dismiss an accusation filed in this court unless it appears from the accusation: (1) that the accuser has set forth specific charges which, if proved, would constitute grounds for disciplinary action; (2) that the same specific charges have been previously presented in written form to The State Bar for the purpose of invoking its disciplinary powers; and (3) that following such presentation to The State Bar, it has arbitrarily failed or refused to grant a hearing on such specific charges or has arbitrarily failed or refused, after a hearing, to take appropriate action.

[3] It appears from the accusation herein that in 1939, the accuser's mother instituted proceedings as the result of which the accuser was committed to the Stockton State Hospital. The alleged unprofessional conduct of the named members of the bar consisted of alleged acts or omissions on their part in connection with the proceedings resulting in her commitment, or in connection with her guard-

ianship proceedings, or in connection with her subsequent efforts to have the record of the commitment expunged or to obtain financial redress. The only allegations with respect to any attempt to follow the normal procedure by first invoking the disciplinary powers of The State Bar are as follows:

"That affiant has on several occasions in the past interviewed the Secretary of the State Bar Association and after explaining the situation involved was informed by him that he could take no action, that in December 1947 a Subcommittee Hearing was held on one item and the Subcommittee did not even take the trouble to make notes or to comparatively study the statements made on which to base a sound conclusion, and at that time the Secretary of the State Bar Association recommended against a hearing concerning Attorney Melvin Belli mentioned herein, and that for this reason affiant is filing this accusation direct with the Supreme Court of the State of California."

Assuming that the accuser has set forth in the accusation specific charges which, if proved, would constitute grounds for disciplinary action, it is clear that the quoted allegations are wholly insufficient to show either that the same specific charges have been previously presented in written form to The State Bar for the purpose of invoking its disciplinary powers or that, following such presentation, The State Bar has arbitrarily failed or refused to grant a hearing on such specific charges, or has arbitrarily failed or refused, after a hearing, to take appropriate action. The vague allegations of the accusation concerning some form of interviews with the secretary of The State Bar, and concerning some form of hearing held by a subcommittee "on one item" fall far short of the showing which should be required of the accuser when seeking independently to invoke the disciplinary powers of this court.

It is therefore ordered that the accusation be dismissed without prejudice.

32 Cal.2d 430

GARRISON v. ROURKE.

Sac. 5956.

Supreme Court of California, in Bank.

Aug. 20, 1948.

1. Statutes ⇨225¾

Re-enactment of statute in substantially the same language after judicial construction thereof raises a strong presumption of legislative intent to adopt such construction.

2. Elections ⇨275, 300

The jurisdiction vested in superior court by constitution and statute to hear and determine election contests may not lightly be deemed to have been destroyed and intent to divest court of such jurisdiction by time requirements will not be read into statute unless that result is expressly provided or otherwise clearly intended. Elections Code, §§ 8550-8557; Const. art. 6, § 5.

3. Statutes ⇨227

A statutory time limitation for court's action in a matter subject to its determination is not mandatory, regardless of mandatory nature of language used, unless a consequence or penalty is provided for failure to do the act within the time commanded.

4. Courts ⇨43

While courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government and an intent to defeat the exercise of court's jurisdiction will not be supplied by implication.

5. Elections ⇨269, 300

The paramount legislative concern in providing for election contests was not the parties' claims, but the public interest of ascertaining the will of the people at the polls fairly, honestly and legally expressed, and expedition in determining issues is merely incidental to main purpose of law. Elections Code, §§ 8550-8557.

6. Statutes ⇨181(2), 205

The legislative intent must be gathered from statute as a whole, nature and char-

acter of acts to be done thereunder, and consequences which would follow the doing or not doing of the act at required time.

7. Elections ⇨300

Elections Code section providing that court in election contest "shall" file findings and conclusions within ten days of submission thereof is not mandatory, notwithstanding statutory definition of quoted word, since construction of section as mandatory would result in divesting court of jurisdiction by implication. Elections Code, §§ 5, 15, 8550-8557; Const. art. 6, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall".

8. Elections ⇨275

Failure to file findings and conclusions within ten days after submission of election contest as provided by Elections Code did not divest court of jurisdiction. Elections Code, §§ 5, 15, 8550-8557; Const. art. 6, § 5.

9. Statutes ⇨227

Words otherwise generally mandatory or permissive will be given a different meaning when the provisions of the statute, properly construed, require it. Elections Code, § 5.

10. Elections ⇨288

Statement of election contest filed within time limited by Elections Code for filing initial statement could be amended after expiration of time thus limited, where such amendments were filed before hearing on defendant's demurrer and motion to strike, since Elections Code expressly dispenses with any great particularity, formality, or nicety of pleading. Elections Code, §§ 8530, 8531, 8533.

11. Elections ⇨285(3)

Statement of election contest as amended charging malconduct of precinct board, casting of illegal votes, and errors in conduct of election or canvass of returns sufficient to change result of election was sufficient as against general demurrer. Elections Code, §§ 8511(a, d, e), 8530, 8531.

12. Elections ⇨305(6)

Any irregularities in amended statement of election contest subject to special

demurrer need not be considered on appeal in view of the hearing on issues raised by amended statement and answer thereto. Elections Code, § 8530.

13. Elections ⇨186(4), 305(6)

Where cross was placed partly in square opposite name of one candidate for office of county assessor and partly in square opposite name of other candidate, whether a sufficient portion of cross was in square opposite name of one candidate to count vote for him was a question primarily for trial court, and vote was properly rejected on ground that it was impossible to ascertain which candidate was intended, notwithstanding Elections Code provision that a cross partly within and partly without a voting square does not invalidate ballot. Elections Code, §§ 7050, 7052.

14. Elections ⇨186(4)

Where large blot appeared on ballot in square opposite name of one candidate for office of county assessor which, when ballot was folded, was offset and matched by a similar blot in square opposite name of a candidate for another office and there was no distinguishable stamped cross in either blot and no other marks in squares concerning such offices, ballot was properly rejected as to office of county assessor on ground that any attempted choice was not clear and was not a compliance with requirements and instruction that voter indicate choice by stamping a cross. Elections Code, §§ 3828, 7052.

15. Elections ⇨194(3)

A ballot may not be rejected on ground that it bears a distinguishing mark, unless the mark itself warrants an inference that it was designedly placed by voter for purpose of identifying his ballot or there is other evidence of such intent. Elections Code, § 7054.

16. Elections ⇨194(4)

Where choice of candidate for all offices was indicated by stamped cross, fact that vote on each of various propositions was indicated by a penciled check did not invalidate entire ballot on ground that such unauthorized method of voting the propositions was a distinguishing mark, in

absence of evidence of voter's intention thereby to identify his ballot. Elections Code, § 7054.

17. Elections ⇨190

The penciled word "spoiled" appearing in three places on reverse side of ballot with signatures of two clerks did not invalidate ballot, in absence of testimony of election officers regarding it, where nothing on face of ballot indicated that it was spoiled, and it was with sealed ballots opened at trial and not among spoiled ballots and it was not cancelled in accordance with requirements of Elections Code. Elections Code, § 5726.

18. Elections ⇨180(1)

Where stamped cross appeared in square opposite name of each candidate for office of county assessor with a blot accompanying cross opposite one candidate's name, ballot was properly rejected over contention that blotted cross was an offset from blotted cross in square opposite name of candidate for another office. Elections Code, § 7052.

19. Elections ⇨180(3)

Where voter indicated choice of candidates by drawing ink cross with broad blunt edge of stamp or other instrument diagonally across entire square from one corner to the opposite corner without regularity or uniformity, ballot was properly rejected on ground that cross obviously was not made with stamp provided for that purpose.

20. Elections ⇨180(3)

Absentee ballot on which voter's choice was indicated by checkmarks made with a lead pencil was invalid because of non-compliance with Elections Code provisions requiring choice to be indicated by a cross mark made with a stamp, pen and ink or indelible pencil. Elections Code, §§ 3828, 5930, 5931(c).

21. Elections ⇨180(3)

Where ballot clearly showed use of a stamp with a cross impression, fact that impression was smaller and a portion of lower end of cross was cut off due to imperfection of rubber stamp or angle at which it was used did not invalidate ballot

in absence of evidence on or dehors the face of ballot that it was not marked with stamp provided for the purpose.

22. Elections ⚡97

Registration does not add to or alter the qualifications of electors fixed by the constitution. Const. art. 2, § 1.

23. Elections ⚡239

Votes cast by nonresidents of the precinct were properly rejected as illegal, though residential discrepancies were due to mistake of registration officers, since constitutional qualifications of electors include residence in election precinct and only qualified electors are entitled to exercise voting franchise. Elections Code, §§ 70, 8511(d); Const. art. 2, § 1.

24. Elections ⚡295(1)

Impeachment of disqualified voter, who testified that he voted for contestant, by pre-trial inconsistent declarations and other testimony justified court's refusal to disallow his vote, though vote for contestant cast by such disqualified voter's wife, who was also disqualified, was disallowed.

25. Evidence ⚡5(2)

That choice indicated by one spouse at election is not conclusive as to vote cast by the other is common knowledge.

26. Elections ⚡289

Refusal to reject as illegal votes cast for contestant by disqualified voters was not error, where such voters were not on defendant's list of illegal votes furnished to contestant before trial, though originally on contestant's list but later withdrawn, since either party to an election contest must give to the other notice of the votes which he intends to assail as illegal. Elections Code, § 8532.

27. Elections ⚡227(1)

Where voter after receiving ballot and before entering booth went outside with ballot in his possession and talked with a candidate for office of county assessor, then re-entered polling place and cast his ballot for such candidate, ballot was properly rejected as illegal because not cast in the manner required by law, though no booth was immediately available when voter received ballot and conversation was

not as to how ballot should be cast. Elections Code, § 5709.

28. Elections ⚡295(1)

Evidence justified rejection of votes cast by husband and wife at general election on ground of lack of residence. Elections Code, § 5651 et seq.

29. Elections ⚡295(1)

Evidence sustained trial court's finding that polls at sparsely settled mountain precinct were kept open from seven a. m. to seven p. m., though tables were cleared and voting materials temporarily set aside on a stand or shelf during noon hour when voters, who had long distances to travel, picnicked at polling place.

30. Elections ⚡305(5)

Where court and parties to election contest conducted a recount of the ballots, judgment that contestant was duly elected county assessor must be affirmed in absence of error in court's rulings on the ballots and claimed illegal votes, notwithstanding contention as to lack of evidence in the record of the official count. Elections Code, §§ 8530, 8556, 8557.

Appeal from Superior Court, Trinity County; W. T. Belieu, Judge assigned.

Election contest by John N. Garrison against John D. Rourke. Judgment for contestant and contestee appeals.

Judgment affirmed.

For prior opinion, see 192 P.2d 457.

Frank E. Carleton, of Los Angeles, for appellant.

Carr & Kennedy and Laurence J. Kennedy, Jr., all of Redding, for respondent.

SHENK, Justice.

J. N. Garrison and John D. Rourke were opposing candidates for the office of Assessor of Trinity county in the November 1946 general election. The official canvass of the returns showed that Garrison received 1026 votes and Rourke 1028 votes, whereupon the latter was declared elected. Garrison, as contestant-plaintiff, filed in the superior court a contest of the election, and judgment was rendered in his favor.

The defendant Rourke prosecutes this appeal.

judgment shall be entered immediately thereafter."

The first asserted ground for reversal is that the trial court lost jurisdiction to enter judgment because the findings of fact and conclusions of law were not filed within the ten days after submission as prescribed by section 8556 of the Elections Code.

The contestant filed his statement of contest with the county clerk (section 8530, Elec.Code) within 30 days after the declaration of the result of the election (section 8531). A written list of alleged illegal votes was served and filed by each party before trial (section 8532). Within five days after filing of the statement of contest the county clerk notified the superior court that the contest had been filed whereupon the court ordered a special session to be held within the twenty day limitation of section 8550. The special session commenced January 14, 1947, and consumed five days. At the close of the hearing the court ordered briefs to be presented and upon the filing thereof the case to be deemed submitted. The last brief was filed on March 10, 1947, within the time allowed by the court. Findings of fact and conclusions of law dated April 16th, 1947, were filed on April 18th, 1947, declaring that the correct legal count for contestant was 1027, and for the defendant 1022. Judgment that the contestant was the duly elected assessor of Trinity county (section 8557) was entered the same day. A certificate of election was therefore issued to the contestant (section 8570); the judgment annulled any certificate of election previously issued to the defendant (section 8571); and the contestant entered upon the performance of his duties pending the appeal (section 8575).

Section 8556 of the Elections Code reads: "The court shall continue in special session to hear and determine all issues arising in contested elections. After hearing the proofs and allegations of the parties and within ten days after the submission thereof the court shall file its findings of fact and conclusions of law, and immediately thereafter shall pronounce judgment in the premises, either confirming or annulling and setting aside the election. The

It is apparent that the court did not continue in special session "to hear and determine" all issues, but directed that the arguments of the parties be submitted on briefs; and did not file its findings and conclusions within ten days after "submission thereof". The question is whether by this departure from the procedure the court lost jurisdiction to determine the issues and enter judgment.

[1] The provision that the court should continue in special session to hear and determine the issues and file its findings and conclusions within ten days after submission was added to Section 1118 of the Code of Civil Procedure in 1907 (Stats.1907, p. 643). In 1914 in *Bernardo v. Rue*, 26 Cal. App. 108, 146 P. 79, involving somewhat similar facts, it was contended that by the failure to file findings of fact and conclusions of law within the ten day period the trial court lost jurisdiction to render a judgment and that the judgment entered was therefore a nullity and should be reversed. It was held that the sections of the act governing the court's action in the trial of proceedings of this character were directory in the absence of an express provision of the statute declaring them to be mandatory. The court pointed out that while the parties had valuable rights an election contest was not an ordinary adversary proceeding between private parties, but was one in which the public also had a vital interest; that provisions which were evidently intended merely to hasten the work of the court could not be deemed to deprive the parties and the public of their respective rights. The defendant does not question that that case stated the correct construction of the statute in accordance with the rule therein applied. Nor does he question the general rule that when a statute has been judicially construed and as here is re-enacted in substantially the same language there is a strong presumption of a legislative intent to adopt that construction. *Holmes v. McColgan*, 17 Cal.2d 426, 430, 110 P.2d 428; see also cases cited in *Penaat v. Terwilliger*, 23 Cal.2d 865, at page 871, 147 P.2d 552. However the defendant calls

attention to the reservation in the Bernardo case that the statutory provisions were to be deemed directory "in the absence of an express provision of the statute declaring them to be mandatory". He contends that when the legislature in 1939 re-enacted the same provision as section 8556 of the Elections Code, the strong presumption to adopt the prior judicial construction was conclusively rebutted by the enactment in the same year of section 15 of the same Code defining the word "shall", when used in the Code to be mandatory and the word "may" to be permissive. Therefore, asserts the defendant, there is here an express provision declaring the mandatory nature of the code provision, with the result contended by him.

[2,3] Section 5 of Article VI of the constitution of this state (see *Dudley v. Superior Court*, 13 Cal.App. 271, 274, 110 P. 146), and Article 3, Chapter 2, Division 10 (sections 8550-8557) of the Elections Code, vest in the superior court jurisdiction to hear and determine election contests, and to confirm or annul a contested election, or to declare that some other person has been elected. The jurisdiction thus vested may not lightly be deemed to have been destroyed. The intent to divest the court of jurisdiction by time requirements is not read into the statute unless that result is expressly provided or otherwise clearly intended. The consequence or penalty for the failure of the court to file findings of fact and conclusions of law within the designated period was not included in the statute. The defendant does not present a case where such a result ensued in the absence of the express requirement. That it was not to occur unless expressly provided is demonstrated by the fact that when the legislature wished to indicate that intent it adopted the simple expedient of including an express provision to that effect. (See section 660, Code of Civil Procedure, limiting the time for passing upon a motion for new trial; section 657, Code of Civil Procedure, limiting the time when the court may file an order specifying insufficiency of the evidence as a ground for granting new trial.) The case of *Thomas v. Driscoll*, 42 Cal.App.2d 23, 108 P.2d 43,

involved section 657 of the Code of Civil Procedure, and the correct rule is indicated in that decision as follows: A time limitation for the court's action in a matter subject to its determination is not mandatory (regardless of the mandatory nature of the language), unless a consequence or penalty is provided for failure to do the act within the time commanded. See also *In re Shafter-Wasco Irr. Dist.*, 55 Cal.App.2d 484, 130 P.2d 755. When *McQuillan v. Donahue*, 49 Cal. 157 was decided, section 632 of the Code of Civil Procedure limiting the time within which the court "must" file its written decision upon trial of a question of fact, also provided that unless the decision was filed within the prescribed time the action "must" be tried again. But it was concluded that the provision was directory only.

[4,5] The result of a different conclusion in the present case would be to divest the court of jurisdiction by mere implication. While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. *Lorraine v. McComb*, 220 Cal. 753, 756, 32 P.2d 960; *Brydonjack v. State Bar*, 208 Cal. 439, 442, 281 P. 1018, 66 A.L.R. 1507. Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication. To what extent the legislature may constitutionally enact regulations affecting procedure which will defeat or interfere with the exercise of jurisdiction or of the judicial power (see *Ex parte Harker*, 49 Cal. 465; *Chinn v. Superior Court*, 156 Cal. 478, 480, 105 P. 580; *In re Garner*, 179 Cal. 409, 412, 177 P. 162), is not necessary to determine in the absence, as here, of provisions clearly indicating that intent. It is sufficient to point to the public interest in and the general legislative intent to maintain the purity of elections and effect the speedy determination of election contests. As pointed out in *Bernardo v. Rue*, *supra*, 26 Cal.App. at page 110, 146 P. 79, the statute affords the basis for a speedy determination of an election contest. But it does not follow that the failure of the par-

ties to invoke those provisions in the trial court could re-establish by consent a jurisdiction that had been destroyed. See *Harrington v. Superior Court*, 194 Cal. 185, 188, 228 P. 15. Furthermore, it is the public interest, not the parties' claims, which is the paramount legislative concern. *Sweeney v. Adams*, 141 Cal. 558, 560, 75 P. 182; *Minor v. Kidder*, 43 Cal. 229, 236; *Bernardo v. Rue*, supra, 26 Cal.App. 108, 115, 146 P. 79. That interest is to ascertain the will of the people at the polls, fairly, honestly and legally expressed. The outcome of the present election contest is to give the office to the candidate shown to have been legally entitled to it; and while expedition in arriving at a determination of the issues is desirable in accomplishing the objective, speed is not the primary statutory aim but is merely incidental to the main purpose of the law.

[6-9] Reading the provisions of section 8556 of the Elections Code as invoked by the defendant would therefore lead to the result of defeating the aims and purposes of the statute and of raising serious constitutional questions. As indicated in the recent case of *Pulcifer v. Alameda County*, 29 Cal.2d 258, 262, 175 P.2d 1, the legislative intent must be gathered from the statute as a whole, from the nature and character of the act to be done and from the consequences which would follow the doing or not doing of the act at the required time. See also *In re Shafter-Wasco Irr. Dist.*, supra, 55 Cal.App.2d 484, 130 P.2d 755. By section 5 of the Elections Code the general definition of "shall" given in section 15 governs unless the "provision or the context" otherwise requires. True, neither the provision nor the context literally otherwise requires; and such literal inconsistent requirement would not be a normal expectation. However, as noted, the provisions of the statute negative any intent to divest the court of jurisdiction and in that sense require a meaning different from the definition of section 15. Section 15 codifies the generally accepted meanings of the words "shall" and "may". Section 5 must therefore be deemed to be a codification of the well known rule that words otherwise generally mandatory or

permissive will be given a different meaning when the provisions of the statute, properly construed, require it.

We are thus brought to a consideration of the defendant's contentions concerning the alleged lack of support for the trial court's findings.

[10-12] The defendant asserts that the statement of contest was insufficient to justify a recount of the ballots. The initial statement was filed within the thirty day period prescribed by section 8531, and included two grounds of contest under section 8511(a) (malconduct of precinct board), one charge under section 8511(d) (illegal votes cast), and two charges under section 8511(e) (errors in the conduct of the election or canvass of the returns sufficient to change the result of the election). Amendments were filed after the expiration of the thirty day period but before the hearing on the defendant's demurrer and motion to strike. At the defendant's request the court permitted argument on the demurrer to the complaint as amended. It is apparently the defendant's contention that the statement, if originally insufficient, could not be assisted by amendments filed after the expiration of the time limitation prescribed for filing the initial statement. Section 8533 requires that a statement shall not be rejected nor the proceedings dismissed for want of form, if the grounds of contest are alleged with such certainty as to advise the defendant of the particular cause for which the election is contested. It has been held that a contestant may not burden the courts with a recount upon a mere general charge of malconduct referable to all the precincts (*In re Cryer*, 77 Cal.App. 605, 247 P. 252); and the cure of some deficiencies in this and other respects was no doubt intended by the amendments. The right of amendment in election contests has been recognized, and a similar contention concerning an amendment filed after the thirty day period was rejected in *Hannah v. Green*, 143 Cal. 19, 76 P. 708, the court stating that the code (now section 8533, Elec.Code) expressly dispensed with any great particularity, formality or nicety of pleading. See also *Abbott v. Hartley*, 143 Cal. 484, 77 P. 410;

Minor v. Kidder, supra, 43 Cal. 229, 237. There was no error in the ruling on the demurrer and it is not now seriously contended that the statement as amended was insufficient as against a general demurrer. Irregularities if any which might have been subject to special demurrer need not now be considered in view of the hearing on the issues raised by the amended statement and the answer thereto.

Both parties participated in the recount of ballots taken at the trial. Agreement was reached as to all except eight. There are also contentions respecting several claimed illegal votes.

[13] Ballot Exhibit B was stamped with a cross in an apparent attempt to vote for one of the candidates for the office of assessor. The printed line between the squares opposite the names of Rourke and Garrison ran just below the middle of the cross. The cross thus was placed partially in each of the squares opposite the candidates' names. The defendant insists it was properly voted in his favor because the majority of the stamp was above the line and in his square, but the court rejected it on the ground that it was impossible to ascertain which candidate was intended. Section 7050 of the Elections Code provides that a cross partly within and partly without a voting square or space does not invalidate a ballot. The provision cannot be said necessarily to include within the designation a cross partly within and partly without two voting squares. The cross was partly within and partly without each of the voting squares, but obviously it cannot be counted as a vote for each candidate. Whether there was a sufficient portion of the cross in the square opposite defendant's name to count as a vote for him was a question primarily for the trial court. *People v. Town of Sausalito*, 106 Cal. 500, 39 P. 937. The ruling is in accordance with section 7052 of the Elections Code providing that if for any reason it is impossible to determine a voter's choice for any office, his ballot shall not be counted for that office.

[14] Exhibit J: A large blot appears on this ballot in the square opposite the name of the defendant. A similar large

blot appears in the "No" square opposite the name of a candidate for the office of Justice of the Supreme Court. When the ballot is folded the blots apparently offset and match. There is no distinguishable stamped cross mark in either blot. There are no other marks in the squares concerning those offices. The ballot has several other blots. The same considerations apply here as to Ballot B, and no error appears in the ruling rejecting the ballot as a vote for the defendant since the trial court could reasonably conclude that any attempted choice was not clear (section 7052, Elec.Code), and was not a compliance with the requirements and instruction that the voter indicate his choice by stamping a cross (section 3828 Elections Code).

[15, 16] Exhibit 30: The voter's choice of candidates for all offices was clearly indicated by a stamped cross, but the vote on each of the various propositions was indicated by a pencil check (V). The defendant seeks rejection of the ballot as a vote for the contestant on the ground that the unauthorized method of voting the propositions was a distinguishing mark which invalidated the entire ballot. Section 7054 of the Elections Code provides that no unauthorized mark shall invalidate the ballot unless "it appears that the mark was placed there by the voter for the purpose of identifying the ballot". In *Turner v. Wilson*, 171 Cal. 600, 154 P. 2, and *Sweetser v. Pacheco*, 172 Cal. 137, 155 P. 639, it was held that the foregoing provision, first enacted in 1903 by the addition of subdivision 4 to section 1211 of the Political Code, was intended to change the previously existing law which invalidated a ballot having a distinguishing mark. Pursuant to the present law, if the mark itself does not warrant an inference that it was designedly placed by the voter for the purpose of identifying his ballot, and in the absence of other evidence of intent in that regard, the ballot may not be rejected on the ground that it bears a distinguishing mark. The trial court was justified in concluding, in the absence of other evidence, that the pencil marks alone did not indicate an intent to mark the ballot for the purpose of identifying it.

[17] Ballot A-6 showed a vote for the contestant. On the reverse side it was marked "spoiled" in pencil in three places and the signatures of two clerks also appeared. There was nothing on the face of the ballot to indicate that it was spoiled, there was no testimony of the election officers regarding it, it was not among the spoiled ballots but was with the sealed ballots opened at the trial; nor was it cancelled in accordance with the requirements of section 5726 of the Elections Code. The trial court was justified in accepting it as a properly cast ballot. *Morrison v. White*, 10 Cal.App.2d 266, 269-270, 52 P.2d 263; *Lester v. Fairbairn*, 32 Cal.App.2d 411, 414, 89 P.2d 1091.

[18] Ballot 32: A stamped cross appeared in the square opposite each candidate's name, with a blot accompanying the cross opposite the contestant's name. This ballot was put aside on the defendant's objection. Later he withdrew his objection on the theory that the cross and blot opposite contestant's name was an offset from a blotted cross in the "Yes" square opposite the name of the candidate for the office of Justice of the Supreme Court. The trial court concluded however that the ballot showed a vote for each candidate and could not be counted for either. The defendant now contends that the vote should have been counted for him. Since there was a clearly distinguishable cross in each square the court was justified in its determination as to this ballot. (Section 7052, Elections Code.)

[19] Ballot A-11: In designating his choices on this ballot the voter drew an ink cross with the broad blunt edge of the stamp or other instrument, each line of the cross being drawn diagonally across the entire square from one corner to the opposite but without regularity or uniformity. In some squares the marks were blurred and in others the crosses or parts thereof appeared double. If valid the ballot would have counted as a vote for the defendant. The cross obviously was not made with the stamp provided for the purpose and the trial court rejected the ballot because of the invalid method of marking. There was no error in this ruling.

Lester v. Fairbairn, supra, 32 Cal. App.2d at page 413, 89 P.2d 1091; *Morrison v. White*, supra, 10 Cal.App.2d at page 270, 52 P.2d 263. As pointed out in the latter case the facts in *Evarts v. Weise*, 176 Cal. 218, 168 P. 122, relied on by the defendant, are distinguishable because there it did not clearly appear that the mark was not made with the required stamp and the trial court's ruling was upheld on that ground.

[20] Ballot A-32 (absentee ballot): The only mark used on this ballot was a check (V) made with a lead pencil. The ballot was not marked as provided by law. (Sections 3828, 5930, 5931(c), Elections Code.) The only permitted mark to indicate the voter's choice on absentee ballots is a cross made with a stamp, pen and ink, or indelible pencil. Failure to comply rendered the ballot invalid. *Sweetser v. Pacheco*, supra, 172 Cal. 137, 155 P. 639. The court was justified in rejecting the ballot which if valid would have counted for the defendant.

[21] Ballot 46: This ballot clearly shows the use of a stamp with a cross impression, except that the impression was smaller and a portion of the lower end of the cross was cut off due either to an imperfection in the rubber stamp or the angle at which the stamp was used. The ballot showed a vote which was counted at the trial for the contestant. The defendant asserts that if Ballot A-11 showing a larger cross was properly rejected, this ballot showing the smaller mark should likewise be rejected. The conclusion does not follow, since there was no evidence to show either on or de hors the face of ballot 46 that it was not the stamp provided for the purpose. *Evarts v. Weise*, supra, 176 Cal. 218, 168 P. 122.

[22,23] The trial court disallowed six votes as illegal. Five of them were for the defendant and one for the contestant. Illegality was found because they were cast by non-residents of the precincts. The defendant assumes to charge the conceded residential discrepancies to the mistake of the registration officers. The qualifications of electors stated in Article II, section 1, of the state constitution include residence

in the election precinct. By section 70 of the Elections Code only qualified electors are entitled to exercise the voting franchise. The record clearly establishes for whom the disqualified persons cast their ballots. Registration does not add to or alter the qualifications fixed by the Constitution. *Minges v. Board of Trustees*, 27 Cal.App. 15, 16, 17, 148 P. 816. The trial court's ruling on these votes was therefore correct. *Russell v. McDowell*, 83 Cal. 70, 23 P. 183; *Bush v. Head*, 154 Cal. 277, 281, 282, 97 P. 512; Section 8511, subd.(d), Elections Code.

[24, 25] The trial court refused to disallow the vote of another similarly disqualified voter, one Wesella, who testified that he voted for contestant, because he was impeached by pre-trial inconsistent declarations and other testimony. The court's action was justified by the impeachment of the witness. *Smith v. Thomas*, 121 Cal. 533, 54 P. 71. The defendant asserts that the ruling was erroneous because the court deducted the vote for the contestant cast by the voter's wife, also disqualified; but we may perhaps observe as a matter of common knowledge that the choice indicated by one spouse is not conclusive as to the vote cast by the other.

[26] Two additional claimed disqualified persons, the Eslicks, husband and wife, who voted for contestant, were not on the defendant's list furnished to the contestant before trial and for that reason the court ruled that it could not find illegality. The defendant asserts error because their names were originally on the contestant's list, although later withdrawn. The court was apparently of the opinion that a name which was not on the defendant's list of illegal votes could not be contested by him. In *Norwood v. Kenfield*, 30 Cal. 393, 394, it was held that the receipt of evidence of alleged illegality of a vote for contestant was error where the voter's name was not on the list furnished before trial by the defendant to the contestant, citing the provision now included in section 8532 of the Elections Code. It was observed that that provision does not expressly require the defendant to furnish the contestant with such a list, but that where the defend-

ant relies on illegal votes he thereby becomes a counter-contestant and every reason why the contestant is required to furnish such a list applies with equal force to the defendant. It was concluded that the intent was to require each party to give to the other notice of the votes which he intends to assail as illegal, that any other reading would result in a distinction where there ought to be none and give to one of the parties an undue advantage over the other. In *Smith v. Thomas*, 121 Cal. 533, 54 P. 71, the facts were the converse of those on the present record. The contestant attempted to show illegality in a vote not included in the list served by him on the defendant, although the voter's name was on the defendant's list served on the contestant. Arguments similar to those advanced here, including the knowledge of the illegality on the part of the opposing party, were rejected, the court saying that the purpose of the statute requiring notice had nevertheless not been accomplished. Since in the present case the court ruled in compliance with the indicated requirement of the statute, there was no error.

[27] The court invalidated the vote of one Albiez on a finding that after receiving his ballot and before entering the booth he went outside with his ballot in his possession and talked with the defendant, then reentered the polling place and cast his ballot for the defendant. The defendant concedes the facts found but contends that the court should have believed the testimony that there was no conversation as to how the voter should cast his ballot and that they could be seen by the officials through the glass in the door of the polling place. The Albiez vote was illegal because not cast in the manner required by law. Section 5709, Elections Code; *Bush v. Head*, supra, 154 Cal. at pages 281, 282, 97 P. 512. The section requires the voter on receiving his ballot "forthwith, and without leaving the enclosed space", to retire alone to one of the booths. The defendant contends that since all the booths were occupied the voter could not forthwith retire to mark his ballot. There was no showing of compliance with the requirement to retire to a booth, at least as soon

as one was available, without leaving the enclosed space. There is no error in the conclusion of invalidity as to his vote.

[28] The court allowed the election officials' challenge to the Bennett husband and wife absentee ballots, which were not included in the official count, on the ground of lack of residence. The defendant claims these ballots should have been received and the votes counted for him. There was evidence that the Bennetts left Trinity County at the outbreak of World War II, and lived and worked in San Francisco since 1942; that they did not vote in Trinity county in the 1942 or 1944 elections; had not occupied a home or dwelling in the county since their removal, but on a few occasions had stopped at hotels for short stays registering from San Francisco. There was not here the evidence of permanent residence with periods of merely temporary sojourn therefrom which was shown in *People v. English*, 54 Cal.App. 90, 201 P. 145, relied on by the defendant. It cannot be said that the trial court erred in according weight to those elements which, applying the rules for determining residence (sections 5651 et seq. Elections Code), required a ruling adverse to the defendant's contentions.

[29] Finally it is urged that the trial court should have ruled that the polls at Lake Mountain Precinct were not kept open from 7 A.M. to 7 P.M. on the day of the election and that the entire vote of that precinct should be invalidated. This precinct is in a sparsely settled mountain district and the voters, who have long distances to travel, customarily picnicked at the polling place during the noon hour. On this occasion the tables were cleared and the voting materials temporarily set aside on a stand or shelf. The testimony was conflicting as to whether Mr. and Mrs. Little, registered voters entitled to exercise their franchise but who did not do so on that day, appeared during the lunch hour and applied for their ballots. They were seen walking around, but there is evidence which could be believed by the court that they did not make a request to vote, that had they done so their request would have been granted. The polls were

not in fact closed and there was evidence that the election materials were available for use. The trial court's finding that the polls were kept open is supported by the evidence.

[30] Other contentions, such as lack of evidence in the record of the official count, do not merit detailed consideration. They are answered by the fact that the court and the parties conducted a recount of the ballots, and in the absence of error in the rulings on the ballots and the claimed illegal votes, there is no ground upon which to base a conclusion that the recount found by the trial court was incorrect.

The foregoing requires an affirmance of the judgment. It is so ordered.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



87 Cal.App.2d 279

**DENNIS v. SUPERIOR COURT IN AND
FOR SAN MATEO COUNTY.**

Civ. 13910.

District Court of Appeal, First District,
Division 2, California.

Aug. 24, 1948.

1. Elections 276

Section of Elections Code requiring county clerk to notify superior court of all statements of election contest filed and providing that court shall "thereupon" order a special session, does not fix a term within which the order must be made, since quoted word does not necessarily mean immediately, but, at most, within a reasonable time. Elections Code, § 8550.

See Words and Phrases, Permanent Edition, for all other definitions of "Thereupon".

2. Elections 275, 300

When county clerk notified superior court of filing of statement of contest of election to city council, court was required

under statute to fix a proper date for hearing contest without any demand being made by contestant for performance of such duty and failure to set hearing for a date not more than 20 days from date of order, as provided by Elections Code, did not divest superior court of jurisdiction of contest. Elections Code, § 8550.

Proceeding by Edward J. Dennis against Superior Court of the State of California in and for the County of San Mateo regarding the dropping of election contest from court calendar.

Writ granted as prayed.

Wayne R. Millington and Frank B. Blum, both of San Francisco, for petitioner.

Bullock, Wagstaffe & Daba, of Redwood City, for respondent Bertetta, real party in interest.

NOURSE, Presiding Justice.

On May 12, 1948 petitioner filed a statement of contest of the election of Fred Bertetta, who on April 20, 1948 was declared by the City Council of Daly City to have been elected a member of said City Council over petitioner, the candidate who had received the next highest number of votes. On the same day the respondent ordered a special session for the hearing of the contest to be held on June 10, 1948. At that time Fred Bertetta appeared specially and moved to quash the citation which motion was granted and the contest dropped from the calendar.

Petitioner does not allege on what grounds the motion was made but argues that it was granted "on the grounds the respondent had no jurisdiction of the action since it set the hearing for a period of more than twenty days from the date of its order." Respondent argues that the motion to quash was granted because a citation based on an order setting the hearing more than twenty days after the date of the order was void under section 8550 of the Elections Code; he also argues that the petitioner should first have moved for a new order and cannot base his petition for a

writ on the assumption that the court would have denied that motion for lack of jurisdiction.

[1] Section 8550 does not fix a term within which the order must be made. It reads: "Within five days after the end of the time allowed for filing statements of contest the county clerk shall notify the superior court of the county of all statements filed. The court shall thereupon order a special session to be held, on some day to be named by it, not less than ten nor more than twenty days from the date of its order." In *Dudley v. Superior Court*, 13 Cal. App. 271, 276, 110 P. 146, and in *Busick v. Superior Court*, 16 Cal.App. 499, 504, 118 P. 481, it was held with respect to the equivalent old section 1118a of the Code of Civil Procedure that "thereupon" does not of necessity mean immediately, but at most "within a reasonable time." [13 Cal.App. 271, 110 P. 148]

In granting the motion herein the court was influenced by the recent decision in *Garrison v. Rourke*, — Cal.App.2d —, 192 P.2d 457, where the District Court of Appeal held that a similar provision in section 8556 of the Elections Code was mandatory. The *Garrison* case was taken over by our Supreme Court and, after the order herein attacked, a decision was made on August 20, 1948, 32 Cal.2d 430, 196 P.2d 884, holding that section 8556 should not be construed as mandatory when such construction would divest the court of jurisdiction to render the relief which the statute as a whole clearly required.

[2] The same reasoning applies here. It was no fault of the contestant that the court made a void order setting the date of hearing. The statute grants him a right to be heard and imposes upon the court the duty of fixing a proper date. The filing of the statement starts the proceedings under the statute which requires the court to set the hearing when notified by the clerk of the filing. It is not incumbent upon the contestant to demand a performance of that duty.

Writ granted as prayed.

GOODELL, J., concurs.

32 Cal.2d 444

REED et al. v. SIMPSON et al.
No. L. A. 20604.

Supreme Court of California, in Bank.
Aug. 24, 1948.

1. Automobiles ⇨210

Provision of Vehicle Code that emergency vehicle's exemption from traffic laws shall apply only when driver sounds a siren as may be reasonably necessary as a warning to others requires that siren be sounded only when prevailing factual considerations demonstrate the reasonable need therefor and does not require that siren be sounded in every situation. Vehicle Code, § 454(b).

2. Automobiles ⇨245(82)

Whether it was necessary for highway patrolman pursuing motorist at night with red light on motorcycle to sound siren in order to be entitled to statutory exemption from traffic laws accorded emergency vehicles was a question of fact for jury. Vehicle Code, § 454(b).

3. Automobiles ⇨210

Statute exempting driver of emergency vehicle from traffic laws but requiring him to drive with "due regard" for safety of all persons using highways, requires driver, by suitable warning, to give others reasonable opportunity to yield right of way but does not impose the same quantum of care upon him as upon motorists generally. Vehicle Code, § 454.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Regard".

4. Courts ⇨90(4)

Enactment of statute qualifying absolute duty of driver of emergency vehicle to sound a siren warning in order to be entitled to statutory exemption from traffic laws did not affect significance of prior judicial decisions construing statutory requirement that operator of an emergency vehicle drive with due regard for safety of all persons using highways, where language construed in such decisions was carried into later statute containing the qualification. Vehicle Code, § 454.

5. Automobiles ⇨210

Driver of emergency vehicle in pursuit of actual or suspected violator of the law must give suitable warning of his approach to others on the highway, but what constitutes a reasonably necessary procedure in that regard depends upon surrounding circumstances. Vehicle Code, § 454.

6. Automobiles ⇨245(82)

Whether display of red light on front of highway patrolman's motorcycle at night was reasonably necessary warning to motorist from opposite direction contemplating left turn in middle of block so that patrolman would be entitled to statutory exemption from traffic laws, though he did not sound siren, was a question for jury. Vehicle Code, § 454(b).

7. Automobiles ⇨210

Contributory negligence barring recovery for death of highway motorcycle patrolman in collision with motorist from opposite direction making left turn in middle of block while patrolman was in pursuit of another motorist could not be predicated on violation of rules of the road as to speed, right of way etc., if patrolman gave reasonably necessary warning to others. Vehicle Code, § 454(b).

8. Automobiles ⇨210

Where driver of emergency vehicle arbitrarily exercises statutory exemption from traffic laws by continuing on into an inevitable collision after giving a reasonably necessary signal, though he has opportunity to stop and sees that warning has not been observed or heeded, he will not be relieved from his negligence. Vehicle Code, § 454(b).

9. Automobiles ⇨245(82)

Whether failure of highway motorcycle patrolman, pursuing motorist at night, to observe, in time to avoid collision, automobile from opposite direction making left turn in middle of block constituted contributory negligence barring recovery for patrolman's death was a question for jury.

10. Appeal and error ⇨1064(1)

In action for death of highway motorcycle patrolman killed in collision at night with defendant's automobile from opposite

direction making left turn in middle of block while patrolman with red light on front of motorcycle was pursuing another motorist, instruction that patrolman was not entitled to statutory exemptions accorded emergency vehicles because he did not sound siren and was required to comply with all traffic regulations to same extent as operator of any other vehicle on the highway was prejudicial to plaintiffs. Vehicle Code, § 454(b).

11. Trial ⇨240, 244(2)

Instructions which were based upon defendants' theory of the case and stated their claims without, however, intimating that such claims had been proved, and which did not assume the existence of facts which were not in evidence or with respect to which there was a conflict of evidence and which did not undertake to pass upon the facts were not objectionable as argumentative or as placing undue emphasis upon portions of the evidence.

12. Trial ⇨255(2)

Plaintiffs desiring their theory of the case on particular evidentiary features presented to the jury must so request the court.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Helen L. Reed and others against Robert Nathan Simpson and others to recover for the wrongful death of plaintiffs' husband and father. From a judgment for defendants, plaintiffs appeal.

Judgment reversed.

For prior opinion, see 189 P.2d 776.

Spray, Davis & Gould, Clarence G. Weisbrod and Malcolm Archbald, all of Los Angeles, for appellants.

Forrest A. Betts, of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiffs, the surviving widow and minor children of John Reed, a California Highway Patrol Officer, brought this action for damages for his death, which occurred as the result of a collision between a motorcycle operated by the decedent and an auto-

mobile driven by defendant Robert Nathan Simpson. Judgment was entered, pursuant to the verdict of a jury, in favor of defendants, and plaintiffs have appealed therefrom. As ground for reversal, plaintiffs urge that the trial court committed prejudicial error in instructing the jury. A review of the record establishes the merit of their position.

The accident occurred about 11:20 p. m., May 18, 1944, on Sunset Boulevard near the city limits of Los Angeles, where the decedent and his companion officer, Ralph Fritsche, were working as a pair on motorcycles under their assignment to oversee traffic in that vicinity. The boulevard, which extended in an easterly and westerly direction, was well lighted and the weather was clear. Traffic was rather heavy and was moving at about 35 miles an hour. The officers observed a west-bound automobile going down the boulevard in an erratic maner, oscillating over the center line. Deciding to apprehend the offending motorist, the decedent undertook pursuit down the west-bound lane of traffic adjacent to the center line, and Officer Fritsche followed at a distance of some 150 to 200 feet. The latter estimated the decedent's speed at about 35 miles and hour and observed him driving the three blocks they traveled behind the eccentric vehicle. As the officers were so proceeding west in their course, defendant Simpson was coming east in his automobile, with three companions, and desired to turn left into the driveway of a night club located north of Sunset Boulevard in the middle of the block. It was in the process of defendant Simpson's execution of this left turn across the west-bound stream of boulevard traffic that the decedent's motorcycle crashed into the right side of defendant's automobile, and the decedent was rendered unconscious.

Each of defendant Simpson's guests testified that he stopped in the east-bound center lane of traffic before attempting to make the turn, and that only the regular white headlight was displayed on the decedent's motorcycle as he traveled down the boulevard. They were contradicted by a disinterested witness Weber, who had observed the accident from the window of his apartment facing the night club. He

testified that he had noticed the vacillating vehicle traveling west with the decedent trailing it about four car lengths behind, when suddenly defendant Simpson's car, going at a speed of 10 or 15 miles an hour, made a left turn in the center of the boulevard opposite the night club's driveway and collided with the decedent's motorcycle. He stated that he saw the white headlight burning on the motorcycle, and that he recalled some one turning off its red light after it had fallen.

Defendant Simpson testified that as he was beginning to negotiate his left turn on the boulevard, he stopped to allow three or four cars to pass and then proceeded as the nearest oncoming west-bound traffic was about 150 feet distant; that he did not see the decedent's motorcycle before commencing the left turn; and that he did not stop his car again until the crash. Officer Fritsche did not see the vehicles collide. However, on arriving within the "matter of a second" at the point of the accident, he observed that defendant Simpson's car stood with its two front and left rear wheels north of the center line and its right rear wheel to the south thereof; that the decedent and his motorcycle were on the right side of defendant's car; and that the rear wheel of the motorcycle was at the front wheel of the automobile and in the 10-foot lane north of and adjacent to the center. There were no marks on the pavement left by the decedent's motorcycle, nor was there any testimony that its siren had sounded. While two of defendant Simpson's companions fixed the decedent's speed at the time of the accident as 50 to 60 miles per hour, Officer Fritsche, as above stated, estimated the decedent's travel to have been at approximately the same rate as that of the other boulevard traffic, about 35 miles an hour. Officer Fritsche also stated that when he "got there, right after the accident," the "red light was burning" on the decedent's motorcycle, and that some one "turned [it] off * * * after the accident happened." A disinterested witness Howard testified that he lived across from the night club; that on hearing the noise of the crash, he went at once to the scene, saw the red light of the decedent's motorcycle burning and

turned it off. The decedent never regained consciousness following the accident, and he expired at 6:00 o'clock the next morning.

The court, of its own motion, gave the following instruction: "The motorcycle which the deceased, Officer Reed, was riding at the time of the collision in question was an authorized emergency vehicle. The driver of an authorized emergency vehicle is exempt from certain traffic laws if (1) he is in the immediate pursuit of an actual or suspected violator of the law; (2) he sounds a siren in a way that is reasonably necessary to give warning of his approach to others; and (3) at night his vehicle is equipped with at least one lighted lamp displaying a red light to the front. In this case the evidence shows that there were others on said street and that Officer Reed did not sound his siren at all; therefore he was not entitled to exemptions above mentioned and he was required to comply with all traffic rules and regulations to the same extent as the operator of any other motor vehicle than and there on the highway."

The premise of the instruction was section 454 of the Vehicle Code, exempting "the driver of an authorized emergency vehicle" from the "regulations contained in Chapter 6 to and including Chapter 13 of Division IX of this code" whenever such "vehicle is being * * * used in the immediate pursuit of an actual or suspected violator of the law." Particularly pertinent is the following proviso of subdivision (b) of the section as it read at the time of the accident here involved (Stats.1937, ch. 69, sec. 2, p. 168): "Said exemptions shall apply only when the driver of said vehicle sounds a siren *as may be reasonably necessary* as a warning to others and at night time when the vehicle is equipped with at least one lighted lamp displaying red light to the front * * * but said exemptions shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section." (Italics ours.)

[1,2] Construction of the above italicized phrase is the pivotal point in controversy. Plaintiffs maintain that the qualifying words permit the exemptions to apply upon the driver's sounding of his siren as it may be "reasonably necessary" for him so to do, while defendants urge that such words refer to the *manner* of operating the siren, which warning in any event must be given if claim is made to the traffic privileges extended by the statute. A fair view of the disputed language sustains plaintiffs' position as consistent with the evident purpose of the legislature to provide a practical standard of procedure required of the driver of an emergency vehicle dependent upon the prevailing factual considerations demonstrating the "reasonable" need for sounding his siren. In short, in the light of such language, the legislature could not have intended that before he may rely upon the benefit of the exemptions, the operator of an emergency vehicle must in *every* situation proceed along a boulevard sounding his siren. Accordingly, plaintiffs argue here the factual considerations favorable to their case as warranting the conclusion that though the decedent concededly did not sound his siren as he proceeded along the line of traffic in the performance of his official duties, such warning was not "reasonably necessary" in view of the evidence sustaining the inference that the red light was burning on his motorcycle prior to his fatal collision with defendant Simpson's automobile as it unexpectedly turned across the boulevard. Defendants' construction of the statute precludes any regard for such factual variances and correlates with the inflexible standard of warning procedure required under the mandatory provisions of the California Vehicle Act of 1931 as the pertinent sections were discussed in *Russell v. Smith*, 12 Cal.App. 2d 399, 402, 55 P.2d 562. But following that decision in 1936, the legislature enacted the next year into the Vehicle Code the statutory language here involved—section 454(b)—in apparent relaxation of the former prevailing rigidity of the law on the point in question. Inconsistent with the significance of this legislative change is the trial court's instruction, as above

quoted, construing, in accord with defendants' argument, the statute to effect a forfeiture of the traffic exemptions as a matter of law because of the failure of the decedent to sound his siren. Whether it was "reasonably necessary" for such warning signal to be given was a question for determination in the light of the surrounding circumstances, as recognized by the terms of the statute, and the issue should have been submitted to the jury for decision as a matter of fact. *Isaacs v. City and County of San Francisco*, 73 Cal.App. 2d 621, 626, 167 P.2d 221.

[3,4] Defendants then argue that even though the trial court did commit error in its instruction embracing such improper statement of the law, that circumstance cannot avail plaintiffs because the decedent did not operate his motorcycle "with due regard for the safety of all persons using the highway," as required by the statute. But, as plaintiffs maintain, such duty does not impose the same quantum of care upon the driver of an emergency vehicle as upon motorists generally, for in that event the requirement would have the absurd result of practically nullifying the traffic exemptions expressly granted by the section. So pertinent is the interpretation of the phrase in *Lucas v. City of Los Angeles*, 10 Cal.2d 476, at page 483, 75 P.2d 599, at page 603, where it was said: "If the driver of an emergency vehicle is at all times required to drive with due regard for the safety of the public as all other drivers are required to do, then all the provisions of these statutes relating to emergency vehicles become meaningless and no privileges are granted to them. But if his 'due regard' for the safety of others means that he should, by suitable warning, give others a reasonable opportunity to yield the right of way, the statutes become workable for the purposes intended." And while the statute does not "protect [the] driver from 'an arbitrary exercise' of the privileges" there granted, "an arbitrary exercise" of them "cannot be predicated upon the elements of speed and failure to observe other rules of the road where a warning has been given." (*Raynor v. City of Arcata*, 11 Cal.2d 113, 117, 77 P.2d 1054, 1057. "In such cases speed, right of way, and all other 'rules of the

road' are out of the picture." (*Lucas v. City of Los Angeles*, supra, 10 Cal.2d at page 486, 75 P.2d at page 604; see, also, *Stone v. City and County of San Francisco*, 27 Cal.App.2d 34, 38, 80 P.2d 175. While these cases involved consideration of the "due regard" clause in relation to the driver of an emergency vehicle under the law as it existed previous to 1937 and when his sounding of a siren was required by statute as a premise for a claim of "his superior right to the use of the highway" (*Russell v. Smith*, supra, 12 Cal.App.2d 399, 402, 55 P.2d 562, 564; *California Vehicle Act 1931*, sec. 132(b)), the legislature's subsequent qualification of such driver's absolute duty to give a siren warning, upon the enactment of section 454 of the Vehicle Code in 1937, would not affect the significance of the prior judicial decisions as the language there construed was carried into the statute here involved. *Isaacs v. City and County of San Francisco*, supra, 73 Cal.App.2d 621, 625, 626, 167 P.2d 221.

[5-10] In line with these observations, it is appropriate that the driver of an emergency vehicle "in * * * pursuit of an actual or suspected violator of the law" be required to give "suitable warning" of his approach to others on the highway, but what would constitute "reasonably necessary" procedure in that regard depends upon the surrounding circumstances. In the instant case it cannot be said as a matter of law that the decedent's display of a red lamp in front of his motorcycle would not of itself satisfy the terms of section 454(b) of the Vehicle Code, and from the evidence indicating that such light was burning at the time of the fatal collision the jury might have concluded that the decedent, though not sounding his siren, had nevertheless given such warning as would be "reasonably necessary" to a person coming toward him in an adjacent lane of traffic and contemplating a left turn in the middle of the block. Defendants argue evidentiary considerations that would establish contributory negligence on the part of the decedent in bar of plaintiffs' recovery of damages—that if he was traveling at 60 miles an hour on the boulevard, as some wit-

nesses testified, his excessive speed coupled with his neglect to sound his siren contributed proximately to cause the accident; and, on the other hand, if he was proceeding at 35 miles an hour, as other testimony indicates, his failure to keep on the lookout and avoid the dangers of traffic, which was concededly heavy at the time, contributed proximately to the fatal collision. But since in the performance of his official duty, the decedent was exempted from the restrictions of "speed, right of way, and all other 'rules of the road,'" his lack of due care cannot be predicated on those elements if the "reasonably necessary" warning contemplated by the statute was given. *Lucas v. City of Los Angeles*, supra, 10 Cal.2d 476, 486, 75 P.2d 599; see, also, *Isaacs v. City and County of San Francisco*, supra, 73 Cal.App.2d 621, 625, 626, 167 P.2d 221. Of course, if the decedent's conduct were found to be an "arbitrary exercise of [his traffic] privileges"—as where "such driver" has given a "reasonably necessary" warning but sees that it has not been observed or heeded, and having opportunity to stop, he nevertheless continues on into an inevitable collision—he would not be relieved from his negligence because the issue would then be akin to that "involved under the last clear chance doctrine." *Lucas v. City of Los Angeles*, supra, 10 Cal.2d at page 484, 75 P.2d at page 603. However, these were all matters of fact for the determination of the jury. As the record here discloses, the decedent was obliged to watch the erratic vehicle that he was pursuing down the boulevard, and the jury could well have found him free from negligence even though he failed to observe until too late defendant Simpson's car as it undertook in the middle of the block to turn across the oncoming traffic. *Smith v. Aggola*, 27 Cal.App.2d 750, 752, 753, 81 P.2d 997, and cases there cited. In these circumstances, it is apparent that the trial court's instruction declaring, as a matter of law, that the decedent was "not entitled to [the] exemptions" granted by section 454(b) of the Vehicle Code, and that "he was required to comply with all traffic rules and regulations to the same extent as the operator of any other motor vehicle then and

there on the highway," was prejudicial to plaintiffs.

[11,12] Plaintiffs also attack several other instructions as erroneous, claiming that they were "extremely argumentative" and placed "undue emphasis" upon certain portions of the evidence regarding various aspects of the decedent's conduct as well as that of defendant Simpson. There is no force to that contention, and it would unduly prolong this opinion to detail plaintiffs' respective points of challenge. Suffice it to say that while the assailed instructions were based upon defendants' theory of the case, they only served to state defendants' claims without intimating that such claims had been proved, each charge resting on the formula predicate "if you find" or referring to the particular evidentiary consideration presented as one for the jury's determination as an issue of fact. (24 Cal.Jur. sec. 101, p. 841.) They did not assume the existence of facts which were not in evidence (*Kinnear v. Martinelli*, 84 Cal.App. 721, 726, 258 P. 686, or with respect to which there was a conflict of evidence (*Goehring v. Rogers*, 67 Cal.App. 253, 257, 227 P. 687; *Crabbe v. Rhoades*, 101 Cal.App. 503, 519, 282 P. 10; *Galway v. Guggolz*, 117 Cal. App. 639, 641, 4 P.2d 290; *Scandalis v. Jenny*, 132 Cal.App. 307, 314, 22 P.2d 545) nor did the trial court thereby undertake to pass upon the facts. *Tower v. Humboldt Transit Co.*, 176 Cal. 602, 609, 610, 169 P. 227. If plaintiffs desired their theory of the case on the evidentiary features in question presented to the jury, it was their duty to so request the court. *Potter v. Back Country Transp. Co.*, 33 Cal.App. 24, 26, 164 P. 342; *Comstock v. Morse*, 107 Cal.App. 71, 75, 290 P. 108; see, also, *Clarke v. Volpa Brothers*, 51 Cal.App.2d 173, 179, 180, 124 P.2d 377.

However, because of the prejudicial error embraced in the trial court's instruction premised on section 454 of the Vehicle Code as above discussed, plaintiffs are entitled to a retrial of this action.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

SORENSEN v. COSTA et al.

No. Sac. 5842.

Supreme Court of California, in Bank.

Aug. 24, 1948.

Rehearing Denied Sept. 20, 1948.

1. Adverse possession ⇨3

Where deeds of claimant and his predecessors in interest did not include land occupied, title thereto by adverse possession must be established under statutes relating to actual continuous occupation of land under a claim of title not founded upon a written instrument, judgment or decree and not under statute relating to color of title. Code Civ.Proc. §§ 322, 324, 325.

2. Adverse possession ⇨60(3)

The "hostility" essential to acquisition of title by adverse possession means not that parties must have a dispute as to title during period of possession, but that claimant's possession must be adverse to record owner unaccompanied by any recognition, express or inferable from the circumstances, of record owner's right. Code Civ.Proc. §§ 324, 325.

See Words and Phrases, Permanent Edition, for all other definitions of "Hostility".

3. Adverse possession ⇨65

Title by adverse possession may be acquired through possession or use commenced under mistake, the statute of limitations running from date of accrual of cause of action for recovery of the property and not from date of discovery of mistake. Code Civ.Proc. §§ 312, 318, 321, 324, 325; Civ.Code, § 1007.

4. Limitation of actions ⇨43

Statute of limitations generally begins to run when cause of action actually accrues. Code Civ.Proc. § 312.

5. Limitation of actions ⇨44(1)

A cause of action for recovery of real property accrues so as to start statute of limitations running, when owner is deprived of possession. Code Civ.Proc. §§ 312, 318, 321; Civ.Code, § 1007.

6. Adverse possession ⇨33

One claiming title to land by adverse possession must show that occupation thereof was such as to constitute reasonable

notice to true owner that occupant claimed land as his own, but fact that record owner was unaware of his own rights in the land is immaterial. Code Civ.Proc. §§ 324, 325.

7. Adverse possession ⇨65(1)

That plaintiff and his predecessors in interest occupied land adjoining that described in their deeds due to mistake, shared by owner of land thus occupied, as to location of land described in deeds, did not preclude acquisition of title by adverse possession to land thus occupied. Code Civ.Proc. §§ 324, 325; Civ.Code, § 1007.

8. Adverse possession ⇨31

Where land protected by substantial enclosure and usually cultivated was occupied continuously by plaintiff and his predecessors in interest for more than five years and all taxes assessed thereon had been paid by plaintiff and his predecessors, such occupation constituted reasonable notice to true owner that plaintiff and predecessors in interest claimed the land as their own. Code Civ.Proc. §§ 324, 325; Civ.Code, § 1007.

9. Adverse possession ⇨43(3)

In order to tack one person's possession to that of another so as to establish continuity of possession for five year period necessary to acquire title by adverse possession, some form of privity between successive claimants for the five year period is necessary. Code Civ.Proc. § 325.

10. Adverse possession ⇨43(3)

The "privity" necessary to support the tacking of successive possessions of property in order to establish continuity of possession for period required to acquire title by adverse possession may be based upon any connecting relationship which will prevent a breach in the adverse possession and refer the several possessions to the original entry, and for such purpose no written transfer or agreement is necessary. Code Civ.Proc. § 325.

See Words and Phrases, Permanent Edition, for all other definitions of "Privity".

11. Adverse possession ⇨43(3)

Privity, which is necessary to permit tacking in acquisition of title by adverse possession, may exist without a recorded

conveyance or writing of any kind where one by agreement actually surrenders his possession to another in such manner that no interruption or interval occurs between the two possessions. Code Civ.Proc. § 325.

12. Adverse possession ⇨117

Trial court's finding that land to which plaintiff claimed title by adverse possession was conveyed by deeds mistakenly describing adjoining property supported conclusion that plaintiff's predecessors in interest intended to transfer the land to which plaintiff claimed title and together with evidence that possession of such land was actually transferred to each successive occupant during 5 year period necessary to acquire title by adverse possession justified conclusion that plaintiff and his predecessors were in continuous possession for the statutory period. Code Civ.Proc. § 325.

13. Adverse possession ⇨95

Evidence supported trial court's determination that improved land occupied by plaintiff and his predecessors in interest had been mistakenly described on tax rolls as adjoining land, which was unimproved, and that plaintiff and his predecessors had actually paid all taxes assessed on land thus occupied for the statutory period necessary to acquire title by adverse possession, and record owner of such land could not complain of such mistake in description, where at the time he did not know that he had any claim to such land and paid taxes on property he was occupying assessed to him under a similar mistake in description. Code Civ.Proc. § 325.

14. Adverse possession ⇨90

That land was not assessed by its description is not controlling under statute making payment of taxes essential to acquisition of title by adverse possession where the possession is not founded upon written instrument, judgment or decree. Code Civ. Proc. § 325.

15. Taxation ⇨421(1)

The purpose of description of land on tax assessment rolls is to notify interested parties of taxes due on the property, and record owner of land could not complain of any mistake in the description unless he was misled thereby.

16. Adverse possession ⇨95

One claiming title by adverse possession must show that he and his predecessors actually paid the taxes assessed on the particular land occupied as required by statute, and where land occupied was assessed under a correct description that applied to other land, proof that claimant and his predecessors thought or supposed they were paying taxes on the land occupied is insufficient. Code Civ.Proc. § 325.

17. Adverse possession ⇨90

Where claimant of title by adverse possession has paid the taxes actually assessed on the land occupied, a misdescription on tax rolls or in tax receipts will not generally affect the efficacy of payment under statute requiring payment of taxes in order to establish title by adverse possession. Code Civ.Proc. § 325.

18. Adverse possession ⇨95

Where descriptions in tax receipts are insufficient by themselves to identify land occupied by claimant of title by adverse possession, so far as statutory requirements as to payment of taxes in order to establish title by adverse possession are concerned, claimant may show by other evidence that the particular land occupied was assessed and the taxes paid by him or his predecessors. Code Civ.Proc. § 325.

Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Actions by Ernest T. Sorensen against Manuel Costa and Nettie Connolly to quiet title to realty and for reformation of a deed, wherein defendant Costa filed a cross complaint and secured an order to bring in new parties. The actions were consolidated for trial. From judgment in favor of plaintiff in first action, defendant Costa appeals.

Judgment affirmed.

For prior opinion, see 187 P.2d 472.

Ernest C. Crowley, of Fairfield, for appellants.

Morse & Richards and Stanley C. Smallwood, all of Oakland, for respondent.

TRAYNOR, Justice.

Appellant, Manuel F. Costa, appeals from a judgment in favor of plaintiff and respondent, Ernest T. Sorensen, determining the latter to be the owner of a lot described as "The Westerly one-half of Lot 7, Block 51, Benicia, California, as the same is laid down and delineated on the Official Map of the City of Benicia."

According to the evidence and the findings of the trial court, this litigation arose out of a "general mistake existing as to the proper description of several lots lying in and upon block fifty-one as shown on the Official Map of the City of Benicia, California." For many years appellant and at least three of his neighbors living in Block 51 had been occupying land other than that described in their deeds. In 1940 it was discovered that the actual boundaries of the lots occupied by appellant and his neighbors were approximately seventy-five feet, or one-half a lot's width, to the west of the land described in their respective deeds. Thus, appellant had been living for over forty years in a house on a lot that is actually the east half of lot 8, but which his deed describes as the west half of lot 7. His next-door neighbor, respondent, has a deed describing the east half of lot 7, but he has been occupying a house on land described in appellant's deed, the west half of lot 7. Nettie Connolly has been in possession for many years of property that includes the east half of lot 7, which is unimproved land, and the west half of lot 6. Her deed, however, describes the whole of lot 6. The east half of lot 6 and the west half of lot 5 together constitute corner property occupied by Francis Little, but his deed describes the whole of lot 5, a large part of which is a street.

At a tax sale in September, 1940, appellant purchased land described as the east half of lot 8. He had the land surveyed and discovered that the tax deed actually described the land on which he had been living for nearly forty years. A dispute subsequently arose between appellant and respondent with respect to the land occupied by respondent but described in appellant's deed, and respondent brought this action to quiet his title to the land in question on the ground that he had acquired

title thereto by adverse possession. By a subsequent amendment to his complaint he also sought reformation of his deed. Appellant filed an answer and cross-complaint and secured an order to bring in new parties, including E. E. Rose and Bessie C. Rose, who claim an interest in the land in question under a deed of trust. Meanwhile, respondent also brought an action against Nettie Connolly claiming title under his deed to the east half of lot 7. The actions were consolidated for trial. Judgment was entered for respondent quieting his title to the land occupied by him, namely, the west half of lot 7, subject to the deed of trust in favor of E. E. Rose and Bessie C. Rose; the judgment also determined that Nettie Connolly owns the land occupied by her, namely, the east half of lot 7. No appeal has been taken from the part of the judgment quieting title in favor of Nettie Connolly.

In 1890 L. B. Misner executed a deed to lot 7 to E. F. Albee and F. M. Carson. Shortly thereafter the grantees exchanged deeds, dividing the lot between them. Carson received a deed describing the east half of lot 7, and Albee received a deed describing the west half. In 1901 Albee executed a deed to Manuel Costa likewise describing the west half of lot 7, but Costa took possession of the east half of lot 8 and has resided thereon ever since.

In 1893 E. M. Carson executed a deed to Nicholas Nelson describing the east half of lot 7. Similar deeds were executed by Nelson and his successors in interest, including a deed executed in 1928 by H. C. and Myrtle Glass to George Costa, the son of appellant, who occupied the land until 1936, when he transferred possession to E. E. Rose and Bessie Rose and executed a deed in their favor likewise describing the adjoining land. In 1938 E. E. Rose and Bessie Rose executed a like deed in favor of Nicholas Kadas and Josephine Kadas. The land was in possession of tenants of Nicholas and Josephine Kadas in March, 1940, when they executed a deed in favor of respondent, Ernest T. Sorenson, likewise describing adjoining land. The tenants remained in possession, paying their rent to respondent until the termination of their tenancy, about six months later, when respondent went into possession.

The trial court found that "for more than forty years last past, and prior to the commencement of this action, plaintiff Ernest T. Sorenson and his predecessors of title, have been in actual possession" of the property in question; that "from the year 1893, to the date of the commencement of this action, due to the mistake of the several Grantees and Grantors of said real property, the same has been mistakenly described in the several conveyances thereof, including the conveyance to plaintiff herein, as the East one-half (E ½) of Lot Seven (7), Block Fifty-one (51), City of Benicia, California, instead of the West one-half (W ½) of Lot Seven, Block Fifty-one (51), City of Benicia, California."

With respect to the payment of taxes, the trial court found that for many years "and particularly during the five year period prior to the commencement of this action, the real property hereinabove described * * * has been described on the tax assessment rolls of both the County of Solano, and the City of Benicia, California, as the East one-half (E ½) of Lot Seven (7) Block Fifty-one (51), City of Benicia, California and that all taxes assessed by the County of Solano and City of Benicia, California, against said property have been assessed against plaintiff, Ernest T. Sorenson and his predecessors in possession and occupation of said real property * * *." The court also found that both appellant and respondent and their predecessors "have paid all of the taxes assessed by the City of Benicia and the County of Solano, against the properties actually occupied by them."

In addition, the trial court found that respondent "and his predecessors in interest have since the 19th day of April, 1890, been in actual possession" of the property in question "and have ever since the last date * * * occupied, used and cultivated said land, having and keeping the same surrounded by a substantial enclosure, using and claiming the same in their own right from that date to the present time adversely, to all the world."

[1] A person claiming title to property by adverse possession must establish his claim under either section 322 or under sections 324 and 325 of the Code of Civil

Procedure. Adverse possession under section 322 is based on what is commonly referred to as color of title. In order to establish a title under this section it is necessary to show that the claimant or "those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property * * * for five years * * * so included * * *." Since the deeds in question did not include the land occupied, adverse possession thereof is governed by sections 324 and 325 of the Code of Civil Procedure. *Park v. Powers*, 2 Cal.2d 590, 594, 42 P.2d 75.

Section 324 of the Code of Civil Procedure provides that "where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely." Section 325 provides that "For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

"(1) Where it has been protected by a substantial inclosure.

"(2) Where it has been usually cultivated or improved.

"Provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land."

The trial court found that the land was occupied continuously by respondent and

his predecessors for more than five years; that throughout that period it was protected by a substantial enclosure and usually cultivated; and that all the taxes assessed thereon had been paid by respondent and his predecessors. Appellant contends, however, that respondent is precluded, as a matter of law, from establishing title by adverse possession. Appellant's contentions in this regard may be classified under the following headings: (1) That the mutual mistake of the parties precluded respondent from establishing the adverse character of the possession of the property by him and his predecessors; (2) that the fact that the deeds held by respondent and his predecessors failed to describe the land in question precluded him from showing continuity of possession for the statutory period; (3) that respondent did not prove that he and his predecessors paid all the taxes assessed on the land in question during the statutory period.

The Adverse Character of the Possession

[2, 3] Appellant contends that as a matter of law respondent could not have acquired title by adverse possession because the mutual mistake of the parties for the statutory period precluded respondent from showing that the possession was hostile or adverse to the rights of the record owner. A similar contention was rejected by this court in *Woodward v. Faris*, 109 Cal. 12, 17, 41 P. 781. The requirement of "hostility" relied on by appellant (see *West v. Evans*, 29 Cal.2d 414, 417, 175 P.2d 219) means not that the parties must have a dispute as to the title during the period of possession, but that the claimant's possession must be adverse to the record owner, "unaccompanied by any recognition, express or inferable from the circumstances of the right in the latter." (4 *Tiffany*, Real Property, [3rd ed.] 425.) Appellant's contention that respondent's possession was not adverse is based on the statement in *Holzer v. Read*, 216 Cal. 119, 123, 13 P.2d 697, 698, that "where the occupation of land is by mere mistake, and with no intention on the part of the occupant to claim as his own, land which does not belong to him, but with the intention to claim only to the true line

wherever it may be, the holding is not adverse." [Italics added.] That statement is not applicable to the present case, for the trial court found on the basis of substantial evidence that respondent and his predecessors did claim the land as their own and held it "adversely to all the world." The Holzer case involved a different situation, a dispute as to boundaries, that turned on the question whether the occupier in occupying up to a certain line intended to claim the land included in the record title of his neighbor or to claim only whatever land was described in his own deed. (See Code of Civil Procedure, §§ 322, 324.) The trial court found that he intended to claim only the land described in his deed, and this court affirmed the judgment on the ground that in the absence of an intention to claim the land in dispute as his own, his possession was not adverse. On the other hand, in Woodward v. Faris supra, 109 Cal. 12, 17, 41 P. 781, this court expressly held that if the claimant intends to claim the area occupied as his land, the mere fact that the claim was based on mistake does not preclude him from acquiring title by adverse possession. Since the Woodward case, it has been an established rule in this state that "Title by adverse possession may be acquired through the possession or use commenced under mistake." Park v. Powers, supra, 2 Cal.2d 590, 596, 42 P.2d 75, 77; Lucas v. Provines, 130 Cal. 270, 272, 62 P. 509; see 1 Cal.Jur. 578; cases from other jurisdictions collected, 97 A.L.R. 14, 58; 4 Tiffany, Real Property, [supra] section 1159; 1 Walsh, Commentaries on the Law of Real Property, section 19.

[4,5] Nor is there any merit to appellant's contention that if adverse possession may be based on a mistaken entry, the period of the statute of limitations runs only from the discovery of the mistake. Appellant relies on Breen v. Donnelly, 74 Cal. 301, 305, 15 P. 845, and a dictum in Marsicano v. Luning, 19 Cal.App. 334, 336, 125 P. 1083. The case of Breen v. Donnelly, supra, is not in point, for it involved the application of the statute of limitations to an action for relief on the ground of fraud or mistake under section 338(4) of the Code of Civil Procedure.

Section 338(4) provides that in such a case the cause of action for purposes of the statute of limitations is deemed not to accrue until the discovery of facts constituting the fraud or mistake. The section is an express exception to the general rule that the statute of limitations begins to run when the cause of action actually accrues. (Code Civ.Proc. § 312.) A cause of action of the recovery of real property accrues when the owner is deprived of possession. (Code Civ.Proc. §§ 318, 321.) "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto * * * sufficient against all * * *." (Civil Code, § 1007.) The dictum in Marsicano v. Luning, 19 Cal.App. 334, 336, 125 P. 1083, that the period of adverse possession does not commence to run until the discovery of the mistake, must be disapproved, for it is not only inconsistent with the statutes of this state but is directly contrary to the holding of this court in Woodward v. Faris, supra, 109 Cal. at 15, 41 P. at 781, where both parties were operating under a mutual mistake during the statutory period.

[6-8] Appellant also contends that the mutual mistake precludes respondent from showing that his possession and that of his predecessors was under "such circumstances as to constitute reasonable notice to the owner." West v. Evans, supra, 29 Cal.2d 414, 417, 175 P.2d 219, 220. Appellant has evidently misconstrued the foregoing language to mean that a person claiming title by adverse possession must establish that the record owner knew of his own rights in the land in question. All that the claimant must show, however, is that his occupation was such as to constitute reasonable notice to the true owner that he claimed the land as his own. The fact that the record owner was unaware of his own rights in the land is immaterial. Wood v. Davidson, 62 Cal.App.2d, 885, 889, 145 P.2d 659; McLeod v. Reyes, 4 Cal.App. 2d 143, 157, 40 P.2d 839; Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113; additional cases collected, 1 Cal.Jur. 550; 4 Tiffany, Real Property, supra, § 1140. In the present case there can be no question under the findings of

the trial court that the occupation of respondent and his predecessors was such as to constitute reasonable notice that they claimed the land as their own.

Continuity of Possession

[9] Under section 325 of the Code of Civil Procedure, respondent was required to prove that "the land has been occupied and claimed for the period of five years continuously." Since respondent did not himself possess or occupy the land for five years, it was necessary for him to rely on the possessions of his predecessors to establish continuous possession for the five-year period. In order to tack one person's possession to that of another, some form of privity between successive claimants for the five-year period is necessary. *San Francisco v. Fulde*, 37 Cal. 349, 353, 99 Am.Dec. 278; *Meier v. Meier*, 71 Cal. App.2d 502, 507, 162 P.2d 950. Appellant contends that respondent failed to establish the necessary privity.

The trial court found that respondent "and his predecessors in title, have been in possession and occupied the West one-half (W ½) of Lot Seven * * * by virtue and under deed describing their said property as the East one-half (E ½) of Lot Seven. * * *" from the year 1893 to the date of the commencement of the action.

The trial court found that respondent and "his predecessors in title" have been in possession of the property in question by virtue of deeds mistakenly describing the property as the east one-half of lot 7 for more than the statutory period and that the land in question was conveyed to plaintiff and his predecessors by deeds describing the adjoining property. Since respondent's claim of title by adverse possession cannot be based on a written instrument it must be supported, if at all, under Code of Civil Procedure sections 324 and 325, which do not require a written instrument. The question remains what privity other than that based on a deed describing the land will supply the necessary continuity of possession between respondent and his predecessors for the five-year period preceding the commencement of this action.

Relying on *Messer v. Hibernia Savings Society*, 149 Cal. 122, 128, 84 P. 835, and

Von Neindorff v. Schallock, 21 Cal.App.2d 44, 48, 68 P.2d 278, appellant contends that only a deed describing the land claimed will supply the necessary privity. Although the cases relied on contain statements to that effect, the actual holdings are not inconsistent with the view that privity may be supplied by other means. In both cases the claimant attempted to support his claim of adverse possession by a deed excluding the land claimed, and it was held that such deeds did not supply the necessary privity. In the *Von Neindorff* case, *supra*, 21 Cal.App.2d 44, 48, 68 P.2d 280, the court stated that a person claiming title to land by adverse possession "cannot tack to the time of his possession that of a previous holder where the land claimed adversely was not included within the boundaries of the conveyance he received from such previous holder." The court stated as the reason for this rule that "otherwise a person receiving a conveyance of a part of lands occupied by a predecessor might use the possession of that predecessor of another part of the land to defeat the rights of that predecessor with respect to that part of the land which he intended to keep for himself. The rule is particularly appropriate in a case such as this where the land, the predecessor's possession of which is relied upon, was particularly excepted from the conveyance made by the predecessor." This statement of the reason for the rule and its application to the facts of the *Von Neindorff* and *Messer* cases shows that the rule was too broadly stated in those cases. The reasoning supports, at most, a rule designed to protect the claimant's predecessor where he transfers by deed a part but not all of the land he possessed. It has no application to a situation where the deed describes none of the land possessed by the claimant's predecessor and the predecessor has transferred possession and attempted to transfer title to all of the land that he possessed. In such a situation the deed to land possessed by neither the present claimant nor his predecessors does not preclude a claim by the person in possession to the land occupied.

Appellant relies also on *Allen v. McKay and Co.*, 120 Cal. 332, 52 P. 828, and *Saner v. Knight*, 86 Cal.App. 347, 260 P. 942.

The court's only comment relevant to the problem of privity in the Allen case, however, is that [120 Cal. 332, 52 P. 831] "it may be further suggested that a privity of estate is absolutely necessary before various periods of adverse possession created by different parties may be tacked together, and, as to the land in controversy, the existence of such privity * * * is not entirely plain." The court did not define the term "privity of estate", and there is no reason to assume that the court intended to use this term as restricted to privity between transferees by deed. (See Ballantine, Title by Adverse Possession, 32 Harv.L.Rev. 135, 147.) In *Saner v. Knight*, 86 Cal.App. 347, 351, 260 P. 942, it was held that deeds describing the property were sufficient to establish the privity necessary to tack the adverse possession of the claimant to that of his predecessors. Although the court assumed that privity might not be established by other means, any language in the opinion supporting such a rule was unnecessary to the decision in that case and is disapproved.

[10, 11] The requirement of privity between several possessors of land is based on the theory that "The several occupancies must be so connected that each occupant can go back to the original entry or holding as a source of title. The successive occupants must claim through and under their predecessors and not independently to make a continuous holding united into one ground of action." (Ballantine, *supra*, 32 Harv.L.Rev. 135, 147.) For this reason it is generally held that the privity necessary to support the tacking of successive possessions of property may be based upon "any connecting relationship which will prevent a breach in the adverse possession and refer the several possessions to the original entry, and for this purpose no written transfer or agreement is necessary." (4 *Tiffany*, Real Property, *supra*, 434; *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 28, 119 N.W. 550; *Gregory v. Thorez*, 277 Mich. 197, 200, 269 N.W. 142; *Bonds v. Smith*, 79 U.S.App.D.C. 118, 143 F.2d 369, 371; cases collected 46 A.L.R. 792, 795; Ballantine, *supra*, 32 Harv.L.Rev. 135, 147-159; 5 *Thompson on Real Property* [Perm.Ed.], 468; 1 *Walsh*, *Comm-*

on the Law of Real Property, *supra*, sec. 23.) "It is possession not title which is vital. * * * Privity may exist where one by agreement surrenders his possession to another in such manner that no interruption or interval occurs between the two possessions without a recorded conveyance, or even without writing of any kind if actual possession is transferred." *Bonds v. Smith*, *supra*, 79 U.S.App.D.C. 118, 143 F.2d 369, 371.

[12] In the present case, although the finding that the land in question was conveyed by deeds mistakenly describing the property does not alone support the conclusion that the privity necessary to tack successive possessions existed between respondent and his predecessors, it does support the conclusion that respondent's predecessors intended to transfer the land in question. There is no question that the evidence before the trial court showed that possession to the land in question was actually transferred to each successive occupant during the five-year period. It therefore follows that the conclusion of the trial court that the respondent and his predecessors were in continuous possession for the statutory period must be sustained.

Payment of Taxes

The trial court found that the land occupied by respondent, the west half of lot 7, is improved land, whereas the east half of lot 7 described in respondent's deed is unimproved, and that through a general mistake, the improved lot occupied by respondent "has been generally known and described in and about the City of Benecia" as the east half of lot 7, an unimproved part of the property occupied by Nettie Connolly. The court found that this same mistake was made on the assessment rolls and that the property occupied by respondent has been described in the tax assessment rolls of both the city and county as the east half of lot 7 and assessed to respondent and his predecessors as improved property. The court therefore determined that respondent and his predecessors have paid all the taxes that have been assessed on the property actually occupied by them for the five-year period before the commencement of the action.

[13] Thus, all interested persons have mistakenly believed during the statutory period that the description of the land and improvements on the tax assessment rolls referred to the land occupied by respondent, when, in fact, the description erroneously referred to certain unimproved property. The evidence before the trial court, particularly the fact that the land was assessed as improved property whereas the description on its face referred to a vacant lot, supports the trial court's determination that the description was mistaken and that the respondent and his predecessors actually paid all taxes assessed for the statutory period on the land that they occupied.

[14-16] Appellant contends that the description on the tax assessment rolls is controlling, and that as a matter of law the respondent must have paid taxes only on the land described on the assessment rolls. This court has held, however, that the fact that land was not assessed by its description is not controlling under section 325 of the Code of Civil Procedure. *Ward Redwood Company v. Fortain*, 16 Cal.2d 34, 44, 104 P.2d 813. The purpose of the description on the tax assessment rolls is to notify interested parties of the taxes due on the property, and appellant cannot complain of any mistake in the description unless he was misled thereby. *San Francisco v. San Mateo*, 17 Cal.2d 814, 819, 112 P.2d 595; *E. E. McCalla Co. v. Sleeper*, 105 Cal.App. 562, 567, 288 P. 146; *Biaggi v. Phillips*, 50 Cal.App.2d 92, 98, 122 P.2d 619; see also *Lummer v. Unruh*, 25 Cal. App. 97, 103, 104, 142 P. 914. Since appellant as well as other interested parties at the time the taxes in question were assessed also understood that the taxes related to the property occupied, he could not have been misled thereby. He was not injured by the mistake in the description, for at the time he did not know that he had any claim to the land in question and paid taxes on the property he was occupying assessed under a similar mistake in description. Appellant contends, however, that respondent cannot rely on his own mistake and that of his predecessors as to the payment of taxes on the wrong land. There is no question that a person

claiming title by adverse possession must show that he and his predecessors actually paid the taxes assessed on the particular land occupied, and he cannot show compliance with section 325 of the Code of Civil Procedure by merely proving that he and his predecessors "thought or supposed they were paying taxes" on the land occupied by them, when the lands were assessed under a correct description that applied to other land. *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, 124, 64 P. 113; *Reynolds v. Williard*, 80 Cal. 605, 608, 22 P. 262. In the present case, however, the respondent proved by substantial evidence that the description on the tax assessment rolls was mistaken and that he and his predecessors not only thought that they were paying taxes on the land occupied but in fact paid taxes actually assessed against such lands.

[17, 18] Appellant also relies on certain cases involving boundary disputes between adjoining landowners, in which the courts have denied claims of title by adverse possession up to the boundaries of the land occupied, on the ground that the claimant failed to establish payment of taxes on the disputed part of the occupied land by tax receipts that failed to describe the land. See *Freidman v. Southern Calif. T. Co.*, 179 Cal. 266, 176 P. 442; *Mann v. Mann*, 152 Cal. 23, 29, 91 P. 994; *Wilder v. Nicolaus*, 50 Cal.App. 776, 195 P. 1068; *Johnson v. Buck*, 7 Cal.App.2d 197, 202, 46 P.2d 771. In none of these cases, however, does it appear that the claimant showed that the descriptions on the tax receipts were erroneous and that he actually paid the taxes assessed on the land in controversy. Where a claimant of title by adverse possession has paid the taxes actually assessed on the property occupied, a misdescription on the tax assessment roll or in the tax receipts will not generally affect the efficacy of payment under statutes requiring the payment of taxes in order to establish title by adverse possession. *West Chicago Park Commissioners v. Coleman*, 108 Ill. 591, 598; *W. D. Cleveland & Sons v. Smith*, Tex.Civ.App., 156 S.W. 247, 251; cases collected 2 C.J.S., *Adverse Possession*, § 177, page 752; 132 A.L.R. 216, 227. Even if the descriptions on the

tax receipts are insufficient by themselves to identify the property, as far as the requirements of adverse possession are involved, the claimant may show by other evidence that the particular land occupied was assessed, and the taxes were paid by him or his predecessors. See *Branch v. Lee*, 373 Ill. 333, 26 N.E.2d 88; see also *Lummer v. Unruh*, supra, 25 Cal.App. 97, 104, 142 P. 914.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.



32 Cal.2d 520

PATTON v. PATTON.

S. F. 17399.

Supreme Court of California, in Bank.

Sept. 1, 1948.

Divorce ¶189, 213, 225

Where court was confronted by two contracts admittedly made by wife waiving right to alimony and attorney's fees for stated money consideration, no claim was made that agreements were not binding upon her, and no objection was made to their introduction in evidence and wife stipulated that judgment in which court in previous divorce action had held they were executed for valid consideration and not obtained by fraud of husband, could be made part of the record, property settlement agreements precluded divorce court from allowing wife alimony pendente lite, attorney's fees and costs. Civ.Code, §§ 137, 139, 3268, 3513.

SPENCE and TRAYNOR, JJ., dissenting.

Appeal from Superior Court, San Francisco County; James G. Conlan, Judge.

Action by John Patton against Willie Patton for divorce, wherein defendant filed a cross-complaint. From an order allowing defendant alimony pendente lite and an

additional amount for attorney's fees and costs, plaintiff appeals.

Judgment reversed.

For prior opinion, see 181 P.2d 913.

Edmund J. Holl, of San Francisco, for appellant.

Fitz-Gerald Ames, Sr., Hugh B. Miller, and John H. Lenz, all of San Francisco, for respondent.

EDMONDS, Justice.

Willie Patton is defending the suit of her husband for a divorce and is asking for a decree in her favor upon a cross-complaint. At the time of the separation of the parties they entered into a property settlement agreement in which the wife released the husband from "all claims whatsoever" for support or attorney's fees. Upon the hearing of an order to show cause, Mrs. Patton was allowed alimony pendente lite and an additional amount for attorney's fees and costs. By his appeal from that order, the husband challenges the wife's right to such an award upon the ground that it violates the provisions of their contract and a later one executed by them.

The parties married in 1943 and separated 18 months later. At that time, they entered into a property settlement agreement by which, in consideration of \$500, the wife released to her husband all interest in specifically described property. The contract also provided: "Husband shall not be liable for support, maintenance, costs or attorney's fees of Wife and in this respect wife releases husband for all claims whatsoever. * * *"

A reconciliation was followed by a brief resumption of marital relations, but in June, 1945, the parties again separated. Another contract was then executed in which they "ratified and confirmed" the prior agreement and the wife accepted \$250 "in full settlement of all claims and demands, and of all property rights of the parties."

Six months after the date of this agreement, the wife sued to cancel both contracts upon the grounds of lack of consideration and the alleged fraud of the hus-

band. At that time there was pending an action for divorce commenced by the husband in which the wife had filed a cross-complaint. The two actions were consolidated and, upon a trial, the court concluded that neither party was entitled to a divorce. As to the contracts, it found that each of them was valid, being based upon a valid consideration and not executed as the result of any fraud of the husband. Mrs. Patton appealed from that portion of the judgment determining the validity of the agreements, but her appeal was dismissed for lack of prosecution and the determination is now final.

In the meantime, the husband commenced the present action and the wife cross-complained, asking for a decree upon a cause of action based upon acts allegedly occurring after the entry of the judgments in the consolidated case but before the appeal was dismissed. Following the filing of an affidavit made by Mrs. Patton in which she asserted that she was without funds necessary for her support and the defense of the action and her husband had possession of specified community property, he was ordered to show cause why he should not be required to pay her a reasonable amount for her maintenance and for counsel fees.

When the matter came on for hearing, Mrs. Patton testified that she was not working and had no money. The husband offered in evidence the two contracts of the parties, and they were received without objection from the wife. The trial judge then stated: "I don't care anything about these documents, but I will make an order for the support of this woman pending the hearing of the divorce action * * *: I will make an order for counsel fees and for her support." By stipulation of counsel, the judgment roll in each of the prior actions between the parties was then made a part of the record, and the court ordered the husband to pay to Mrs. Patton \$100 per month "as and for alimony for her support and maintenance during the pendency of this action", \$100 on account of attorney's fees and \$10 on account of costs. The appeal is from that order.

The appellant contends that although a court is authorized, in its discretion, to re-

quire the payment of alimony pendente lite, attorney's fees and costs, a wife by contract may waive her right to such allowances. Therefore, he argues, it was error to make the award to Mrs. Patton as it violates the provisions of the property settlement agreements which were made in good faith for a valuable consideration. The wife relies upon the applicable statutory provisions and maintains that the court cannot be deprived of its power by a contract between the parties.

"Property settlement agreements occupy a favored position in the law of this state and are sanctioned by the Civil Code. *Hill v. Hill*, 23 Cal.2d 82, 89, 142 P.2d 417; *Hensley v. Hensley*, 179 Cal. 284, 287, 183 P. 445; Civ.Code § 158, 159 * * *. When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable consideration." *Adams v. Adams*, 29 Cal.2d 621, 624, 177 P.2d 265, 267.

A waiver is the intentional relinquishment of a known right (*First Nat. Bank v. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am. St.Rep. 64; *Jones v. Maria*, 48 Cal.App. 171, 191 P. 943; 25 Cal.Jur. 926) and anyone may waive the provisions of a law or a contract for his benefit unless such a waiver would be against public policy. Civil Code secs. 3268, 3513; *Chesney v. Byram*, 15 Cal.2d 460, 101 P.2d 1106; *Leonard v. Board of Education*, 36 Cal. App.2d 595, 97 P.2d 1032.

Section 137 of the Civil Code provides: "When an action for divorce is pending, the court may, in its discretion, require the husband * * * to pay as alimony any money necessary to enable the wife * * * to support herself * * * or to prosecute or defend the action. * * *" But to obtain such an order, there must be a showing of necessity or the award is improper. (*Kellett v. Kellett*, 2 Cal.2d 45, 39 P.2d 203; *White v. White*, 86 Cal. 212, 24 P. 1030; *Sharon v. Sharon*, 75 Cal. 1, 16 P. 345; *Falk v. Falk*, 48 Cal.App.2d 780, 120 P.2d 724. The purpose of the statute was to protect an impoverished wife by requiring her husband, if he is able to do so, to provide money for her support and the fees of counsel to pre-

serve her rights in the event that she has no means available for that purpose. Accordingly, it has been held that in a divorce action, until the court has either approved or disapproved a property settlement agreement, even though by agreement the wife has waived all rights to alimony, counsel fees, and costs, an award may be made for necessary support and counsel fees pendente lite. *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 227 P. 715; *Steinmetz v. Steinmetz*, 67 Cal.App. 195, 227 P. 713. But in the present case, the court was confronted by two contracts admittedly made by the wife, in each of which, for a stated money consideration, she waived her right to alimony and attorney's fees. She made no claim that these agreements were not binding upon her. No objection was made to their introduction in evidence and she stipulated that the judgment in which the court held that they were executed for a valid consideration and not obtained by any fraud of the husband might also be made a part of the record.

Under these circumstances, as in *Majors v. Majors*, 70 Cal.App.2d 619, 161 P.2d 494, 497, the contract "stood in the way * * * of any judgment for plaintiff's support contrary to or inconsistent with its provision, and the court could not properly ignore its existence. If there was no good reason for questioning the validity or fairness of the agreement and for placing that matter in issue, then there was no good reason for refusing to approve it. In order to dispose of the matters of community property and support, the agreement had to be regarded as valid, in which case the judgment should have followed it, or it had to be found invalid and therefore ineffective to influence or control the judgment." The award challenged by *Majors* was for permanent alimony, but the legislative purpose of section 139 of the Civil Code, which authorizes the court to require a husband to support his wife after they are divorced, has a stronger social purpose than that which underlies the provision for temporary alimony. *McCaleb v. McCaleb*, 177 Cal. 147, 169 P. 1023; *Millar v. Millar*, 175 Cal. 797, 167 P. 394, L.R.A.1918B, 415, Ann.Cas.1918E, 184;

Simpson v. Simpson, 21 Cal.App. 150, 131 P. 99.

The *Steinmetz* and *Locke Paddon* decisions, supra, have not been impliedly overruled by the recent *Adams* case, supra, as is contended. In that decision, this court considered some of the legal consequences which follow the execution of a valid property settlement agreement. The controversy concerned a decree which awarded permanent support contrary to the provisions of the agreement of the parties although the wife "presented no evidence showing that it was unfair, nor was any such evidence elicited by the trial court". The wife's complaint in the *Locke Paddon* litigation charged that a property settlement agreement signed by her had been obtained by the fraud of the husband, and the court upheld an award of temporary alimony and counsel fees pending a trial of the issue in regard to the right to a divorce and the validity of their contract. The decision in the *Steinmetz* case stands upon the same ground, for by the pleadings in the husband's action for divorce, the wife attacked the agreement she had made as fraudulent and void.

In the present suit, Mrs. Patton did not charge, either by her pleadings nor by the affidavit presented in support of her application for alimony and counsel fees, that the agreements she had made were obtained by any fraud of the husband nor that they were inequitable. She made no objection when they, and the judgment upholding their validity were offered in evidence, and she did not ask the court to allow her to then present proof which would support a determination that she should not be bound by them. Under these circumstances, the trial court abused its discretion in refusing to consider the effect of these agreements as evidence bearing upon the wife's right to support and in making an order for alimony and counsel fees regardless of their validity.

The judgment is reversed.

GIBSON, C. J., and SHENK, J., concur.

CARTER, Justice.

I concur in the judgment of reversal. It is neither illegal, immoral nor against

public policy for a husband and wife to enter into a property settlement agreement wherein they agree upon a division of their property and waive all claims, past, present and future, against each other, including alimony, temporary and permanent, and attorney's fees and costs. Such agreements are sanctioned by both statutory provisions (Civ.Code, secs. 158, 159), and court decisions (*Hill v. Hill*, 23 Cal.2d 82, 142 P.2d 417; *Hensley v. Hensley*, 179 Cal. 284, 183 P. 445) in this state. When such an agreement has been executed, and either party applies to a court for relief contrary to its provisions, it is the duty of the court, upon demand of the other party, to determine its validity. If the agreement is found to be valid, the parties should be required to comply with its provisions. On an application by a wife for temporary alimony, attorney's fees and costs in an action for divorce or separate maintenance, if the husband submits such an agreement to the court and claims that his obligations to his wife are specified therein, it is the duty of the court to make at least a preliminary determination as to the validity of such agreement in passing on such application. If it should appear to the court that such agreement is valid, it should deny any relief to the wife contrary to its provisions. But if a prima facie showing of invalidity is made, the court may reserve its ruling until the case is tried on the merits and may make an order for relief to the wife pendente lite notwithstanding the agreement. In other words, the agreement should be considered by the court in passing on such an application. This the court did not do in this case, even though in a prior action it had held the agreement to be valid. Regardless of whether its judgment in the prior action had become final at the time of the hearing on the wife's application, it was the plain duty of the court to consider the agreement as binding upon the parties and deny the wife any relief contrary to its provisions. Unless this is done, an agreement providing for the payment by the husband of temporary alimony, attorney's fees and costs would be just a worthless scrap of paper. Furthermore, such an agreement may have been partially or fully executed

and the wife may have received from the husband valuable properties and large sums of money as consideration for its execution. Certainly, these facts should be considered by the trial court in passing on such application.

In the case at bar, the agreement having been determined to be valid in a prior action, the court had no power to make an award contrary to its provisions.

SCHAUER, J., concurs.

SPENCER, Justice.

I dissent.

The majority opinion holds that the trial court abused its discretion in making an award of temporary alimony, counsel fees and costs, and therefore reverses the trial court's order. I cannot agree with the reasoning or the result reached in that opinion.

The undisputed facts may be briefly stated. It appears that this is the second divorce action instituted by the plaintiff husband against defendant, and that it was filed before there had been a determination in the first divorce action that he was not entitled to a divorce. The defendant wife filed an answer and cross-complaint, and sought temporary alimony and suit money. It also appears that the wife had brought a prior action to set aside two property settlement agreements which had been signed by the parties. That action was consolidated for trial with the first divorce action and had resulted in a judgment of the trial court upholding the validity of said agreements. The wife promptly appealed, and that appeal was still pending and undetermined when the challenged order herein was made.

In addition to the foregoing facts, which were before the trial court on the hearing, it appeared without conflict that the wife was then entirely without funds; that she had no property; that she was ill and unable to work; that the husband had an income of approximately \$450 or more per month from a cafe and other properties; and that the total sum which the wife had received from the husband under the disputed property settlement agreements was but \$750, in consideration of which she had waived all property rights or claims for

financial assistance. The husband introduced no evidence except evidence of the property settlement agreements, and evidence concerning the prior action in which the validity of the agreements had been put in issue, and in which action the wife's appeal was still pending. Upon this showing, the trial court made its order awarding to the wife \$100 per month as temporary alimony, \$100 as counsel fees, and \$10.00 as costs.

It is my opinion, first, that the trial court had the power, at least until the judgment in the prior action had become final, to make an order awarding temporary alimony and attorney's fees and costs; and second, that if the trial court had the power to make any order for temporary alimony and suit money, it did not abuse its discretion in making an order awarding the amounts above mentioned.

When the validity of a property settlement agreement is put in issue in a divorce action, there is no question concerning the power of the trial court to award temporary alimony and suit money in that action, regardless of any provisions of such agreement waiving financial assistance, until such time as the validity of the agreement may be determined. *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 227 P. 715; *Steinmetz v. Steinmetz*, 67 Cal.App. 195, 227 P. 713. Here the validity of the property settlement agreements had been put in issue in a separate action, but an appeal was pending in that action and the issue raised therein had not been finally determined when the order in question was made. The rationale of the cited cases, however, clearly indicates that the trial court should be held to have had such power until such final determination. It is clear that until the prior judgment became final, the doctrine of *res judicata* was not applicable. (15 Cal.Jur. 121, and cases cited.)

As I read the majority opinion, it does not deny the existence of the power of the trial court but it points out that the wife did not raise the issue of invalidity of the agreements in this divorce action, did not present proof of invalidity at the time of the hearing of her application, and did not object to the introduction of the evi-

dence of the agreements or of the prior judgment. It therefore concludes that "Under these circumstances, the trial court abused its discretion in refusing to consider the effect of these agreements as evidence bearing upon the wife's right to support and in making an order for alimony and counsel fees regardless of their validity." In other words, abuse of discretion "under these circumstances" is the basis of the majority opinion, rather than lack of power. But I find no circumstances which would warrant the conclusion that the trial court abused its discretion.

It indisputably appears that the wife had attacked and, by appeal, was continuing to attack the validity of those agreements in a separate action brought for that purpose. She was neither required nor should she be permitted in this divorce action to relitigate the same issue. It was therefore not incumbent upon her, or proper for her, to plead or prove in this action such invalidity, which was the sole issue in the separate action. She did properly show, however, that she had attacked the agreements in the separate action, and that an appeal was pending therein, and this was a sufficient showing to require the trial court to hear her application and to exercise its discretion in determining whether, in view of all the circumstances, it should be granted, and, if so, in what amount. Among those circumstances, of course, was the fact of the existence of said agreements and the fact of the pendency of the separate action challenging their validity. No significance can therefore be attached to the wife's failure to object to the introduction of evidence concerning the existence of said agreements or concerning the pendency of the other action. Such evidence was material in order to apprise the court of the entire situation and any objection to the introduction of such evidence would have been properly overruled. Furthermore, it is not correct to say, as does the majority opinion, that "She made no claim that these agreements were not binding upon her." If this were true, the reliance by the majority opinion on the case of *Majors v. Majors*, 70 Cal.App.2d 619, 161 P.2d 494, might be justified. That case arose upon an appeal from a judgment on the merits

on all issues, including an award of permanent support, in a case where the plaintiff wife had sought approval of the property settlement agreement and had testified that she was satisfied with it. But here it appeared that the wife was wholly dissatisfied and had brought a separate action, which was still pending and not finally determined, claiming that the agreements should be set aside because of fraud and of failure of consideration. It is difficult to see how the wife could have more effectively "made [the] claim that these agreements were not binding upon her." If it is the theory of the majority opinion or concurring opinion that the issue of invalidity of a property settlement agreement must be not only raised but also proved upon an application for temporary alimony, such view appears unsound and it is contrary to the views expressed in *Locke Paddon v. Locke Paddon*, supra, 194 Cal. 73, 81, 227 P. 715.

Appellant stated in his petition for hearing herein that "there is squarely presented the question as to whether the Superior Court in the divorce action possessed the power" to award temporary alimony and suit money in view of the agreements of the parties and the judgment of the superior court in the other action which was then on appeal. The majority opinion, however, appears to treat the case as one involving the question of abuse of discretion in the exercise of a conceded power, such abuse consisting of "refusing to consider the effect of these agreements as evidence bearing upon the wife's right to support and in making an order for alimony and counsel fees regardless of their validity." Such alleged refusal is based upon the following circumstances: after hearing the undisputed evidence of the wife's physical and financial distress, of the two property settlement agreements under which the wife had previously received but \$750 in consideration of her waiver of all property rights and rights to financial assistance, of the two

prior actions between the parties and the pendency of the appeal in the action involving the validity of the agreements, the trial judge said: "I don't care anything about these documents, but I will make an order for the support of this woman pending the hearing of the divorce action." Such remark may reasonably be construed to mean that the trial court, after considering all the evidence, did not feel bound by the terms of said agreements but, on the contrary, did feel that, despite the existence of such agreements, it should exercise its discretion and make some award to permit the wife to defend this second divorce action instituted against her by the husband. The record does not bear out the statement that the trial court either refused or failed to consider any of the evidence before it, and to attempt to use the above mentioned remark as the basis for indicating that it did furnish frail ground for the reversal of what appears to me to be a wholly reasonable order for temporary support and suit money made by the trial court within its power and in the exercise of a sound discretion under the circumstances.

It is stated in the majority opinion that the wife's appeal in the other action "was dismissed for lack of prosecution and the determination is now final." That fact, if it be a fact, does not appear from the record herein. In the husband's petition for hearing in this court, it is stated: "The wife has appealed from that judgment and that appeal is now pending." But in any event, the propriety of the trial court's order must be determined in view of the circumstances existing at the time of its entry, and it is conceded that the wife's appeal in the other action was then pending and that it remained undetermined for some time thereafter.

I am of the view that the order should be affirmed.

TRAYNOR, J., concurs.

CHELINI v. NIERI.**S. F. 17718.****Supreme Court of California, in Bank.****Aug. 30, 1948.****Rehearing Denied Sept. 27, 1948.****1. Damages ⇨32**

Whenever terms of a contract relate to matters which concern directly comfort, happiness, or personal welfare of one of parties, or subject matter of which is such as directly to affect or move affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach.

2. Dead bodies ⇨9

Plaintiff could recover damages for illness suffered and disability resulting from plaintiff's discovery that flesh of body of plaintiff's deceased mother had become disintegrated and insect infested because of defendant mortician's breach of contract to embalm the body so that body would keep almost forever.

3. Appeal and error ⇨1039(13)

Where in course of argument on motion to amend complaint in other respects, it became apparent that plaintiff intended to prove contract to which plaintiff thereafter testified, rather than contract which plaintiff had pleaded, and defendant was not surprised by plaintiff's testimony, and after overruling of defendant's objection to plaintiff's testimony on ground of variance between testimony and case alleged, defendant made no further reference to question of variance and fully contested case made out by plaintiff, variance was immaterial and would be disregarded on appeal. Code, Civ.Proc. § 469.

4. Pleading ⇨388

Whether a variance between pleading and proof in a given case is material must be determined from the circumstances. Code Civ.Proc. § 469.

5. Appeal and error ⇨1039(13)

A variance is immaterial and may be disregarded on appeal where the case was as fully and fairly tried upon the merits as though the variance had not existed. Code Civ.Proc. § 469.

6. Damages ⇨89(1)

Under statute creating right to recover exemplary damages in action for breach of an obligation not arising from contract where defendant has been guilty of oppression, fraud or malice, exemplary damages may not be recovered in action based on contractual obligation even though the breach was wilful or malicious, but exemplary damages may be recovered in tort action upon a proper showing of malice, fraud or oppression even though the tort incidentally involves a breach of contract. Civ.Code, § 3294.

7. Fraud ⇨12

A false promise may be a fraudulent representation.

8. Dead bodies ⇨9

In action for breach of mortician's alleged agreement to embalm the body of plaintiff's deceased mother so that body would keep almost forever, exemplary damages could not be recovered even if the defendant's actions or omissions in embalming the body were wilful. Civ.Code, § 3294.

Appeal from Superior Court, San Mateo County; Clark Clement, Judge, assigned.

Action by August Chelini against Silvio Nieri and John Doe Johnson, to recover general and exemplary damages for breach of contract to embalm the body of plaintiff's mother. From an adverse judgment, defendant Silvio Nieri appeals.

Judgment affirmed as modified.

For prior opinion, see, 188 P.2d 564.

J. W. Coleberd, of San Francisco, R. A. Rapsey, of San Bruno, and Richard P. Lyons, of South San Francisco, for appellant.

Melvin M. Belli, of San Francisco, Jonathan H. Rowell, of Redwood City, Laurenz Krueger, of San Francisco, and Howard E. Gawthrop, of Redwood City, for respondent.

SCHAUER, Justice.

[1, 2] Defendant appeals from a judgment entered pursuant to a verdict which awards plaintiff "\$10,000.00 for general

damages, and \$900.00 for exemplary damages." The award of so-called "general damages" is predicated on defendant mortician's breach of a contract to preserve the body of plaintiff's mother and on plaintiff's physical illness, suffering and disability resulting from his discovery that because of such breach of contract the body became a "rotted, decomposed and insect and worm infested mass." Recovery of such damages is proper under the rule, laid down in *Westervelt v. McCullough* (1924), 68 Cal.App. 198, 208-209, 228 P. 734, 738, and included in the instructions to the jury, that "Whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject-matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach." As will appear from the subsequent discussion, no prejudicial error contributed to the award of damages for physical illness. The award of exemplary damages, however, cannot be sustained because, by an instruction hereinafter quoted, the jury were erroneously told that they could award such damages if they found merely "wilful" breach of contract, whereas it is the settled law of this state that such damages can be awarded only "for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice." (Civ.Code, § 3294.)

From the evidence most favorable to plaintiff the following appears: On December 11, 1943, plaintiff's mother died. Plaintiff employed defendant, who was a friend of plaintiff and a mortician, to prepare the body for burial. Defendant orally agreed to embalm the body so that it would "keep almost forever" and to provide a hermetically sealed casket. Plaintiff repeatedly informed defendant that he wished "to have his mother's body preserved, because she had a horror * * * of bugs and water," and defendant repeatedly assured plaintiff that "it would last almost forever." On December 12, 1943, plaintiff selected from defendant's

stock a metal casket concerning which defendant said, "it was a bronze casket, and was a hermetically sealed casket, and * * * that is the finest thing that is made * * * 'this is pre-war stuff.'" Plaintiff was grief-stricken and therefore did not in his examination of the casket observe whether it was so constructed that it could be hermetically sealed, but relied on defendant's representation. Plaintiff agreed to and did pay \$875 for the casket, embalming, and funeral. Plaintiff further informed defendant that "after the war" he intended to construct a lead box, place the casket therein, have a family vault erected, and move the body to such vault. Defendant agreed that at the time the body was moved to the proposed family vault he would place a ring on the finger and slippers on the feet, and plaintiff paid defendant an additional \$25 in consideration of defendant's agreement to perform these services.

Thus defendant knew, at or about the time he agreed to preserve the body "almost forever," that plaintiff was highly preoccupied with the importance of such preservation and that at some indefinite future date plaintiff intended to move the casket and expected the body to be in such a state of preservation that defendant could place a ring and slippers on it.

There is evidence which tends to show that defendant, when he made the agreement, further knew that it would be substantially impossible of performance. He testified that at that time he "didn't have any [hermetically sealed caskets] in stock," and he "knew that we could preserve the body for a time but not indefinitely." Also there is expert testimony that it is not possible to give any assurance whatsoever as to the length of time an embalmed body will remain in a state of preservation until the embalming has been completed. Defendant, however, assured plaintiff even before embalming was commenced that the body would "keep almost forever."

An employe of defendant, Howard Johnson, embalmed the body. Defendant did not tell Johnson of any special agreement or give him any special instructions with reference to this body. Johnson testified that he would not have been able to guar-

antee that the body, as embalmed by him in the manner customarily used by competent embalmers in this state, would remain preserved for any length of time.

From December 12 to December 16, 1943, the body was displayed in plaintiff's living room. On December 16, it was placed in a temporary receiving vault at Cypress Lawn Memorial Park. Thereafter, plaintiff visited the vault frequently, sometimes as often as four or five times a week. About two months after the body had been placed there, he observed "a lot of ants walking around there, and quite a few moths there, and I didn't like the looks of that." This condition continued. On about four occasions plaintiff told defendant, "I don't like the looks of these ants," and on each occasion defendant said, "Don't worry about that, your mother is hermetically sealed * * * She will last practically forever." In July, 1945, there were "more ants than ever, and there is a lot of hideous little black bugs jumping around." On July 13, 1945, at plaintiff's request, an employe of the cemetery opened the vault in plaintiff's presence. The casket was covered with cobwebs and insects. Plaintiff went to defendant and told him that the next day at plaintiff's request the casket was to be opened. Defendant assured plaintiff that the body would be "just as perfect as the day we put her in there * * * She might have a little mold on her, on her hands." Defendant said that he would go to the cemetery to view the remains. The next morning plaintiff, his wife, his physician, Dr. Young, and cemetery employes met at the vault. Defendant sent his employe Johnson in his stead. The casket was opened and it was discovered that the flesh of the body had disintegrated and the skeleton was covered with insects.

That night plaintiff awakened with "a terrible pressure on me." He arose, attempted to get a drink of water, suffered a cerebral spasm and fell to the floor unconscious. As a result of the fall plaintiff's face and arms were cut and bruised. The next day plaintiff went to his physician, Dr. Young. The doctor found that plaintiff's blood pressure was abnormally high, prescribed a diet and medicine, and told plaintiff to "stay in bed and rest, and stop

his work * * *—if he did it must be very light work." Since he viewed the decomposed body plaintiff can work for only fifteen minutes to half an hour without rest; he frequently feels faint; his blood pressure remains abnormally high. Plaintiff had previously felt well, worked sometimes for himself and sometimes for others, and "could do the work of any two men."

According to the testimony of plaintiff's physician, an emotional shock cannot cause permanent high blood pressure but it can "aggravate" and "accentuate" the condition of one so afflicted, particularly in the case of one, such as plaintiff, who "is a hyperthyroid type"; temporarily "high blood pressure that is incident to shock, and also what you call cerebral spasm * * * leaves some impairment [of the circulatory system]."

Defendant complains of a variance between the cause of action proved and the cause of action alleged. According to the complaint defendant's agreement was simply to embalm the body of plaintiff's mother "in a good and workmanlike manner" and to supply "a metal casket, and all services and every thing necessary * * * for properly depositing said remains in a crypt in Cypress Lawn Memorial Park." The complaint does not allege the contract to which plaintiff testified; i. e., to preserve the body "almost forever" and to place it in a hermetically sealed casket. But defendant does not attempt to show, nor does it appear, that this variance in any way prejudiced defendant.

Immediately before the taking of evidence began, the plaintiff moved to amend his complaint by adding to his allegation that defendant performed the alleged services and supplied the alleged materials "negligently," the words "and wilfully." This motion was granted. As hereinafter shown, this amendment did not have the effect for which plaintiff contends; i. e., it did not result in the statement of a cause of action for which exemplary damages could be awarded. But in the course of argument on the motion it became apparent that plaintiff, although he did not ask leave to amend his complaint in such respect,

proposed to attempt to prove the contract to which he thereafter testified, rather than the contract which he had pleaded. One of plaintiff's counsel, during such argument, said, "it has developed in the depositions and here, that the Defendant is maintaining that it was impossible to perform the contract, that he represented that he could perform. At the time he was engaged by the plaintiff in this case he was asked to perform a job of embalming which would preserve that woman's body almost forever, and now his position is that it was impossible to do that, and, nevertheless, the defendant represented and agreed that he would do that." Another of plaintiff's counsel stated, "if this is a case where there was a special contract to embalm this body so that it could be moved later on and the defendants knew they did not do it, and that is the proof, then, there would certainly be wilfulness in making the contract."

Thereafter, when plaintiff first testified that he told defendant, "I wanted a hermetically sealed casket, because—," defendant's counsel interposed, "I object to that testimony, on the ground that there is no allegation in the complaint to the effect that there was to be a hermetically sealed casket." The objection was overruled. Defendant made no claim that he was surprised. He did not object to plaintiff's evidence that he agreed to preserve the body "almost forever." Indeed, during the course of the trial he made no further reference to the question of variance between the case developed and that alleged. Defendant by his evidence fully contested the case made out by plaintiff. He testified that he did not agree to supply a hermetically sealed casket and that he made no agreement or representation as to the length of time during which the body would remain in a state of preservation; he denied that plaintiff, at the time defendant undertook to embalm the body, made any statement as to the length of time it should be preserved or as to the mother's horror and fear that "bugs would get at her"; he

produced other undertakers to testify that a funeral director of defendant's ability and experience would not state that a body could be so embalmed that it would keep "almost forever" in a vault.

[3-5] If, as defendant now urges, he was of the view that allegations of the complaint as to the terms of the contract were "unproved, not in some particular or particulars only, but in [their] general scope and meaning" so as to constitute "a failure of proof" (Code of Civil Procedure, § 471), then defendant could have moved the trial court to dismiss the action. (Code of Civil Procedure, § 581, par. 5, as it read at the time of trial [Stats.1935, p. 1954].) The defendant made no such motion, nor did he move for a new trial. In these circumstances we are satisfied that the matter is covered by section 469¹ of the Code of Civil Procedure and that defendant cannot prevail on appeal by advancing the technical objection, unsupported by any claim of prejudice, that the terms of the contract which during the trial were treated by both parties as being in issue, are not the terms alleged in the complaint. It has been repeatedly held that the question whether a variance between pleading and proof in a given case is material must be determined from the circumstances (see 21 Cal.Jur. 265, and cases cited) and that a variance is immaterial and may be disregarded where the case was as fully and fairly tried upon the merits as though the variance had not existed (*Grossetti v. Sweasey* (1917), 176 Cal. 793, 795, 169 P. 687; *Martin v. Pacific Gas & Electric Co.* (1928), 203 Cal. 291, 298, 264 P. 246; see also cases cited in 9 Cal.Jur. Ten Year Supp. 267, 268, § 184).

[6] Section 3294 of the Civil Code creates the right to recover exemplary damages. The section provides, "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover

¹ Code of Civ.Proc., § 469. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the

adverse party to his prejudice in maintaining his action or defense upon the merits. * * *

er damages for the sake of example and by way of punishing the defendant." It has long been settled that "Under this section exemplary damages may not be recovered in an action based upon a contractual obligation even though the breach of contract is wilful or malicious. [Citations.] If on the other hand the action is one in tort, exemplary damages may be recovered upon a proper showing of malice, fraud or oppression even though the tort incidentally involves a breach of contract. [Citations.]" (*Haigler v. Donnelly* (1941), 18 Cal.2d 674, 680, 117 P.2d 331, 335.)

[7,8] The above recited evidence, viewed most favorably to plaintiff, would permit the conclusion that defendant was guilty of the tort of deceit; i. e., that defendant intended to and did induce plaintiff to employ² him by making promises which he did not intend to (since he knew he could not) perform and that plaintiff justifiably relied upon such promises and believed that they had been performed, to his damage. (See 12 Cal.Jur. 724, stating the elements of actionable fraud; that a false promise may be a fraudulent representation, see Civil Code, § 1710, subd. 4, § 1572, subd. 4; *Union Flower Market v. Southern Calif. Flower Market* (1938), 10 Cal.2d 671, 676, 76 P.2d 503; cases cited in 12 Cal.Jur. 738-740.) Had this action been based upon fraud, exemplary damages might have been allowed even though the operative facts amounted also to a breach of contract. (*Thompson v. Modern School, etc.* (1920), 183 Cal. 112, 120, 190 P. 451.) But the cause of action pleaded and presented to the triers of fact, upon any reasonable construction thereof of which defendant can be said to have had notice, was based only on contract. The jury were instructed that "if you find * * * that the defendant Nieri's actions or omissions * * * were wilful, that is, intentionally and knowingly wrongful, you

may assess a further sum by way of punitive damages * * *" but no issue on the theory of the tort of deceit as the basis for compensatory damages, and, hence, punitive also, was submitted to the jury. Under the instructions they were permitted to award exemplary damages if they found merely that any "actions or omissions" of defendant in relation to performance or breach of the contract proved were "wilful, that is, intentionally and knowingly wrongful," even though they found that defendant was guilty of no tortious ground of action and no "oppression, fraud, or malice." Therefore, and particularly in view of the fact that on the evidence the jury may well have believed that defendant's representations, although knowingly false, were motivated by friendship or compassion for plaintiff and a desire to comfort him, the award of exemplary damages cannot stand.

Plaintiff concedes that "the item exemplary damages alone could by this court be stricken from the judgment allowing only the general damages to stand"; he states also that "It is further our contention that the Supreme Court may easily strike the severable \$900 exemplary damages if they are *not* allowable and affirm the trial judge of the Westervelt aspects of this case." In view of such concession and contention it is unnecessary to consider whether we should otherwise be required to reverse the entire judgment because of the error affecting the exemplary award.

For the reasons above stated, the judgment is modified by striking therefrom that portion which provides that plaintiff recover of defendant \$900 for exemplary damages and, as so modified, is affirmed.

GIBSON, C. J., and SHENK, ED-
MONDS, CARTER, TRAYNOR, and
SPENCE, JJ., concur.

² A jury could also, of course, take a more charitable view of the motive of defendant's representations and find that

they were made for the purpose of comforting plaintiff.

**MARIPOSA COUNTY v. MERCED IRR.
DIST. et al.**
Sac. 5914.

Supreme Court of California.
Aug. 30, 1948.

Rehearing Denied Sept. 27, 1948.

1. Waters and water courses ⇨226

Requirement of irrigation district law that a petition for inclusion of land might be filed by holders of title representing half or more of any body of land adjacent to boundary of district does not mean that there must be more than one property owner involved. St.1897, p. 254, §§ 85, 86; Water Code, § 26876.

2. Taxation ⇨217

The 1914 constitutional amendment withdrawing exemption of municipal corporations, including irrigation districts, from taxation as to their property outside their boundaries, did not freeze the then existing status of property in relation to its exemption from taxation. Const. art. 13, § 1.

3. Taxation ⇨204(2)

Constitutional and statutory provisions on exemptions from taxation should be construed to apply prospectively as well as presently, that is, to act upon property from time to time as it is acquired or loses its character with reference to ownership, use, and the like.

4. Taxation ⇨204(2)

The 1914 constitutional amendment withdrawing exemption of municipal corporations, including irrigation districts, from taxation as to their property outside their boundaries, is not to be given an interpretation which would make it discriminatory, since one of the general purposes of the provision amended is to secure uniformity in taxation. Const. art. 13, § 1.

5. Taxation ⇨217

As used in the constitutional provision exempting from taxation property of municipal corporations except such lands and improvements thereon located outside of boundaries of such municipal corporations owning the property as were subject to taxation at the time of acquisition of the same, the phrase "at the time of the ac-

quisition of the same" refers to and modifies only the clause "as were subject to taxation", and not the clause "located outside the municipal corporation". Const. art. 13, § 1.

6. Taxation ⇨217

The constitutional provision exempting from taxation property of municipal corporations, including irrigation districts, except that realty outside their boundaries, will not be construed to require exemption to depend upon whether acquisition of realty or inclusion within boundaries came first. Const. art. 13, § 1.

7. Constitutional law ⇨92

County has no vested right to tax property of an irrigation district. Const. art. 13, § 1.

8. Waters and water courses ⇨226

Irrigation district, as an owner of land lying without its boundaries, is competent to petition for the inclusion of land in the district notwithstanding that such land is not susceptible of irrigation. Water Code, §§ 20566.1, 26876, 26901.

9. Statutes ⇨233

Waters and water courses ⇨226

Where statute authorizing petition by landowners to include their land in irrigation district refers to owners of land and another statute permits irrigation district to be such owner, the rule that statutes do not include the state or its subdivisions unless they are expressly mentioned is not applicable to prevent district as landowner from petitioning to have land included within boundaries of district. Water Code, §§ 20566.1, 26876, 26901.

10. Statutes ⇨233

The rule that statutes do not include the state or its subdivisions unless they are expressly mentioned is founded upon the policy against the derogation of sovereignty and does not apply where political subdivision of state is being given powers by statute rather than having them taken away.

11. Statutes ⇨226

The fact that bills were introduced in Legislature which flatly exempted all irrigation district lands from taxation and

failed of passage does not alter interpretation of statute authorizing the inclusion in district of lands outside district on petition of owners as authorizing district, as owner of land outside its boundaries, to petition for inclusion of land in district and thereby secure its exemption from taxes. Water Code, § 26901.

12. Constitutional law ⇨63(2)

Taxation ⇨216

The effect of authority granted to irrigation district to include additional land within boundaries of district, and thereby exempt from taxation land owned by district and brought into its boundaries upon taxation by county, is only an incidental result flowing from inclusion and does not constitute an attempt to empower districts to interfere with counties' taxing power and process in violation of constitutional prohibition of such interference. Water Code, § 26901; Const. art. 11, § 13.

13. Constitutional law ⇨80(3)

Waters and water courses ⇨216

Where irrigation district was the only landowner involved in proceeding to incorporate land within boundaries of district, county in which land was situated had no ground to object that district would be acting upon its own petition in alleged violation of the separation of powers clause of the Constitution. Water Code, §§ 20566.1, 26901; Const. art. 3, § 1.

14. Constitutional law ⇨50

The separation of powers provision of the Constitution does not apply to local government as distinguished from departments of the state government. Const. art. 3, § 1.

Original proceeding in mandamus by the County of Mariposa against Merced Irrigation District and others to compel respondents to discontinue proceedings to include real property within the district boundaries.

Petition for peremptory writ of mandate denied and alternative writ discharged.

Robert Owen Curran, Dist. Atty., of Mariposa, Virgil M. Airola, Dist. Atty., of

San Andreas, T. R. Vilas, Dist. Atty., of Sonora, John L. Nourse, of Los Angeles, and Ross A. Carkeet, of Sonora, for petitioner.

C. Ray Robinson, W. Eugene Craven and Margaret A. Flynn, all of Merced, P. J. Minasian, of Oroville, Rutherford, Jacobs, Cavaleiro & Dietrich, of Stockton, and Le Roy McCormick, of Visalia, for respondents.

W. Coburn Cook, of Turlock, and Charles L. Childers, of Beaumont, amici curiæ on behalf of respondents.

CARTER, Justice.

Petitioner county, a political subdivision of the state, seeks by mandate to compel respondents, an irrigation district, a public corporation of the state, and its directors to discontinue proceedings to include real property within the district's boundaries.

Respondent district is an irrigation district organized under the laws of this state. See, Water Code, Div. 11. Such districts are organized primarily for establishing a common water supply for irrigating the lands within the district. Respondent district, located in Merced County, owns land in petitioner Mariposa County, upon which some of its water works are situated. That land is not at present within the boundaries of the district. It is now proceeding under the law hereafter mentioned to have that land included within its boundaries or annexed to it. By having the land so included it will no longer, it is claimed, be subject to the general property tax levied by petitioner. See, Cal.Const., Art. XIII, sec. 1, *infra*.

Petitioner contends that the law authorizing the inclusion of that land within the boundaries of the district is invalid in that it will frustrate the purpose of the constitution (Cal.Const., Art. XIII, sec. 1, *infra*) to require irrigation districts to pay taxes on land owned by them to the county in which the land is located but which land is not within the boundaries of the district.

The constitutional provision in question reads: "All property in the State except as otherwise in this Constitution provided,

* * * shall be taxed in proportion to its value, * * * provided, that property * * * such as may belong to this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation, *except such lands and the improvements thereon located outside of the county, city and county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation*; provided, that no improvements of any character whatever constructed by any county, city and county or municipal corporation shall be subject to taxation." [Emphasis added.] Cal.Const., Art. XIII, sec. 1. The italicized portion of the foregoing is the part here pertinent. This Court held on September 14, 1946, that an irrigation district fell within the term "municipal corporation" as used in that constitutional provision and hence property owned by such districts situated outside their boundaries was subject to taxation by the county in which it was located. *Rock Creek Water Dist. v. County of Calaveras*, 29 Cal.2d 7, 172 P.2d 863. Thus in the instant case the land sought to be included in respondent district and lying within petitioner's boundaries is subject to taxation by petitioner, unless the constitutional provision may be avoided by including the land in or annexing it to the district.

At the session of the Legislature (1947) following the decision in the *Rock Creek* case certain provisions of the Irrigation District Law were amended in the following respects (the italicized portion is the material added by the amendment): "No land shall be included within a district unless *either the owner has petitioned for its inclusion or* the board after an inclusion hearing determines that it can be irrigated by means of some of the works of the district or by means of practicable works connecting therewith and will be benefited by the irrigation." Water Code, sec. 26901, as amended Stats.1947, ch. 725. To the part of the Irrigation District Law dealing with general matters there was added the following: "A district with respect to land owned by it may through its board sign any

petition provided for in this division." Water Code, sec. 20566.1, as added Stats.1947, ch. 749. There are other provisions in that part of the law dealing with who may sign petitions. Plainly the petition referred to, that may be signed by the district, includes the one necessary when proceedings are taken for the inclusion within or annexation to the district of land situated outside its boundaries. See, Water Code, Div. 11, pt. 11, ch. 2.

[1] It may be that the above 1947 changes in the Irrigation District Law were made for the purpose of enlarging or clarifying the power of a district to include land already owned by it within its boundaries although such lands are not susceptible of irrigation, such as where they were only available as sources for water supply and works, and in that fashion empowering the district to escape the taxation of such land formerly existing by reason of its location outside of the district under the above quoted constitutional provision. It should be noted, however, that the 1947 amendment of section 26901 of the Water Code may not have been necessary (that is, the provision authorizing the inclusion of land in a district upon consent of the owner, regardless of whether it was suitable for irrigation) except for the change in the Irrigation District Law in 1927 (Stats.1927, p. 193). Prior to that time, and when the constitution was amended in 1914 (Cal.Const., Art. XIII, sec. 1, *supra*), to withdraw the exemption from taxation from municipal corporations, as to their property outside their boundaries, the Irrigation District Law required that a petition for inclusion of land might be filed by holders of title representing half or more of any body of land "adjacent" to the boundary of the district. Stats.1897, p. 254, secs. 85, 86. That provision does not mean that there had to be more than one property owner involved in the inclusion. The statute as it now reads: "A majority of the holders of title to any tract of land who are also the holders of title to one-half or more of the area of the tract may file in the district office a petition praying that the tract of land be included within the district" (Water Code, sec. 26876), **is**

substantially the same except contiguity is not required. In the old law there was no requirement for adaptability for irrigation and that was the main change made by the 1927 amendment. Hence it may well be that in 1914 a district's land lying outside its boundaries could have been included or annexed by inclusion proceedings.

[2,3] The real issue is whether the 1914 amendment to section 1 of Article XIII froze the boundaries of cities, irrigation districts and the like as of 1914 in so far as the taxation of the land of such public organizations is concerned. That is so because the acceptance of petitioner's contention would mean that no municipal corporation could thereafter annex property to it whether it then belonged to it or was acquired after the annexation and thereby secure the tax exemption to which it is entitled by reason of the location of the property within its boundaries. The 1914 constitutional amendment would, in effect, impliedly amend all annexation and inclusion statutes then existing so as to provide that property thereafter annexed or included thereunder would not be exempt from taxation in the event the same was acquired by the annexing corporation. And that would be in the face of all the statutory provisions authorizing annexation and inclusion that existed in 1914 and the provision in the constitution that: "The Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this State." Cal.Const., Art. XI, sec. 13. Although it may be that to some extent the taxation of property outside a district could be thwarted by annexation or inclusion of the property within the boundaries of the district, and ordinarily that which cannot be done directly under or by reason of a constitutional provision cannot be achieved indirectly, we cannot believe that the intent of the 1914 amendment was to freeze the then existing conditions with reference to the status of property in relation to its exemption from taxation. The amendment, by referring to property

which is not exempt, characterizes it—describes it as "outside" the municipal corporation. Constitutional and statutory provisions on exemptions should be construed to apply prospectively as well as presently, that is, to act upon property from time to time as it is acquired or loses its character with reference to ownership, use and the like. Ordinarily their application is not limited to the character the property happens to possess at the particular time such provisions become effective. If this were not true, and particular conditions prevailed at the time of acquisition, application to other situations later might produce anomalous results. For example, the exemption of public property (which is the general rule rather than the exception, see, *San Francisco v. San Mateo*, 17 Cal. 2d 814, 112 P.2d 595; *The Housing Authority of Los Angeles County v. Dockweiler*, 14 Cal.2d 437, 94 P.2d 794; *Anderson-Cottonwood Irr. Dist. v. Klukkert*, 13 Cal.2d 191, 88 P.2d 685; *State Land Settlement Bd. v. Henderson*, 197 Cal. 470, 241 P. 560) would apply only to such property as belonged to a public agency at the time the exempting statute was passed, and that acquired in the future would not be exempt. The same would be true of other exemptions such as property used for charitable or educational purposes. Conversely, property that had an exempt status at that time would continue to be exempt although its use or ownership was changed.

[4-6] The 1914 amendment should not be given an interpretation which would make it discriminatory. One of the general purposes of section 1 of Article XIII is to secure uniformity in taxation. *Watchtower Bible & Tract Soc. v. County of Los Angeles*, 30 Cal.2d 426, 182 P.2d 178. If petitioner's position is right, then property of a municipal corporation, situated within the boundary of such corporation in 1914, would be exempt from taxation, but property not then within the boundary of such corporation but later brought within it by inclusion or annexation of additional territory would not be. The sole factor of differentiation would be simply the time of inclusion. In both cases the property would now belong to the corpora-

tion and be within its boundaries. Likewise if property was included within or annexed to a municipal corporation after 1914, and such property was later acquired by the municipal corporation, it would not be exempt, for its character would have been irrevocably fixed as of 1914. The constitutional amendment puts two qualifications on lands which are excluded from the exemption. They must be outside the municipal corporation and such "as were subject to taxation at the time of the acquisition of the same" by the municipal corporation. Manifestly, the phrase "at the time of the acquisition of the same" refers to and modifies only the clause "as were subject to taxation" and not the clause "located outside of the * * * corporation owning the same." That is to say, the amendment does not mean that property located outside the boundaries at the time of acquisition is taxable even though later included within the boundaries of the corporation, while property inside the corporation at the time of acquisition is not taxable. The only differentiating factor would be time or manner of procedure. The land could be annexed and then acquired by the corporation, and thus escape taxation. But if it first were acquired by the corporation, then annexed, it would not. Such an illogical intent will not be assumed. The whole issue of whether it was or was not taxable would hinge on which step, inclusion or annexation, was taken first.

[7] It is urged by petitioner that it has a vested right granted by the constitution to tax property of irrigation districts and that to authorize the district to include property in its boundary and thus escape taxation without notice or hearing is unconstitutional; and that there is really no hearing, for the petition for inclusion is filed with the board of directors of the district, thus authorizing the district to decide its own matter. That is nothing more than another way of stating the argument first discussed with reference to the interpretation of Article XIII, section 1, of the constitution. Correctly construed the constitutional provision contemplates that very power, that is, the power to annex

additional area and thus incidentally achieve tax exemption. The major premise of that provision is that property owned by governmental agencies is not taxable. It is only an exception that makes taxable some of its property. Moreover, petitioner cites no authority, and we have found none, which holds that a county has a vested right to tax district property. Thus it can hardly be doubted that the Legislature could directly enlarge the boundaries of districts in so far as the right by counties to tax is involved.

[8-10] The 1947 amendment to the Irrigation District Law, contends petitioner, does not authorize a district to include land unless it can be irrigated with water furnished by the district; and further in that connection, that it is not contemplated that the district itself may petition to include its own land. The language of section 26901 of the Water Code, heretofore quoted, is clearly broad enough to embrace a district. It refers to a petition by the "owner" of the land. There is nothing that excludes the district from being such an owner. True, in dealing with the *formation* of a district the land embraced therein must be susceptible of irrigation, but by the very failure to place such a limitation on later annexed land, shows an intent not to impose such requirement in that case. There are different factors involved in formation proceedings, such as the justice of not including, and thus burdening with assessments, lands that receive no benefit. When the *owner* petitions for inclusion he consents to the lack of benefits if such is physically the case. He is in no position to object. In exclusion proceedings the same factors authorize the exclusion of land which cannot be benefited by the irrigation system. Section 26876 of the Water Code providing that the majority of the holders of title to any tract of land, who are also the holders of title to half or more of the area of the tract, may petition for inclusion, is in harmony with the provision authorizing a petition by the district. Certainly there does not have to be more than one owner under that section to qualify for an inclusion petition. Nor is the asserted rule, that statutes do not in-

clude the state or its subdivisions unless they are expressly mentioned, applicable. The reference is to owners of land and the district may be such an owner. The foundation for the rule is the policy against the derogation of sovereignty. It has been said: "Statutes are ordinarily designed for the government of citizens and residences rather than the state, and it is settled that the state is not bound by general words of a statute or code provision *which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it*, unless the intent to bind it thereby otherwise clearly appears." [Emphasis added.] 23 Cal.Jur. 625. Here the district is a political subdivision of the state and it is being *given* powers rather than having them taken away.

[11] The fact that bills (which did not pass) were introduced in the Legislature at the 1947 session when section 26901 was amended, which flatly exempted all district lands from taxation, does not alter the interpretation. Plainly one factor involved in their failure of passage was that they were squarely contrary to Article XIII, section 1, of the constitution. The 1947 amendment authorizes inclusion, and there is implicit therein whatever consequences that may flow from having the land in the district.

[12] It is urged that there is an unlawful delegation of power to the district directors to affect county financial affairs in violation of the constitutional clause reading: "The Legislature shall not delegate to any special commission, * * * any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever, except that the Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this State."

Cal.Const., Art. XI, sec. 13. The act authorized by the Legislature in the instant case is annexation or inclusion of additional land within the district's boundaries. The effect that has upon taxation by the county—the presence or lack of exemption from taxation—is only one incidental result that happens to flow from the inclusion. Thus the districts are not really empowered to interfere with the counties' taxing power and process. To support petitioner's argument the absurd result would follow that every grant of an exemption from taxation would be a violation of that constitutional provision, for an individual having a right to an exemption would have within his power to take property from the tax rolls by acquiring the property—his acquisition being at his own whim and caprice. By virtue of section 1 of Article XIII itself, property of public agencies is exempt from taxation, and thus whenever they acquire property it attains that status. On various grounds in analogous situations it has been held that such transition does not constitute a violation of Article XI, section 13, of the constitution. See, *Joint Highway Dist. No. 13 v. Hinman*, 220 Cal. 578, 32 P.2d 144; *City of Pasadena v. Chamberlain*, 204 Cal. 653, 269 P. 630; *Esberg v. Badaracco*, 202 Cal. 110, 259 P. 730; *Doyle v. Jordan*, 200 Cal. 170, 252 P. 577; *City of Oakland v. Garrison*, 194 Cal. 298, 228 P. 433; *Henshaw v. Foster*, 176 Cal. 507, 169 P. 82; *People v. Town of Ontario*, 148 Cal. 625, 84 P. 205; *Gadd v. McGuire*, 69 Cal.App. 347, 231 P. 754; *Peterson v. Board of Supervisors*, 65 Cal. App. 670, 225 P. 28.

[13,14] Petitioner claims that permitting the district to file a petition, authorized by its directors, for inclusion within its boundaries of land owned by it is an executive function, and that its determination of the petition is judicial; that hence it is granted powers to exercise both executive and judicial functions in violation of the separation of powers doctrine. We see no reason why a district could not have been authorized to include its own land within its boundaries merely by resolution of its directors. Presumably the directors will protect the interests of the owners of

land in the district, and the district is the only land owner involved in the land to be included. We fail to see where the petitioner county has any grounds to object to this procedure. If it could be done in that way we see no invalidity in pursuing the petition method. Moreover it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government. *Holley v. County of Orange*, 106 Cal. 420, 39 P. 790; 5 Cal.Jur. 660-663.

It is argued in the brief of amicus curiae that *Rock Creek Water Dist. v. County of Calaveras*, supra, holding that the property of irrigation districts lying outside their boundaries is not exempt from taxation, should be overruled. We are satisfied that that decision is sound.

The petition for a peremptory writ of mandate is denied. The alternative writ is discharged.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



32 Cal.2d 477

**VISTA IRR. DIST. v. BOARD OF SUP'RS
OF SAN DIEGO COUNTY et al.**

L. A. 20540.

Supreme Court of California.

Aug. 30, 1948.

Rehearing Denied Sept. 27, 1948.

Mandamus ☞ 3(8)

Mandamus is not available to irrigation district to compel board of supervisors of county to cancel assessment of taxes on district's property, since district has an adequate remedy at law.

Mandamus by Vista Irrigation District against Board of Supervisors of San Diego County and others, to compel the cancellation of an assessment of taxes on petitioner's property.

Petition denied and alternative writ discharged.

O'Melveny & Myers, James L. Beebe, Pierce Works, Jackson W. Chance, and Howard J. Deards, all of Los Angeles, for petitioner.

James Don Keller, Dist. Atty., Carroll H. Smith, Chief Trial Deputy Dist. Atty., and Robert G. Berrey, Deputy Dist. Atty., all of San Diego, for respondents.

CARTER, Justice.

In this case petitioner for a writ of mandate is an irrigation district which proceeded under the Irrigation District Law, Water Code, § 20500 et seq., as it existed prior to its amendment in 1947 to include within its boundaries property owned by it. The 1947 amendment and problems similar to those here raised are discussed in *County of Mariposa v. Merced Irrigation District*, Cal.Sup., 196 P.2d 920. However, in this case the district seeks by mandamus to compel the board of supervisors of San Diego County to cancel the assessment of taxes on its property, the board having refused to cancel on the ground that the district could not escape taxation of its property formerly outside of its boundaries by annexing it. It is asserted that mandamus is not available as petitioner has an adequate remedy at law. That contention must be sustained. The unavailability of that remedy is settled. *Sherman v. Quinn*, 31 Cal.2d 661, 192 P.2d 17.

The petition for the writ is denied. The alternative writ is discharged.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

Rehearing denied; TRAYNOR, J., dissenting.

**COUNTY OF CALAVERAS, Petitioner, v.
OAKDALE IRRIGATION DISTRICT,
Respondent.**
Sac. 5915.

Supreme Court of California.

Aug. 30, 1948.

Rehearing Denied Sept. 27, 1948.

Robert Owen Curran, Dist. Atty., of Mariposa, Virgil M. Airola, Dist. Atty., of San Andreas, T. R. Vilas, Dist. Atty., of Sonora, John L. Nourse, of Los Angeles, and Ross A. Carkeet, of Sonora, for petitioner.

C. Ray Robinson, W. Eugene Craven, and Margaret A. Flynn, all of Merced, P. J. Minasian, of Oroville, Rutherford, Jacobs, Cavaleiro & Dietrich, of Stockton, and Le Roy McCormick, of Visalia, for respondent.

W. Coburn Cook, of Turlock, and Charles L. Childers, of Beaumont, amici curiae on behalf of respondent.

CARTER, Justice.

This case involves the same questions presented in County of Mariposa v. Merced Irrigation District, Cal.Sup., 196 P.2d 920, and is controlled thereby. Therefore the petition for a peremptory writ of mandate is denied, and the alternative writ is discharged.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



32 Cal.2d 891

**COUNTY OF TUOLUMNE, Petitioner, v.
OAKDALE IRRIGATION DISTRICT,
Respondent.**
Sac. 5916.

Supreme Court of California.

Aug. 30, 1948.

Rehearing Denied Sept. 27, 1948.

Robert Owen Curran, Dist. Atty., of Mariposa, Virgil M. Airola, Dist. Atty., of San Andreas, T. R. Vilas, Dist. Atty., of

Sonora, John L. Nourse, of Los Angeles, and Ross A. Carkeet, of Sonora, for petitioner.

C. Ray Robinson, W. Eugene Craven and Margaret A. Flynn, all of Merced, P. J. Minasian, of Oroville, Rutherford, Jacobs, Cavaleiro & Dietrich, of Stockton, and Le Roy McCormick, of Visalia, for respondent.

W. Coburn Cook, of Turlock, and Charles L. Childers, of Beaumont, amici curiae on behalf of respondent.

CARTER, Justice.

This case involves the same questions presented in County of Mariposa v. Merced Irrigation District, Cal.Sup., 196 P.2d 920, and is controlled thereby. Therefore the petition for a peremptory writ of mandate is denied, and the alternative writ is discharged.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



BURTNETT v. KING et al.
S. F. 17550.

Supreme Court of California.

Aug. 31, 1948.

Rehearing Granted Sept. 27, 1948.*

Divorce 255

Where wife obtained default divorce decree awarding her community property consisting of realty and dwelling house under complaint that contained only a prayer asking for order restraining husband from being at the home and for such other relief as might be just and equitable, but husband with knowledge of decree failed to attack it directly and thereafter rights of bona fide purchaser from wife intervened, husband could not later collaterally attack divorce decree by action to quiet title to the one-half interest in realty assigned to wife on ground that divorce court had no jurisdiction to determine prop-

* Subsequent opinion 205 P.2d 657.

erty rights of the parties. Code Civ.Proc., § 580.

CARTER, SHENK, and SCHAUER, JJ., dissenting.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Edward M. Burtnett against Ellijah B. King and another to quiet title to realty. From a judgment for defendants, plaintiff appeals.

Judgment affirmed.

Prior opinion 188 P.2d 562.

Robert E. Hatch, of San Francisco, for appellant.

Royal E. Handlos, of San Francisco, for respondents.

EDMONDS, Justice.

Edward M. Burtnett, when sued for divorce by his wife, defaulted, and she obtained a decree which included an award of the community property. Later, he commenced the present action to quiet title to a one-half interest in the real property assigned to the wife by that decree upon the ground that, in the prior litigation, the court had no jurisdiction to determine the property rights of the parties. His appeal from an adverse judgment presents only the question of the validity of the decree of divorce insofar as the provisions in regard to property interests are concerned.

The complaint for divorce stated a cause of action upon the ground of extreme cruelty. In addition, it alleged that "the community property of plaintiff and defendant consists of the interest of plaintiff and defendant in the real property and dwelling house * * *" in San Mateo County and certain personal property. There was no request for an award of the community property but the prayer, in addition to seeking the judgment of divorce, asked for an order restraining the husband "from being upon or at the home * * *" and for "such other and further relief as may be just and equitable." Upon a hearing, the court, after finding that the real and personal property was community property, ordered that it be assigned to the

wife. The defendants are successors in interest of Mrs. Burtnett.

In a default action, the court may not grant relief beyond that which was prayed for in the complaint. § 580, Code Civ. Proc. But a judgment in excess of the prayer of the complaint is not necessarily void and thereby subject to collateral attack. Only to the extent that it refers to a subject matter not embraced within an issue which was before the court, is the judgment void. Under such circumstances, the court has no jurisdiction over the subject matter, and its determination is a nullity. But where the subject matter is before the court, through appropriate allegations of the complaint, a judgment which exceeds the demands of the prayer is erroneous and subject to direct, but not to collateral, attack.

In an action where the jurisdiction of the court depends upon the amount of the "demand," ordinarily the prayer is determinative of the question. *Miller v. Carlisle*, 127 Cal. 327, 330, 59 P. 785; and see *Becker v. Superior Court*, 151 Cal. 313, 90 P. 689. The right to adjudicate is not always to be determined by looking to the measure of the relief sought; it may be "found in the nature of the case as made by the complaint." *Silverman v. Greenberg*, 12 Cal.2d 252, 254, 83 P.2d 293, 294. As stated in section 1917 of the Code of Civil Procedure, "The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment."

To support his contention that, in a divorce action, a decree which disposes of community property without a prayer to that effect is void, the appellant relies upon *Lang v. Lang*, 182 Cal. 765, 190 P. 181; *Metropolitan Life Ins. Co. v. Welch*, 202 Cal. 312, 260 P. 545; *Balaam v. Perazzo*, 211 Cal. 375, 295 P. 330; and *Grant v. Grant*, 52 Cal.App.2d 359, 126 P.2d 130. But these decisions are not factually similar to the present litigation nor are they authority for the appellant's position.

In the *Lang* case, the complaint contained no allegation with reference to the community homestead of the parties; it

was not mentioned in the prayer, and no disposition was made of it by the interlocutory decree. The final decree, however, set apart the homestead to the plaintiff. When title to the property was challenged, it was held that the question of property rights was not before the trial court, and consequently it was without jurisdiction to make any order with reference to such rights. The final decree of divorce, therefore, was void to the extent that it disposed of the property of the parties and subject to collateral attack.

By the divorce decree which was the subject of the controversy in *Metropolitan Life Ins. Co. v. Welch*, supra, plaintiff had been awarded [202 Cal. 312, 260 P. 546] "all of the community property of the plaintiff and defendant." It was held that, because the insurance policy was not mentioned in the complaint, the decree was a nullity as to it. However, the further determination that the void judgment was res judicata is disapproved. In each of the other two cases relied upon by the appellant, the judgment was held to be a nullity and subject to collateral attack upon the ground that no reference to the specific property which was the subject of the judgment was contained in either the body of the complaint or the prayer.

This rule was applied in considering a decree which determined the property interests of the parties to an action for separate maintenance. The plaintiff had alleged the existence of community property, describing it, and the husband's ability to pay for her support. The prayer requested "a reasonable sum" for that purpose, as well as for attorneys fees and costs, and for an order restraining dissipation of the assets by the husband. The decree required the husband to pay specified amounts to her for her separate maintenance, and she also was awarded certain of the property described in the complaint. Upon collateral attack, this court held that the allegations as to the ability of the husband to pay support and the itemization of the community property "were sufficient to notify him that the disposition of the community property and his ability to make the payments requested were issuable facts." *Horton v. Horton*, 18 Cal.2d 579,

583, 116 P.2d 605, 607. The *Lang* case was distinguished upon the basis that, although it correctly stated "the rule that in such circumstances the allowance of relief beyond the scope of the pleading is a nullity," it was not in point "because the wife's pleading amply sustains the amended decree as rendered." 18 Cal.2d at page 583, 116 P.2d at page 607.

It may be noted that the courts have gone a step further in upholding decrees of divorce which provide for the payment of alimony although the complaints did not include a prayer for such relief. The decisions in those cases have been placed upon the ground that, because the support of a wife "is so germane to the cause of action for divorce", *Parker v. Parker*, 203 Cal. 787, 793, 266 P. 283, 285, a judgment which includes such relief is within the exercise of jurisdiction and therefore not void, although it is erroneous. *Bowman v. Bowman*, 29 Cal.2d 808, 812, 178 P.2d 751, 170 A.L.R. 246; *Miller v. Superior Court*, 9 Cal.2d 733, 740, 72 P.2d 868; *Karlslyst v. Frazier*, 213 Cal. 377, 381, 2 P.2d 362; *Parker v. Parker*, supra; *Cohen v. Cohen*, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520.

In the *Burnett* divorce complaint, the community property was appropriately described and the prayer sought an order restraining the husband "from being upon or at the home * * *" and for "such other and further relief as may be just and equitable." Just as in the *Horton* case, the allegations and the prayer were sufficient to notify the appellant here that the disposition of the community property was an issuable fact. They were also sufficient to bring the property within the jurisdiction of the court and the decree, although erroneous, is not void and subject to collateral attack.

The judgment is affirmed.

GIBSON, C. J., and SPENCE, J., concur.

TRAYNOR, Justice (concurring).

I concur in the judgment.

I agree that, as stated in the opinion of Mr. Justice CARTER, the complaint is insufficient to raise the issue concerning

the property rights of the parties and that the judgment awarding the property was therefore outside the issues of the case. But it does not follow that such a judgment is in all cases subject to collateral attack.

On the contrary, it would seem clear that where the defendant, with knowledge of the improper judgment, whether merely erroneous or in excess of jurisdiction, took no steps to attack it directly, and thereafter the rights of a bona fide purchaser from the defendant intervened, a collateral attack on the judgment would operate to defeat rather than to achieve the ends of justice.

CARTER, Justice (dissenting).

I dissent.

In this case the complaint for divorce alleged that the community property of the plaintiff wife and defendant husband "consists" of certain described real property. *Nothing whatsoever other than that is said about the property.* The prayer does not demand an award of the property. It makes no mention at all of it. In passing it may be observed that the complaint alleges that said defendant will inflict bodily violence upon plaintiff unless restrained. The prayer asks that such violence be restrained, and incidentally, to carry out that purpose, that defendant be ordered to stay away from the "home of plaintiff and defendant." Rather than advising defendant that the rights in the home would be adjudicated as indicated by the majority opinion, the clear implication is that it is conceded that the property was *the home of both*, and would remain such, but that defendant should not go there during the pendency of the action. The only reasonable interpretation of the pleading is that plaintiff was not going to claim the home as hers, and she was recognizing defendant's interest therein. The only prayer that could possibly be said to embrace a demand for the property was a general prayer for such other relief as may be proper. On the basis of that allegation alone as to the character of the property as community, the majority opinion holds that a default judgment awarding it to plaintiff was *not void* although conceding it was erroneous.

It should first be noted that it is obvious that defendant had no notice or warning that the property would be affected by a default judgment. On the contrary, as above seen, the only indication was otherwise, and in addition, by reason of plaintiff's silence on the subject in her prayer, defendant would properly assume that the rights to the property were not to be litigated in that action. To hold, as does the majority, means that this court sanctions a procedure under which a defendant may be *trapped* by a default judgment. Merely alleging that the property was community in no way challenged his right to retain his interest therein. Rather it admitted he should. He would feel wholly safe in agreeing to that allegation without any thought that his interest in the property was in jeopardy.

The law on the subject commences with the statute: "The relief granted to the plaintiff, if there be no answer, *cannot exceed* that which he shall have *demanded* in his complaint; but *in any other case*, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." [Emphasis added.] Code Civ.Proc., § 580. In cases where no answer has been filed and a default has been entered, but the clerk may not enter a default judgment, the plaintiff may apply to the court "for the relief *demanded* in the complaint," and after evidence is heard, the court may render a default judgment "for such sum (*not exceeding the amount stated in the complaint*), as appears by such evidence to be just." Code Civ.Proc., § 585(2). Manifestly "demanded" means claimed, asserted a right to or prayed for. That there was no demand for the property in the instant case is plain, that is, not only did the relief accorded *exceed* the demand, it adjudicated property rights when none were ever asserted, claimed or prayed for.

It is equally clear that by the use of the mandatory language of the statute (the court *cannot* give a default judgment in excess of the demand), the court's jurisdiction to render default judgments can be *exercised only in the way authorized by statute*. It cannot act except in a particular manner, that is, by keeping the judgment

within the bounds of the relief demanded. It has been held repeatedly, and recently, that where a statute requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or subject to certain limitations, an act beyond those limits is in excess of its jurisdiction. See, *Tabor v. Superior Court*, 28 Cal.2d 505, 170 P.2d 667; *Lord v. Superior Court*, 27 Cal.2d 855, 168 P.2d 14; *Redlands High School Dist. v. Superior Court*, 20 Cal.2d 348, 125 P.2d 490; *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; *Fortenbury v. Superior Court*, 16 Cal.2d 405, 106 P.2d 441; *Evans v. Superior Court*, 14 Cal.2d 563, 96 P.2d 107; *Rodman v. Superior Court*, 13 Cal.2d 262, 89 P.2d 109; *Spreckels Sugar Co. v. Industrial Accident Commission*, 186 Cal. 256, 199 P. 8. Certainly no statutory method of procedure or limitation on power could be more clearly expressed than that set forth in section 580 of the Code of Civil Procedure, *supra*. Thus the court wholly lacked jurisdiction to render a judgment affecting the community property, for there was no demand for such relief. Having no jurisdiction the judgment was not *res judicata* on this issue. It was void.

The essence of the policy underlying section 580 of the Code of Civil Procedure, *supra*, is that in default cases, defendant must be given notice of what judgment may be taken against him—a policy underlying all precepts of jurisprudence and protected by our constitutions. If a judgment other than that which is demanded is taken against him, he has been deprived of his day in court—a right to a hearing on the matter adjudicated. In the instant case precisely such an event occurred. In cases where the clerk may enter a default judgment as distinguished from a default, he has no power other than that conferred by the *statutes*. He must strictly stay within his statutory authorization and a failure to do so renders the judgment *void*. *Baird v. Smith*, 216 Cal. 408, 14 P.2d 749; *Landwehr v. Gillette*, 174 Cal. 654, 163 P. 1018; *Farrar v. Steenbergh*, 173 Cal. 94, 159 P. 707; *Reher v. Reed*, 166 Cal. 525, 137 P. 263, Ann.Cas.1915C, 737; *Crossman v. Vivienda Water Co.*, 136 Cal. 571, 69 P.

220; *Wharton v. Harlan*, 68 Cal. 422, 9 P. 727; *Junkans v. Bergin*, 64 Cal. 203, 30 P. 627; *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501; *Providence Tool Company v. Prader*, 32 Cal. 634, 91 Am. Dec. 598; *Kelly v. Van Austin*, 17 Cal. 564; *Potts v. Whitson*, 52 Cal.App.2d 199, 125 P.2d 947; *Crofton v. Young*, 48 Cal. App.2d 452, 119 P.2d 1003; *Spaulding & Co. v. Chapin*, 37 Cal.App. 573, 174 P. 334; *Kimbel v. Osborn*, Wyo., 156 P.2d 279, 158 A.L.R. 1079, 1091, 1114; 14 Cal.Jur. 893. True, the court in those cases spoke of the ministerial character of the clerk's function but the policy there enunciated is based upon the necessity of notice. It is crystal clear that the lack of it is as grave to defendant whether the clerk or the court renders the default judgment.

It is a settled rule, and has been clearly stated in many recent authorities, that a default judgment by the court that exceeds the demand or gives relief where no demand is made therefor is void as in excess of the court's jurisdiction and not *res judicata*. *Lang v. Lang*, 182 Cal. 765, 190 P. 181; *Metropolitan Life Ins. Co. v. Welch*, 202 Cal. 312, 260 P. 545; *Gregg v. Stark*, 128 Cal.App. 434, 17 P.2d 766; *Balaam v. Perazzo*, 211 Cal. 375, 295 P. 330; *Horton v. Horton*, 18 Cal.2d 579, 116 P.2d 605. It is said in *Lang v. Lang*, *supra*, 182 Cal. at page 768, 190 P. at page 182, where the divorce decree adjudicated community property rights where none were mentioned in the pleadings: "The defendant in that action (plaintiff here) had the right to assume that the judgment which would follow a default on her part would embrace only the issues presented by the complaint and the relief therein prayed.

* * *

"Parties to an action for divorce may submit to the court the simple issue of their right to a divorce without reference to their property. *Coats v. Coats*, 160 Cal. 671, 118 P. 441, 36 L.R.A.,N.S., 844. This being so, where a complaint in divorce contains no allegation with reference to property rights, a defaulting defendant should be entitled to assume that the only matter which will be determined by the court is the matter of divorce, and that the question of property rights will be left

for consideration and determination in another and separate action. In addition thereto, it is a well-established rule *that in a default case the relief granted cannot exceed the prayer*. *Brooks v. Forington*, 117 Cal. 219, 48 P. 1073; *Mudge v. Steinhart*, 78 Cal. 34, 20 P. 147, 12 Am.St.Rep. 17. *And where relief is given beyond the scope of that asked for, it is a nullity, and may be attacked collaterally, or its effect avoided* under the doctrine that it is not *res judicata*." [Emphasis added.] And in *Horton v. Horton*, supra, 18 Cal.2d at page 583, 116 P.2d at page 607: "While all these cases [referring to *Lang v. Lang*, supra, and others] *correctly* state the rule that in such circumstances *the allowance of relief beyond the scope of the pleading is a nullity*, for a defendant has the right to assume that the judgment which would follow a default on his part would embrace only the issues presented by the complaint and the relief therein asked, these authorities are not in point here because the wife's pleading amply sustains the amended decree as rendered." [Emphasis added.]

Some cases have said that the judgment is erroneous. *Balfour-Guthrie Inv. Co. v. Sawday*, 133 Cal. 228, 65 P. 400; *Longmaid v. Coulter*, 123 Cal. 208, 55 P. 791; *Foley v. Foley*, 120 Cal. 33, 52 P. 122, 65 Am.St.Rep. 147; *Gage v. Rogers*, 20 Cal. 91; *Lattimer v. Ryan*, 20 Cal. 628; *Mudge v. Steinhart*, 78 Cal. 34, 20 P. 147, 12 Am.St.Rep. 17; *Burke v. Koch*, 75 Cal. 356, 17 P. 228; *Pittsburgh Coal Mining Co. v. Greenwood*, 39 Cal. 71; *Parrott v. Den*, 34 Cal. 79; *Darsie v. Darsie*, 49 Cal.App.2d 491, 122 P.2d 64; *Flores v. Smith*, 47 Cal.App.2d 253, 117 P.2d 712; *Von Der Kuhlen v. Hegel*, 51 Cal.App. 416, 196 P. 913; *Williams v. Reed*, 43 Cal.App. 425, 185 P. 515; *Brown v. Caldwell*, 13 Cal.App. 29, 108 P. 874; see, merely reversed, *Savings & Loan Soc. v. Horton*, 63 Cal. 105. But none of those cases decided or found it necessary to decide that the judgment was not void.

The cases of *Bowman v. Bowman*, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246; *Miller v. Superior Court*, 9 Cal.2d 733, 72 P.2d 868; *Karlslust v. Frazier*, 213 Cal. 377, 2 P.2d 362; *Parker v. Parker*, 203

Cal. 787, 266 P. 283; and *Cohen v. Cohen*, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520, are not in point for the reason that there, support money or alimony were involved, and it may be conceded that this issue is so germane to the issue of divorce that a defendant must anticipate an award therefor although there is no prayer to that effect. In some of the other cases cited above there were other factors giving defendant adequate notice.

It is conceded by the majority that it is erroneous to grant relief in excess of the demand, and *all the cases hold at least that*. If it is error, it must be for the reason that the judgment violates section 580 of the Code of Civil Procedure, and obviously, the violation consists of *attempting to adjudicate matters beyond the issues made by the complaint*. The only issues that may be litigated in a default proceeding are those presented by the complaint. As to other issues those are not and cannot be litigated or adjudicated. It has long been settled that a judgment is not *res judicata* as to issues that are not or could not be litigated. In *English v. English*, 9 Cal.2d 358, 363, 70 P.2d 625, 628, 128 A.L.R. 467, this Court quotes with approval from *Corpus Juris*: "The doctrine of conclusiveness of judgments applies to a judgment by default with the same validity and force as to a judgment rendered upon a trial of issues, provided such judgment is regular and valid, and shows distinctly on what count or cause of action it was rested. But the confession implied from the default is limited to the material issuable facts which are well pleaded in the declaration or complaint, and does not apply to issues which were not raised in the pleadings. Nor, subject to the rule that the judgment is conclusive as to every fact necessary to uphold it, is a default judgment conclusive, in a subsequent suit on a different cause of action, against any defenses defendant may have, although the same defenses, if pleaded and proved in the former action, would have defeated plaintiff's recovery, because in the absence of a trial and hearing in the first suit, it cannot be said that such matters were adjudicated therein."

The majority decision in this case strikes at the very foundation of Anglo Saxon justice—due process of law. How can it be said that a person has been accorded due process of law when he is deprived of his property without notice or hearing? That is just what will happen in this case if the majority decision stands. Even without the express statutory provision which we have in this state (Code Civ.Proc., sec. 580), the settled rules of the common law should afford defendant protection from the effect of a judgment rendered against him without notice or hearing. These rules as well as the mandatory provisions of section 580 of the Code of Civil Procedure have been ignored by the majority.

For the foregoing reasons I would reverse the judgment.

SHENK and SCHAUER, JJ., concur.



87 Cal.App.2d 359

PEOPLE v. SIMPSON.

Cr. 4244.

District Court of Appeal, Second District,
Division 3, California.

Sept. 1, 1948.

Rehearing Denied Sept. 14, 1948.

Hearing Denied Sept. 30, 1948.

1. Assault and battery ☞92

Evidence supported conviction of assault with a deadly weapon.

2. Criminal law ☞878(3)

Where defendant was charged in two counts with crime of assault with a deadly weapon upon two separate individuals, and evidence was sufficient to support a finding that defendant assaulted both victims acquittal of defendant on count charging assault on second victim did not require acquittal of defendant on count charging assault of other victim notwithstanding both alleged assaults arose out of same transaction. Penal Code, § 954.

3. Criminal law ☞761(1)

Court should not directly or indirectly, assume guilt of accused or any fact to be determined by jury, nor employ equivocal phrases which may leave such an impression.

4. Criminal law ☞761(6)

In prosecution for assault with deadly weapon, where question whether defendant used automobile jack in any manner at all was a controverted issue, instruction defining deadly weapon as any object which "used in the manner in which it appears to have been used" is capable of producing great bodily injury, improperly assumed that jack was used in some assaulting manner by defendant.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Curtis Simpson was convicted of assault with a deadly weapon, and he appeals.

Reversed.

J. Q. Gilchrist, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Dan Kaufman, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged in count I of an information with the crime of assault with a deadly weapon upon Hugh N. Wiley, and in count II thereof with the crime of assault with a deadly weapon upon Equilla D. Williams. The jury found defendant guilty as charged in count I and not guilty as charged in count II. Defendant appeals from the judgment and from the order denying his motion for a new trial.

Appellant contends that the verdict of not guilty on count II is so inconsistent with the verdict of guilty on count I that it constitutes an acquittal of the offense charged in count I; and that the court erroneously instructed the jury in respect to the existence of certain facts.

The crimes charged were allegedly committed during an altercation which oc-

curred after an automobile collision. On January 1, 1948, Wiley, his wife, and one Robinson, had been visiting Wiley's sister, Equilla D. Williams. There was testimony on behalf of the prosecution to the effect that about 2 p. m. on that date, Wiley left his sister's house, entered his automobile, which was parked parallel to the curb in front of the sister's house, and started to drive away; that his wife came out of the house and objected to his driving the automobile; that Wiley then stopped the automobile in such a position that the right front portion of the automobile was about 1-1/2 feet from the curb, and the right rear portion was close to the curb; that his wife then entered the automobile and then they sat in the automobile and talked; that defendant, who was proceeding in his automobile in the same direction that the Wiley automobile was facing, passed the Wiley automobile and struck the front bumper of it with his right rear fender; that an argument arose regarding the collision, and Miss Williams told Wiley to go into the house; that as Wiley started toward the house the defendant opened the front door of his automobile, removed the keys from the ignition lock, went to the rear of his automobile, and unlocked and opened the door of the trunk; that he then took the bumper jack from inside the trunk, and, while holding it over his shoulder with both hands, rushed toward Wiley; that Miss Williams called to Wiley to watch out, and she ran between him and defendant; that defendant swung the jack toward Wiley, and Wiley put up his right hand to catch the jack; that the jack struck and broke his hand; that it also struck and cut Miss Williams on the forehead; that a scuffle ensued in which the defendant Simpson, Wiley, Robinson, and two men who had been passengers in defendant's automobile participated; and that during the scuffle the jack was taken away from defendant. Wiley testified that defendant first hit Miss Williams with the jack, and that he then raised it again and hit the witness Wiley.

There was testimony on behalf of defendant as follows: Defendant and a passenger in his automobile testified that Wiley got the jack from behind the seat of his

(Wiley's) automobile; that defendant grabbed hold of it and began to tussle with Wiley; that the passenger and Robinson then joined in and the four of them had hold of the jack and were scuffling over it; that one of the women told someone to go into the house and get a gun; that defendant then released his hold on the jack, ran to his automobile and got into it; and that the passenger gave Wiley a shove, then got into defendant's automobile, and defendant drove away. Another witness, who was a passenger in defendant's automobile, testified that he saw Wiley open the right door of his (Wiley's) automobile, reach inside and take the jack from a shelf back of the seat; and that as soon as Wiley got the jack out of his automobile defendant "grabbed" him, and they started tussling. Another witness, who was also a passenger in defendant's automobile, testified that he saw Wiley start toward his (Wiley's) automobile, and the witness then got out of defendant's automobile, walked to the front of it, and at that time three men were tussling over the jack; that later another man joined in the scuffle; and that defendant quit the scuffle first, and then Wiley "broke loose" and started toward the house.

[1,2] Appellant (defendant) asserts that all the witnesses for the prosecution, except Wiley, testified that defendant struck only one blow, and that, with the one blow, he struck Wiley and Miss Williams. In support of his contention that the verdicts are so inconsistent as to constitute an acquittal of the offense of which he was found guilty, appellant argues in effect that the verdicts show that the jury believed that only one blow was struck; and, therefore, that if one of the alleged assaults was not committed, the other alleged assault was not committed. As above shown, the evidence is legally sufficient to support the finding that defendant assaulted Wiley. Although there is evidence that would have been legally sufficient to have supported a finding that he also assaulted Miss Williams, there is also evidence from which the jury could have concluded that Miss Williams was not assaulted by defendant, but was injured in the general scuffle in some unascertainable manner.

Appellant's contention regarding inconsistent verdicts is not sustainable. The crime charged in count I was an offense separate from that charged in count II. Appellant cites *People v. Andursky*, 75 Cal. App. 16, 241 P. 591, in which the defendant was charged in one count with the commission of a certain crime, and in a second count he was charged with the commission of the same crime, together with other unlawful acts against the same person named in count one. The jury found defendant guilty of the charge in the first count and not guilty of the charge on the second count. It was held therein that the findings were conflicting and inconsistent, since the jury by its verdict of guilty had found that defendant had committed the offense and by its verdict of not guilty had found that defendant had not committed the offense. It does not necessarily follow, however, when two or more offenses are charged as the result of one act that an acquittal as to one of the alleged offenses amounts to a finding that the act was not committed. Furthermore, the *Andursky* case was decided before section 954 of the Penal Code was amended in 1927. By that amendment the following provision was added to the section: "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." See *People v. Amick*, 20 Cal.2d 247, 250, 251, 125 P.2d 25, 27. In the last cited case two persons were killed when a truck which was being driven on the wrong side of the highway collided with another truck proceeding in the opposite direction. The sole contention on appeal was that the verdict acquitting appellant of manslaughter was inconsistent with the verdict of guilty of negligent homicide, since both charges grew out of the same act. The court therein discussed the 1927 amendment to section 954 of the Penal Code and concluded that an acquittal on one count did not result in an acquittal on the other count.

[3,4] Appellant also contends that a part of a given instruction, defining a deadly weapon, was erroneous. Said part of the instruction is as follows: "A deadly weapon is any object, instrument or weap-

on which, used in the manner in which it appears to have been used, is capable of producing, and is likely to produce, death or great bodily injury." (Italics added.) That instruction is a part of an instruction known as instruction No. 604 of the book of California Jury Instructions, Criminal. The instruction was erroneous under the circumstances of the present case. It assumes as a fact that the jack was used in some assaulting manner by the defendant. The question as to whether the defendant used the jack in any manner was one of the controverted issues for the determination of the jury. There was evidence on behalf of the prosecution that defendant Simpson obtained the jack from his own automobile and then with the jack in his hands, holding it above his shoulder, rushed toward Wiley. On behalf of defendant there was evidence that Wiley obtained the jack from his own automobile and that defendant grabbed hold of the jack while Wiley was holding it, and then two other persons also took hold of the jack and a general scuffle ensued over it, and that defendant at no time had or used the jack. The evidence was therefore conflicting as to the manner in which the jack was used or involved in the transaction. It could not properly be concluded as a matter of law that it appeared that the jack was used by defendant in any particular manner. Of course, if the jack was involved only in the manner asserted by the defense witnesses the defendant did not assault anyone. The court, in instructing the jury, should not have implied that it appears that the jack was used by defendant in the manner asserted by the prosecution. "The Court should not, directly or indirectly, assume the guilt of the accused [or any fact to be determined by the jury], nor employ equivocal phrases which may leave such an impression." *People v. Peterson*, 29 Cal.2d 69, 77, 173 P.2d 11, 15; and *People v. Williams*, 17 Cal. 142, 147. In *People v. Williams*, just cited, the defendant was charged with murder, and the court in giving an instruction on self-defense referred to the decedent as defendant's "victim." The court in that case stated at page 147 of 17 Cal.: "* * * it is apparent that in a

case of conflicting proofs, even an equivocal expression coming from the Judge, may be fatal to the prisoner. When the deceased is referred to as 'a victim,' the impression is naturally created that some unlawful power or dominion had been exerted over his person. * * * The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the Court, and the great deference which they pay to the opinions and suggestions of the presiding Judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the Court." See also *People v. Orosco*, 73 Cal. App. 580, 585, 239 P. 82.

Respondent cites *People v. Rodrigo*, 69 Cal. 601, 11 P. 481 and asserts that a similar instruction was given therein and held to be proper. It appears in that case, however, that the assault was admitted, but the defendant sought to prove that the assault was made in self-defense. In the case of *People v. Valliere*, 123 Cal. 576, 56 P. 433, also cited by respondent, the defendant admitted the assault, but argued that the instrument with which the assault was made was not a deadly weapon. In other words, in those cases, there was no controversy as to the manner in which it appeared that the instrument was used.

In the present case, considering the instructions as a whole, it does not appear that the harmful effect of the language used in the above instruction was cured by other instructions.

The judgment and the order denying the motion for a new trial are reversed.

VALLÉE, J., concurs.

SHINN, Justice.

I concur. The instruction is subject to the further criticism that it misstates the law. The weapon described by the witnesses was an automobile jack. The jury should have been instructed that an automobile jack if used in such a manner that it is likely to produce death or great bodily injury is a deadly weapon. One definition of "appear" is "To seem, to have a certain

appearance, to look." Where the weapon is not inherently deadly, the fact that it was used in a manner likely to produce death or great bodily injury, being an element of the offense, must be proved beyond a reasonable doubt. Mere appearances are not sufficient.

Hearing denied; SHENK, J., dissenting.



87 Cal.App.2d 281

PEOPLE v. BROWN.

Cr. 2512.

District Court of Appeal, First District,
Division 2, California.

Aug. 25, 1948.

As Modified Sept. 3, 1948.

Hearing Denied Sept. 23, 1948.

1. Criminal law ⇨1169(12)

In prosecution for rape and other sex offenses, defendant's admission in his testimony that he had the wife of a friend of his in his room on night of alleged offenses was not prejudicial to defendant, in view of evidence supporting convictions. Penal Code, §§ 220, 261, 286.

2. Criminal law ⇨1159(2)

To justify reversal of conviction, improbability of evidence against defendant must amount to incredibility and appear very clearly.

3. Criminal law ⇨1159(4)

In prosecution for rape, assault with intent to commit rape, crime against nature, and violation of Deadly Weapons Control Act, complaining witness' testimony was not so inherently improbable as to warrant reversal of convictions as resulting from passion and prejudice, in view of disinterested witness' corroboration of such testimony in important particulars. Penal Code, §§ 220, 261, 286; Gen.Laws, Act 1970.

4. Criminal law ⇨698(1)

In rape prosecution, admission of police inspector's testimony that complain-

ing witness, at defendant's place of employment, identified him as guilty man was not error, where preceding questions indicated that defendant was present at time of identification, there was no showing that he was not within hearing distance, no objection to question asked witness as lacking foundation or calling for hearsay was made, defendant did not move to strike out witness' answer as unresponsive or otherwise improper, and complaining witness identified defendant in his presence at city jail.

5. Criminal law ⇨407(1)

In prosecution for rape, admission without objection of police inspector's testimony as to defendant's question, "Did you ever see me before?", when complaining witness accused defendant of being guilty man, was not error, as such question was equivocal response, which was proper subject for jury to weigh.

6. Criminal law ⇨1169(3)

In rape prosecution, admission of police inspector's testimony that defendant said he had taken a married woman, other than complaining witness, to his room under circumstances warranting inference that he had committed adultery, was harmless to defendant, where he testified that he took the wife of a friend of his to his room on night of alleged crime.

7. Criminal law ⇨1177

Indictment and information ⇨129(1)

Assault with intent to commit rape being included in offenses of rape and infamous crime against nature, conviction of such assault in prosecution for all of such offenses prejudiced defendant, though sentence thereon ran concurrently with sentences on his convictions of other offenses, but piling of charge on charge was not legally prejudicial, as information may contain charge of assault with such intent along with charge of completed offense. Penal Code, §§ 220, 261, 286, 954.

8. Criminal law ⇨1184

Under statute authorizing appellate court to reverse, affirm or modify judgment appealed from and to set aside, affirm or modify proceedings subsequent to or

dependent on such judgment, appellant's rights respecting overlapping judgments of conviction on counts of information charging rape and assault with intent to commit rape may be protected by consolidating such judgments. Penal Code, §§ 220, 261, subd. 4, 1260.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Earl J. Brown was convicted of rape, assault with intent to commit rape, the infamous crime against nature, and violation of the Deadly Weapons Control Act, and he appeals.

Judgments on the verdicts modified and affirmed as modified.

Bauer E. Kramer and Cameron W. Wolfe, both of Oakland, for appellant.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Dep. Atty. Gen., and J. F. Coakley, Dist. Atty., Alameda County, Cecil Mosbacher and Frank D. Parker, Dep. Dist. Attys., all of Oakland, for respondent.

GOODELL, Justice.

Appellant was accused by an information in four counts of violating sections 261, 286, and 220, of the Penal Code, and the Deadly Weapons Control Act, Gen. Laws, Act 1970. Two prior convictions in Illinois were pleaded. He entered pleas of not guilty and denied the prior convictions. The charge of the second prior conviction was dismissed before trial. The jury returned a verdict of guilty of each of the four offenses and found true the allegation of the first alleged prior conviction. A motion for new trial was denied and this appeal was taken. Counsel now appearing for appellant were assigned to represent him on this appeal and did not participate in the trial.

The first point presented is that the testimony of the complaining witness is inherently improbable and that the verdicts were the result of passion and prejudice.

On Saturday evening, October 20, 1945, at about 11 o'clock, according to the testimony of the complaining witness (who was

over 18), she and the appellant became acquainted, without introduction at a dance hall in Oakland, where they danced together. When the hall closed at midnight they went to a restaurant and it was later agreed that they would go to a night club. Appellant hailed a taxicab and directed the driver to take them to 14th and Willow Streets. On arrival they approached a building which the complaining witness thought was a night club. It was, in fact, a men's dormitory. Appellant rapped on the window of one of the rooms and asked its occupant to let him in, saying "This is 'Brownie'". The occupant did so, and the couple entered appellant's room over the protest of the complaining witness, who said, "I thought you were taking me to a night club". The details of what ensued need not be recounted. According to the complaining witness the acts denounced by sections 261 and 286 were committed. She testified that appellant at first held a gun as if to use it as a bludgeon and later pointed it at her, threatening to kill her.

When she left the place she started to walk to her sister's home and on the way saw a man wearing a uniform which she mistook to be that of a police officer. She complained to him of what had happened and he escorted her to her sister's home. This was in the early hours of Sunday. That evening she reported the occurrence to the police and on the following Tuesday, accompanied by two inspectors, she went to appellant's place of employment, where he was taken into custody. The inspectors later took him to his room, where they found a loaded gun in a bureau drawer and a cap bearing the name of his employer, which cap, the complaining witness testified, she had seen in the room and had made a mental note thereof which enabled her to direct the inspectors to appellant's place of employment.

Five of the incidents testified to by the complaining witness were admitted by appellant in his testimony. He admitted being at the dance hall which she had named, and said that he might have danced with her. He admitted going afterward to the restaurant which she had named, but not with her. He admitted going home in

a taxicab, but not in her company. She testified that between dances she accompanied appellant to a refreshment bar in the hall; that he took a bottle from his pocket and while pouring from it a special officer interrupted and prevailed on appellant to leave the bottle with him. This was done and appellant reclaimed it on departing. Appellant on cross-examination recalled "some gentleman taking a bottle of whiskey from me" at the dance. Respondent argues, in answer to the claim of inherent improbability, that the complaining witness could not have testified to these five incidents unless she had been in appellant's company, and we must say that it is difficult to avoid that conclusion.

In addition to these admissions of appellant dealing with preliminary incidents, the testimony of the complaining witness is corroborated in several important particulars by four disinterested witnesses. The lodger who answered appellant's rap on the window and opened the door, occupied the room adjoining that of appellant and testified that he heard appellant say "Take off your clothes, all of them," and the voice of a woman pleading with him not to hurt her and saying "Put the gun away, Brownie." The physician who examined the complaining witness two days after the occurrence testified to certain conditions of her body which definitely bore out her testimony. The man in uniform whom she met on the street and to whom she complained after the occurrence, identified the complaining witness and testified that "She said that a man had forced her at the point of a pistol and she pointed up to a room up the street to the house—". The special officer testified that he saw the complaining witness with the appellant at the dance; that he took the bottle from appellant, and saw them leave the hall together.

[1] Appellant admitted in his testimony that he had a woman companion in his room on the night in question but flatly denied that she was the complaining witness. When questioned as to her identity he said she was the wife of a friend of his, and that he would not disclose her name. It is argued that this admission

with respect to a friend's wife so inflamed the jury against appellant that the verdicts were based on passion and prejudice rather than the result of a calm and dispassionate weighing of the evidence. There is no claim of insufficiency of the evidence to support the verdicts and, of course, could not be in view of the abundant corroboration. There is no merit to this claim of passion and prejudice. The question was purely one of fact and of credence, and no appellate court reviewing the record on a transcript of the testimony could say that the jury was prejudiced against the appellant rather than that they were convinced that he was guilty of just what the prosecution claimed.

[2,3] In *People v. Dorland*, 2 Cal.2d 235, 243, 40 P.2d 474, 477, it is said "While it has been held that a verdict may be set aside where the entire evidence is so improbable and incredible as to amount to no evidence at all, the rule is that such improbability must amount to incredibility and must very clearly appear in order to justify a reversal [citations]." In 8 Cal. Jur. p. 590 it is said: "* * * the conclusions of the jury will be overruled only where the *uncorroborated* testimony of the complaining witness is so obviously and so inherently improbable as to leave no recourse, without self-stultification, except to reverse the judgment * * *" (Emphasis added). The corroboration in this case was such as is rarely found in cases such as this, and it leaves no room whatever for the claim of inherent improbability.

[4] Appellant next contends that the court improperly admitted hearsay evidence of identification of the appellant by the complaining witness.

A police inspector when asked whether, when he went to appellant's place of employment with another inspector and the complaining witness, "there was any conversation between the parties there" answered "At that time the defendant was in the doorway of a box car, and as Inspector Vernon and I walked up, she said, 'That's the man'". It is argued that there is no evidence that appellant heard this state-

ment or was within hearing distance, and hence that it is hearsay. The preceding questions indicate that all four persons were present together and there is nothing to show that appellant was not within hearing distance. Moreover there was no objection to the question on the ground that it lacked a foundation, or called for hearsay, or otherwise. *People v. Scalapio*, 143 Cal. 343, 76 P. 1098. And there was no motion to strike out the answer on the ground that it was unresponsive, or otherwise. In addition to that, at the city jail where, beyond any question, the appellant was in the presence of the complaining witness, she said "That's the man". There is no merit in the point.

[5] Equally without merit is appellant's complaint with respect to an accusatory statement. One of the inspectors testified that the complaining witness was called into the appellant's presence and when she accused him of being the man who raped her he replied "Did you ever see me before?" In the first place this was not objected to, and, secondly, it was an equivocal response which was a proper subject for the jury to weigh. *People v. Orloff*, 65 Cal.App.2d 614, 622, 151 P.2d 288; *People v. Megladdery*, 40 Cal.App.2d 748, 784, 106 P.2d 84.

[6] Without merit, also, is the contention that it was error to admit the testimony of one of the inspectors that appellant had told him that he had taken a married woman (other than the complaining witness) to his room under circumstances giving rise to the inference that he had committed adultery. Counsel for appellant, however, in examining the appellant brought out the statement that he had taken the wife of a friend to his room on the night in question, which rendered harmless the inspector's testimony.

[7] The most important point raised by the appellant is that he was convicted of an offense included within other offenses charged.

The third count based on section 220, Penal Code charged an assault with intent

to commit rape and the offense denounced by section 286, Penal Code. Appellant argues that the threat of bodily harm arising from the use of the gun was an integral part of each of these two offenses.

Respondent concedes that a violation of section 220 is included within each of the other completed offenses. *People v. Chavez*, 103 Cal. 407, 37 P. 389; *People v. Babcock*, 160 Cal. 537, 117 P. 549. It follows that the judgment of conviction under section 220 prejudices appellant notwithstanding the fact that the sentence on that count was made to run concurrently with the sentences under sections 261 and 286. There is no merit, however, in appellant's contention that the "piling of charge upon charge" was legally prejudicial. Under section 954, Penal Code it was perfectly proper for the information to contain the charge of an assault along with that of a completed offense.

[8] Section 1260, Penal Code provides that "The court may reverse, affirm, or modify the judgment or order appealed from and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial."

Under this section, and following the pattern adopted in *People v. Craig*, 17 Cal. 2d 453, 110 P.2d 403; and *People v. Scott*, 24 Cal.2d 774, 151 P.2d 517, the appellant's rights can be amply protected with respect to the overlapping judgment by consolidating the judgments rendered on counts one and three.

Accordingly, the judgment of conviction herein based on a violation of section 261 of the Penal Code and the judgment of conviction herein based on a violation of section 220 of the Penal Code (an included offense) are consolidated and modified to read: "Whereas the defendant Earl J. Brown has been found guilty of the crime of rape, a felony, as defined in subdivision 4 of section 261 of the Penal Code, and of the crime of assault with intent to commit rape, a felony, as defined in section 220 of the Penal Code, and the allegation of a prior conviction having been found true as therein alleged, to wit: of the crime of felony, to wit, assault with intent to commit rape on or about the 21st day of September, 1934, in the Circuit Court of the State of Illinois, County of Macon, pursuant to which he served a term, under the name of Earl Brown, in a penal institution.

"It is therefore ordered, adjudged and decreed that said Earl J. Brown be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law."

"Further ordered that the sentence under said section 261 of the Penal Code, and that under section 286 of the Penal Code and that under the fourth count of the information for a violation of the Deadly Weapons Control Act, run consecutively, as heretofore adjudged and determined."

As thus modified, the judgments and orders are affirmed.

NOURSE, P. J., and GRIFFIN, J., pro tem., concur.

87 Cal.App.2d 377

BIRD v. BIRD et al.
Civ. 16299.

District Court of Appeal, Second District,
Division 1, California.
Sept. 2, 1948.

1. Appeal and error ⇨931(1)

Appellant's contentions that the trial court erred in making certain findings and in failing to make other findings, could be sustained on appeal only if, viewing evidence in light most favorable to respondents, and indulging in all legitimate and reasonable inferences therefrom to uphold the findings of the court, the result was a conclusion that there was no substantial evidence to support findings complained of.

2. Partnership ⇨328(3)

Evidence sustained finding that son was no longer a partner or owner of any interest in partnership because of agreement for dissolution of partnership when son entered military service.

3. Appeal and error ⇨1011(1)

Trial court's finding based on substantial though contradicted evidence, and on inferences reasonably to be drawn from the evidence, could not be disturbed by District Court of Appeal.

4. Appeal and error ⇨931(1)

Evidence and inferences to be drawn therefrom must be considered and resolved on appeal in favor of the trial court's determination, and, if there be any doubt as to its sufficiency, that doubt must be resolved in favor of and not against the judgment.

5. Trusts ⇨44(1)

In action by son against father to establish that son was the owner of a 1/20 interest in partnership composed of son and father, on ground that when son executed a written instrument terminating the partnership when he entered into military service, it was agreed that the sole purpose of agreement was to facilitate sale of son's interest by father in event that son was killed while in military service, and that agreement was not to be effective if

son returned safely from military service, evidence sustained trial court's findings that son failed to establish a trust.

6. Payment ⇨73(1)

In action by son against father to recover sum of money which son had sent to father for safe-keeping, while son was overseas in military service, evidence sustained finding that such sum had already been repaid to son by father.

Appeal from Superior Court, Los Angeles County; Charles T. Blackstock, Judge.

Action by Ralph S. Bird, Jr., against Ralph S. Bird, Sr., and Ralph S. Bird, Inc., a corporation, for an accounting, for imposition of a trust on assets conveyed by Ralph S. Bird, Sr., to the corporation, for declaratory relief, and for a money judgment. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

B. Warren Vinetz, of Los Angeles, for appellant.

Daily & Gallaudet, of Glendale (Henry F. Walker, of Los Angeles, of counsel), for respondents.

WHITE, Justice.

This is an appeal from a judgment for defendant after trial before the court without a jury. Plaintiff claimed a 1/20th interest as a copartner with defendant, his father, in a clothing business, and sought an accounting, the imposition of a trust upon assets conveyed by the father to defendant corporation, declaratory relief and a money judgment. Defendant father and defendant corporation by their answer put in issue all the allegations of the complaint.

The trial court found all the allegations of plaintiff's complaint to be untrue except as hereinafter set forth. The court further found:

"2. That at the commencement of the trial of this cause, all parties stipulated that the issues formed by the pleadings might be disregarded; that the plaintiff abandoned all claims except as to the issues following: (1) was the plaintiff an

owner of a one-twentieth interest in the partnership of Ralph Bird and Sons, and (2) was the sum of \$4480.00 previously deposited with defendant, Ralph S. Bird, Sr., by plaintiff, repaid by said defendant to plaintiff.

"3. The plaintiff and the defendant, Ralph S. Bird, Sr., entered into a written agreement of partnership on or about the 26th day of August, 1940; that said agreement was modified in writing on or about the 1st day of October, 1940; that under and by virtue of said modified agreement, plaintiff agreed to purchase a one-twentieth interest in said partnership for the sum of \$1,000.00, and said obligation so to pay was evidenced by a written promissory note dated the 5th day of October, 1940, signed by plaintiff as maker thereof in the sum of \$1,000 and payable to Ralph S. Bird, Sr.; that thereafter and prior to March of 1942, plaintiff paid the sum of \$138.00 upon the principal of said note, and plaintiff was credited with an additional payment of \$156.00 on the principal of said note.

"4. That prior to January 2, 1942, or thereabouts, defendant, Ralph S. Bird, Sr., paid over and returned to plaintiff the sum of \$138.00 theretofore paid on said note; that on January 2, 1942, or thereabouts plaintiff made and executed a written document whereby and by the terms of which the partnership theretofore existing between said parties was terminated and ended, and whereby and by the further terms of which plaintiff assigned his interest in the partnership to defendant, Ralph S. Bird, Sr. * * *

"5. That the partnership theretofore existing between plaintiff and defendant, Ralph S. Bird, Sr., was, by mutual consent of said partners, terminated and dissolved on or about January 2, 1942."

With reference to the second issue presented by stipulation at the trial, whether defendant father had repaid the sum of \$4480.00 deposited with him by the son, the court found "that early in the month of October, 1945, plaintiff demanded of defendant, Ralph S. Bird, Sr., that said defendant repay to plaintiff said sum of money, although at such time plaintiff insisted that said sum of money amounted to

\$4580.00; that thereupon and on October 16, 1945, defendant, Ralph S. Bird, Sr., paid over and delivered to plaintiff in cash the sum of \$4580.00."

As conclusions of law the court found that the partnership was dissolved about January, 1942; that plaintiff had no interest therein; that defendant father had paid all sums due plaintiff; and that judgment should be entered for defendants.

[1] Appellant urges, first, that the court erred in failing to find that a copartnership existed between plaintiff and defendant father; that the finding that plaintiff was not after January 2, 1942, a partner or owner of any interest in the partnership is against the law and the evidence; and that the court erred in failing to find that all the earnings of the partnership, as well as the drawings of defendant father up to January 2, 1942, belonged to the partnership of plaintiff and defendant. Secondly, it is contended that the court erred in finding that plaintiff had been repaid the sum of \$4,480.00 claimed by him. Appellant's contentions can be sustained only if, viewing the evidence in the light most favorable to respondents, and indulging in all legitimate and reasonable inferences therefrom to uphold the findings of the trier of fact, the result is a conclusion that there is no substantial evidence to support the finding or findings complained of. *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183.

With respect to the termination of the partnership in January of 1942, plaintiff testified that the sole purpose of the agreement to resell his interest was that if he were killed while overseas with the armed forces the defendant would have difficulty in selling the business; that defendant father agreed that he would not use the instrument unless plaintiff failed to return, and further agreed to permit plaintiff to purchase a greater interest in the business at a later date. The promissory note which he had executed was not returned to him but was retained by his father.

During his stay overseas plaintiff forwarded a total of \$4,480.00 to his father. The father continued to operate the business under the name of Ralph Bird & Sons

at the same location. Plaintiff further testified that upon his return from overseas his father refused to acknowledge his interest in the partnership and refused to permit him to join in the formation of another partnership; that being convinced further demand was useless, he demanded return of the sum of \$4,480.00 which he had sent his father, which demand was refused. It further appeared that while defendant was in service there appeared in a Glendale newspaper a notice that plaintiff and defendant were partners, a copy of the newspaper notice being mailed to plaintiff by defendant. In 1944, defendant father executed a will declaring: "I hereby state and declare that my son Ralph Seaman Bird, Junior and I acquired a men's clothing business in the City of Glendale under the firm name of Ralph Bird & Sons; that thereafter my said son and I operated the said business until my said son entered the armed forces of the United States; that since my said son has been in the armed forces of the United States he has sent and is now sending me various sums of money to pay for an increased interest in said partnership."

Defendant father testified: "The purpose of selling the business was that he was going overseas, and business wasn't in any too good condition, and that we both figured that if anything caused me to sell or liquidate the business, it would be much easier, I thought, if it was in my ownership, and that at the time he would return, we would do everything possible to make a satisfactory arrangement for a new business at that time."

"The Court: When he went overseas, the partnership was off, for the time being?"

"A. Yes, sir. * * *

"A. The partnership was eliminated when we signed this agreement when he was in the service. * * * it was made so that I could have the ownership of the business, so that should the business need to be liquidated, or sold, or any other thing happen to him while he was in the service, it would be in my hands to handle the liquidation of the entire business, or the transaction of selling or liquidating the business. * * * I was to carry on the

business, and there would be the best possible efforts to form a new business when he returned from the service.

"The Court: It was your understanding, however, that after he signed that document, and received that, he had no further interest in the business?"

"A. Yes, sir."

It further appeared that defendant offered plaintiff after his return an opportunity to join in the formation of a corporation for operation of the business, but the son declined.

[2] It thus appears that from the conflicting testimony the court might reasonably infer that the partnership was dissolved, with an understanding that a new arrangement might be entered into when the son returned from overseas. It is to be noted, in this connection, that the issues presented at the trial by stipulation did not include any claim for injury resulting from the failure to enter into a new partnership agreement, the son's sole claim being for his original 1/20th interest plus the return of the \$4,580.00 or \$4,480.00 sent to his father during the son's overseas service. It was admitted that the son parted with no consideration for his alleged interest. He received back the sum of \$138.00 which had been credited on the note which he executed, and in addition, with reference to the sum of \$156.00 credited on the note as a present from his father, the father tendered to him this sum in open court, which tender the son accepted.

[3-5] With reference to the contention that a trust was established, the trial court here determined, upon conflicting evidence, that plaintiff had not sustained the burden resting upon him. Under familiar rules, we are not at liberty to disturb such finding, based as it is upon substantial although contradicted evidence, and upon inferences reasonably to be drawn therefrom. *Crawford v. Southern Pacific Co.*, supra; *Arundel v. Turk*, 16 Cal.App.2d 293, 295, 60 P.2d 486; *Balasco v. Chick*, 84 Cal.App.2d 802, 192 P.2d 76. The evidence and inferences to be drawn therefrom must be considered and resolved on appeal in favor of the determination made by the court below. If there be any doubt as to its suf-

iciency, that doubt must be resolved in favor of and not against the judgment. *Fackrell v. City of San Diego*, 26 Cal.2d 196, 207, 157 P.2d 625, 158 A.L.R. 773.

[6] Appellant's contention that the court erred in finding against him on his claim that the sum of \$4,580.00 deposited with his father had not been repaid likewise must fail. The father testified that upon his return home the son insisted upon repayment in cash; that the father thereupon cashed a check in that amount and delivered the proceeds to the son. The cancelled check was put in evidence. A witness corroborated the father as to the physical delivery of the money to the son. Shortly after the date of the alleged repayment the son made large deposits in a safe deposit box and thereafter, in January, 1946, in his bank accounts. The son testified that these sums represented reimbursement for traveling expenses and purchases of merchandise made by him for his father while crossing the United States returning home from Europe and the sum of over \$5,000.00 which he had on his person upon his return to this country. This conflict was for the trier of fact to resolve.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



87 Cal.App.2d 268

SCHUBERT v. REICH.

Civ. 16270.

District Court of Appeal, Second District,
Division 1, California.

Aug. 23, 1948.

1. Customs and usages ◀15(1)

In action to restrain enforcement of processor's lien against dates delivered to processor by plaintiff grower under contract, and for declaratory relief, evidence of custom was properly received on question as to how dates are graded. Civ.Code, § 3050 et seq.

2. Customs and usages ▶16

In action to restrain enforcement of processor's lien against dates delivered to processor by plaintiff grower under contract, and for declaratory relief, evidence of a custom that no extra charge was made for grading dates by or with the use of the internal inspection method was not admissible. Civ.Code, § 3050 et seq.

3. Agriculture ▶11

Statement in letter from defendant date processor to plaintiff grower that processor would expect plaintiff to finance processor's operations by paying for each lot of dates as finished by processor, and that processing would run into considerable labor which would be cash, was merely an explanation of why processor expected to be paid for each lot of dates delivered under contract as it was finished and was not an unreasonable "demand" for payment as implied by findings of trial court in action to restrain enforcement of processor's lien against dates, and for declaratory relief. Civ.Code, § 3050 et seq.

4. Agriculture ▶15

In action to restrain enforcement of processor's lien against dates delivered under contract to processor by plaintiff grower, and for declaratory relief, record revealed that any failure on part of defendant after a dispute arose was due to instruction from plaintiff who made other arrangements, and did not sustain finding that defendant had not rendered any service by labor or skill or otherwise for the protection, improvement, or safe-keeping of plaintiff's dates. Civ.Code, § 3050 et seq.

Appeal from Superior Court, Los Angeles County; Paul Vallee, Judge.

Action by Frank H. Schubert against Andrew Reich for restraining order to prevent the enforcement of a lien upon dates grown by plaintiff and for declaration of the rights of the parties under an agreement for defendant to recondition dates grown by defendant so as to comply with the agricultural code. From an adverse judgment, defendant appeals.

Judgment reversed and cause remanded.

Clyde Thomas, of Los Angeles, for appellant.

Joseph Doyle, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment by defendant in an action alleged to be for declaratory relief.

The complaint alleges that plaintiff was in the business of "growing, cultivating, harvesting and marketing dates and date by-products which are grown upon real property owned and operated by plaintiff"; that defendant is engaged in the business of "grading, packing, reconditioning, storing, shipping and selling dates and date by-products"; that during the 1945 season "plaintiff became aware that some of the dates grown and harvested in plaintiff's date gardens in Riverside County had become infested with insects and mold". The legal requirements specified by the Agricultural Code in such circumstances is also alleged. It is then alleged that, "during the month of October, 1945, plaintiff discussed said situation with defendant Andrew Reich and informed said Andrew Reich that said field-run dates must be graded and reconditioned so as to comply with said Agricultural Code, and said defendant Andrew Reich did then and there warrant and represent to plaintiff that if plaintiff would deliver said field-run dates to defendant at defendant's packing house located in Covina, California, that defendant would and he did then guarantee to grade, process and recondition said dates, and each and all thereof, in such manner that the same and all thereof when so graded, processed and reconditioned would comply with each, every and all of the provisions of the Agricultural Code and of the regulations of the Department of Agriculture of the State of California; that in reliance upon said representations and warranties and verily believing the same, plaintiff did then and there enter into an oral contract and agreement with defendant Andrew Reich wherein and whereby the latter contracted and agreed that he would upon receipt at his packing house in Covina, California, proceed forthwith to grade, process and re-

condition said dates in a good and workmanlike manner and in such manner that the same, and each and all thereof; would conform to the laws, rules and regulations of the State of California, made and provided for dates and date by-products, as aforesaid, *for which services plaintiff did then and there agree to pay to defendant the reasonable value thereof, said payment to be made when and after said dates had been so graded, processed and reconditioned so as to comply with the laws of the State of California and the regulations of the California Department of Agriculture.*" (Emphasis added.)

It is then further alleged that plaintiff, pursuant to said agreement thereafter delivered to defendant 135,000 pounds of dates and that defendant claims to have "rendered services to plaintiff under the terms of said oral agreement", and, "by reason thereof has claimed and asserted a lien against said dates in the amount of Six Thousand Forty-two and 07/100 Dollars (\$6,042.07) and does now claim and continue to claim a lien against said dates under the provisions of section 3050 et seq of the Civil Code of the State of California." It is then further alleged that defendant failed and refused to "fulfill the terms of said oral agreement." It is also alleged that an actual controversy has arisen, that defendant has demanded payment of the above mentioned sum but that defendant is not entitled thereto "because of defendant's failure to comply with the terms of said agreement." The prayer was for a restraining order to prevent the enforcement of the lien and for a "declaration of the rights of the parties."

The answer in substance admits a transaction but denies any failure or refusal to comply with the terms of the agreement and, "admits he claims and alleges that he is entitled to a lien on said dates for the services rendered by him in grading, reconditioning and processing said dates in the sum of \$6,042.07 and desires that said lien be enforced and the dates sold and the proceeds applied in satisfaction thereof. Further admits that he has taken steps to foreclose said lien and desires to continue to do so and has only desisted from

the enforcement thereof because of the injunction entered in the above entitled action."

The court found for plaintiff, which findings, in part, recited, "*the custom prevailing in the date and date grading, reconditioning and processing industry for California-grown dates was for California graders, reconditioners and processors to grade dates by external inspection, sometimes called 'sight-grading', if thereby the graded dates met or exceeded the standards set forth in the Agricultural Code of the State of California and the rules and regulations of the Department of Agricultural of the State of California, and if by the use of said 'sight-grading' method the graded dates did not or could not be made to meet or exceed said standards, then in that event said graders graded and processed dates by supplementing said 'sight-grading' method with, or substituting for said 'sight-grading' method, grading by internal inspection wherein dates are cut, opened and examined for defects, and no extra charge was made for grading by or with the use of the internal inspection method.*" (Emphasis added.)

The findings also recite that "on and after December 10, 1945, defendant demanded that plaintiff pay to defendant sums of money sufficient to defray defendant's labor costs in the cutting, opening and examining of plaintiff's said dates, except said culls, and to finance the operation of grading and reconditioning of said dates, except said culls, by internal inspection by paying defendant for each lot as defendant finished said grading and reconditioning; that plaintiff refused and continues to refuse to pay and has not paid said demanded sums or any part thereof, and plaintiff demanded that defendant fulfill the terms of said oral agreement; that defendant has failed and refused to fulfill the terms of said oral agreement and has failed and continues to fail to grade, process or recondition plaintiff's said remaining dates or any part thereof in accordance with the terms and provisions of said oral agreement."

The evidence which, incidentally, is not without conclusions, reveals in substance

that plaintiff is a date grower at Indio in Riverside County and that defendant is, and had been for ten or twelve years, engaged in the business of culling and processing dates at Covina in Los Angeles County and, as correctly recited by defendant and appellant:

"In 1945 plaintiff harvested his crop of dates and as is usual, such 'field-run' dates had to be graded, processed, and reconditioned for marketing and to meet the requirements of the law of California as established in the Agricultural Code. The custom of the industry is to grade dates by 'sight-grading', that is, picking out dates which are found to be defective by visual observation. If the dates thus graded did not meet the standards required by law, it was the custom of the industry to supplement the sight-grading by cutting each date and making an internal inspection thereof.

"Defendant negotiated with plaintiff for the processing of dates grown by plaintiff during the 1945 season and they entered into an oral agreement under which plaintiff was to and did deliver dates to defendant's place of business at Covina, California, defendant agreeing to grade, process, and recondition plaintiff's 'field-run' dates in a good and workmanlike manner and plaintiff agreeing to pay defendant the reasonable value of such services.

"Pursuant to said oral agreement plaintiff delivered approximately 128,523 lbs. of 'field-run' dates to defendant. The dates received by defendant were processed by him and approximately 90,902 lbs. remained in his possession at the time of filing this action.

"On and after December 10, 1945, the dates remaining in the possession of defendant were inspected by the Los Angeles County Agricultural Commissioner and red-tagged as containing 7% beetles and 8% mold and therefore were below the requirements of the Agricultural Code and could not be marketed.

"Defendant claimed payment of \$6,042.07 as due and owing by plaintiff to defendant for defendant's services upon plaintiff's dates and plaintiff denied that he owed

"Jan. 2, 1946

such sum or that defendant was entitled to a lien on said dates therefor. Defendant threatened and began proceedings to foreclose a lien on said dates for the money claimed by him and was stopped by the filing and issuance of a restraining order in the instant action."

It is contended on appeal that "the conclusions of law and judgment are not in accordance with or supported by the findings of fact", and that "the findings of fact are not sustained by the evidence."

On December 10, 1945, defendant wrote plaintiff the following letter:

"Dec. 10, 1945

"Frank Schubert
Sun Gold Date Gardens
P.O. Box 98
Indio, California
Dear Frank:

The Standardization Inspectors have tied up your fruit that is packed and suggested that they see the rest of the ungraded fruit after it is graded. Also Mr. Ridenour just phoned that 18 flats, hydrated, have been red-tagged, and that they are being returned to us. Mr. Hubble is also delivering to us about 10,000 pounds of graded dates to be cut etc.

We have no understanding with you for cutting and inspection. It will run into considerable labor, which of course is cash. We will do this work for you, but we will have to expect you to finance the operation by paying for each lot as it is finished. Our price is: actual cutting labor cost, plus average floor labor cost, and operation cost of .0168 cents per pound.

We would appreciate having a letter from you so that we might get under way.

Very truly yours,
Andrew Reich

P.S. What shall we do with the cull dates? We have several thousand pounds of your cull dates already graded out which must be disposed of promptly. As a suggestion, Calavo is selling their culls to Parker Bros. for delivery to Randisi Winery. Let us know on this too."

Plaintiff wrote nothing in reply and on January 2nd, defendant sent plaintiff the following telegram:

"Frank Schubert
Sun Gold Date Gardens
Indio, Calif.

To date no reply from you to our letter of Dec. 10, 1945. Shall we proceed to cut dates in order that the dates may pass inspection. Please do not delay any longer to answer.

Andrew Reich."

Plaintiff made no reply in writing or by wire to the above telegram.

A controversy had developed which appears from the evidence to have resulted from the quality of the 1945 crop rather than from any shortcoming or default on the part of defendant. Indeed so far as the evidence shows, there was no violation of the agreement at all by defendant. So far as can be determined by the evidence, the parties agreed that defendant was to grade the dates first by "sight-grading" and if by this method the graded dates do not meet the "standards required by law" then the dates are cut one by one, opened and examined for defects. This the defendant was willing to do. It should be noted that when this situation developed defendant had already graded and returned to plaintiff 37,621 lbs. for which defendant had not been paid. The date season continues for several months during which period dates are delivered from time to time in varying quantities for inspection. When defendant demanded payment as above noted in the letter of December 10, plaintiff refused to pay and took the position that no money was due until the entire crop had been processed to meet the legal requirements. Not only is there no evidence to support plaintiff's position in this regard but the complaint affirmatively alleges, as above noted in italics, that plaintiff agreed to pay for such services, "*after said dates had been so graded etc.*", and as the evidence clear-discloses, that is all that defendant was trying to accomplish.

As to the quality of the crop and the cost of processing, plaintiff testified on cross-examination as follows:

"Q. And did the dealing during 1944-1945 have anything to do with any cutting

problem? A. I don't recall, no, I don't think there was any cutting problem.

"Q. You did not have any, and when you made the agreement prior to delivery in October, 1945, was there any conversation relative to the price to be paid for cutting? A. None at all, it never was discussed.

"Q. It was never contemplated? A. Never contemplated nor discussed."

[1, 2] With relation to the question as to how dates are graded, evidence of custom was properly received; indeed there is no dispute on this point but, the court's finding, above emphasized, to the effect that according to the "*custom prevailing*" * * * "no extra charge was made for grading by or with the use of the internal inspection method" goes farther than the law authorizes. It is well settled that evidence of custom is proper in some cases and for some purposes, but the rule in this regard has never been extended to include evidence of a custom as to whether a party to a contract is entitled to assess a "charge" for services rendered.

[3] The finding that, "defendant demanded that plaintiff pay to defendant sums of money sufficient to defray defendant's labor costs in the cutting, opening and examining of plaintiff's said dates", is not only unsupported by the evidence but is refuted by the record as an examination of the complaint and defendant's letter of December 10, both as above recited, will show. Obviously, defendant's statement in the letter, to-wit, "we will have to expect you to finance the operation by paying for each lot as it is finished", and that, "It will run into considerable labor, which of course is cash", is merely an explanation of why defendant expected to be paid for each lot as it was finished. In no sense is it presumptuous or unreasonable "demand" in violation of the agreement as implied by the findings. Actually defendant paid the labor costs, indeed all of the costs, and not the plaintiff. Under the terms of the agreement the plaintiff manifestly was supposed to pay for the services rendered.

[4] The court's finding that "defendant has not rendered any service by labor or

skill or otherwise for the protection, improvement, or safekeeping of plaintiff's dates or any part thereof", also lacks support in the evidence. The record reveals that any failure on the part of defendant after the dispute arose was due to instruction from plaintiff who the evidence shows made other arrangements; plaintiff had, in effect, effectively terminated any contract that had existed. Assuming, but by no means deciding that the action in declaratory relief was appropriate and valid, it is evidence from a review of the record that the findings are unsupported by the evidence.

For the foregoing reasons, the judgment is reversed and the cause remanded.

YORK, P. J., and WHITE, J., concur.



87 Cal.App.2d 352

PEOPLE v. PRYOR.
Cr. 2527.

District Court of Appeal, First District,
Division 2, California.
Sept. 1, 1948.

1. Criminal law ⇐997

The scope of writ of error coram nobis is very restricted.

2. Criminal law ⇐997

Petition for writ of error coram nobis, alleging that judgment of conviction of arson was void on its face and that petitioner's imprisonment was in violation of federal Constitution and setting forth a statement of facts containing circumstances surrounding arrest, actions of police officers, and some of the testimony, was properly denied as failing to state a case within scope of the writ. Pen.Code, § 447a.

3. Criminal law ⇐997

The writ of error coram nobis cannot be used to serve the purpose of appeal.

Appeal from Superior Court, City and County of San Francisco; Wm. F. Traverso, Judge.

Stanley Pryor was convicted of arson, and, from an order denying his petition for writ of error coram nobis and motion to vacate judgment of conviction, he appeals.

Order affirmed.

Stanley Pryor, in pro. per., for appellant.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

GOODELL, Justice.

Appellant was accused by an information of the crime of arson, defined by section 447a of the Penal Code, to which he pleaded not guilty. At the first trial the jury disagreed. An amended information was filed alleging that he had been convicted of a felony in the State of New York in 1926 and of another felony in 1931 and another in 1939 in Michigan, all three of which he admitted. On the second trial he was found guilty. A motion for new trial was denied. *No appeal was taken from the judgment of conviction.* Appellant was represented by the Public Defender.

About a year later he filed in the Superior Court a petition for a writ of error coram nobis and motion to annul, vacate and set aside the judgment, all of which were denied. This appeal was then taken.

In the Superior Court no evidence was presented. The matter was disposed of on the petition alone. The petition, the minute order denying it, and the notice of appeal, certified by the clerk, constitute the record before us. The petition alleges that the judgment is void on its face and that appellant's imprisonment is in violation of several articles of the Federal Constitution. It sets forth what is called a "True statement of facts" containing some of the circumstances surrounding his arrest and what followed thereon, including the actions of the police officers assigned to the case, over a period of four or five days in August, 1946. In this narration there are included what seem to be excerpts from testimony—whether given at the first trial

or the second does not appear. Included, also, are copies of letters from three corporations indicating that appellant was employed by them in the east at periods when some witness testified he was in California. This is not to prove an alibi (for the letters are not directed to the time of the offense) but apparently to contradict the witness as to appellant's whereabouts before the time of the offense. The petition also contains a statement of points and authorities. The excerpts of testimony are not legally authenticated; they merely purport to be quotations from testimony given at one time or another.

[1-3] The scope of the writ of error coram nobis is very restricted in this state. Certain leading cases discuss its limited office and functions. *People v. Mooney*, 178 Cal. 529, 174 P. 325, and *People v. Reid*, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435 (with the first of which appellant is familiar, for he cites it), set forth at considerable length the rules on the subject. A reading of those cases will show that appellant's case on the present record is not within the scope of the writ. For one thing, the writ cannot be used to serve the purpose of an appeal. In the *Reid* case the court says (195 Cal. at page 260, 232 P. at page 461, 36 A.L.R. 1435): "The maxim, 'for every wrong there is a remedy' (Civ.Code, § 3523) is not to be regarded as affording a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time—even though such failure accrued without fault or negligence on his part. This is made clear by the cases of *People v. Mooney*, supra, and *People v. Superior Court*, 190 Cal. 624, 213 P. 945."

In *People v. Moore*, 9 Cal.App.2d 251, 253, 49 P.2d 615, 616, it is said: "The frequent resort to a petition for this writ in recent years persuades one that those who have been convicted of crime have come to look upon it as a remedy which can work magic merely by reason of its invocation. There is, however, no shibboleth in a petition for a writ of error, coram nobis, even though the Latin name has survived to the present time." In *People v. Gilbert*, 25 Cal.2d 422, 442, 154 P.2d 657, 667,

the following is found: "The writ of error coram nobis is not intended to authorize any court to revise and review its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court. 1 Freeman on Judgments, § 94; 23 Cyc. 884.' Nickels v. Florida, 86 Fla. 208, 228, 98 So. 497, 502, 504, 99 So. 121."

In the Gilbert case, 25 Cal.2d at page 444, 154 P.2d at page 668, there are cited a large number of California cases touching the subject.

The appellant has not shown any ground on which the action of the trial court in denying his petition should be disturbed.

The order appealed from is affirmed.

NOURSE, P. J., and GRIFFIN, Justice pro tem., concur.



EVARTS et al. v. JOHNSTON et al.

Civ. 3927.

District Court of Appeal, Fourth District,
California.

Aug. 27, 1948.

Hearing Granted Oct. 25, 1948.*

1. Vendor and purchaser ⇨44

Where parties signed written agreement and escrow instructions constituting contract for sale of realty and such instruments were definite in their terms as to method of disposing of purchasers' equity in other realty which was to be placed in escrow as part of down payment, trial court, in absence of finding of fraud, misrepresentation or mistake, was not authorized, under the evidence, to set aside agreement merely by a finding that there was not a meeting of the minds as to how the down payment was to be made. Code Civ. Proc. § 1856; Civ.Code, §§ 1638-1640, 3391.

* Subsequent opinion 206 P.2d 633.

2. Vendor and purchaser ⇨44

In purchasers' action for specific performance of written contract for sale of realty, evidence that real estate broker made some contemporaneous oral agreement with vendors to sell other realty and place the money in escrow as part of down payment instead of assignment of purchasers' equity therein as provided for in agreement did not afford legal evidentiary support for finding that there was no meeting of the minds regarding such other realty so as to justify rescission of the contract. Code Civ.Proc. § 1856; Civ.Code, §§ 1638-1640, 3391.

3. Specific performance ⇨121(3)

In purchasers' action for specific performance of written contract for sale of realty, evidence did not support trial court's findings that terms of contract were not sufficiently certain to make clearly ascertainable the amount of trust deed to be given by purchasers as part of purchase price or to make ascertainable the terms of obligation to be assumed by vendors upon assignment to them of purchasers' equity under contract for sale of other realty and that it could not be ascertained whether such contract was assignable or whether owner of such other realty would assent to assignment, in absence of evidence that contract was not in fact assignable.

4. Specific performance ⇨97(2)

Where \$450 cash was paid into escrow by purchasers, \$100 was admittedly paid vendors' agent out of escrow and considered part of the \$1250 cash payment to be placed in escrow, and vendors after executing agreement and without consent of purchasers leased a portion of the realty sold, receiving \$700 rent therefor, vendors in defense of action for specific performance of contract for sale of realty could not equitably claim a breach of duty by purchasers on account of failure to pay into escrow an additional sum of \$700.

5. Specific performance ⇨121(11)

In action by purchasers for specific performance of contract for sale of realty, evidence did not support trial court's finding that purchasers were at all times financially unable to perform contract.

6. Specific performance ⇨121(8)

In action by purchasers for specific performance of contract for sale of realty for \$25,000, evidence did not support finding that value of property was \$30,000 at time of entering into contract and that \$25,000 was not a fair and reasonable price.

7. Specific performance ⇨116½

Where purchasers, suing for specific performance of contract for sale of realty, amended their complaint by leave of court so as to conform to the proof and therein alleged that \$25,000 was fair and reasonable value of the realty, such amendment destroyed the effect of former allegation, admitted by vendors' answer, that realty was worth \$30,000 at time of making contract.

8. Evidence ⇨113(16)

Option to purchase realty for \$30,000, given during a period of rising prices more than 18 months after entering into agreement for sale of realty to others for \$25,000 was not evidence of value of that realty when agreement was made.

9. Brokers ⇨106

In action by purchasers for specific performance of contract for sale of realty, finding that real estate broker was acting as agent for vendors and at the same time acting for purchasers as attorney at law in the negotiations and preparation of contracts was without evidentiary support.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by E. F. Evarts and another against Samuel W. Johnston and another, for specific performance of a contract for sale of realty, wherein defendants filed a cross-complaint against plaintiffs and R. S. Harrington. From a judgment denying specific performance, quieting defendants' title to the realty and denying recovery under their cross-complaint, plaintiffs appeal.

Judgment reversed.

E. F. Evarts and Monrova S. Evarts, in pro. per.

Clarence B. Smith, of El Centro, and H. L. Welch, of Los Angeles, for respondents.

John M. Cranston, of San Diego, amicus curiae for California Real Estate Association.

GRIFFIN, Justice.

On January 30, 1945, plaintiffs filed this action against defendants Samuel W. and Sarah E. Johnston, demanding specific performance of an agreement for the sale of a ranch in Imperial County containing approximately 467 acres. A signed, written agreement, dated November 22, 1944, and signed escrow instructions, alleged and referred to in the complaint, constituted the written negotiations of the parties. The agreement acknowledged payment of \$100, paid to the broker, cross-defendant R. S. Harrington, on account of the purchase price, and provided generally for a payment of \$4,000 in escrow, \$1250 cash and an equity of \$2750 in a house in Long Beach, which house was subject to an incumbrance of \$3750. The total purchase price of the acreage was fixed at \$25,000. The balance of \$21,000 was to be paid by note secured by a trust deed payable \$2500 per year. It was agreed that there was an incumbrance on the land for \$2600 and delinquent state and county taxes totaling \$3362.85, payable \$1231.96 per year. Delinquent irrigation district taxes were \$2288.76, payable \$1144.38 per year. Payments on these items were to be made by the purchaser before delinquency and were payable out of the total annual payment of \$2500, with the seller being paid the excess. The seller was to pay the first half of the 1944-45 state and county taxes and district assessments. The purchaser was to take the property subject to leases thereon totaling 195 acres and have the rent that was unpaid thereon. The buyers were to have possession upon payment of \$1150 in escrow. The sellers agreed to allow the buyers to put a first trust deed on the property to secure a loan to pay off any indebtedness due and to accept a second trust deed for the balance of the purchase price. The Long Beach property was to be turned in by the buyers, which contract of purchase was to be assigned by them to the sellers. The agreement then contains the clause that the purchasers agree to buy and the sellers agree to sell on the terms and conditions stated

and that the sellers agree to pay the agent \$1250.

The escrow instructions provided generally that the purchaser pay into escrow \$1150 and execute the trust deed as above indicated and specified the various claims in detail which made up the purchase price of \$25,000.

All moneys and instruments left by the parties were to be returned to them within 30 days from the date of the escrow if the sellers were unable to comply or within such additional time as might be required by the sellers to complete the transaction. Johnston agreed to place his deed in escrow. Subsequent to the execution of these agreements the sellers leased 40 acres of their land for \$1400. \$700 cash was paid to them. Plaintiffs alleged in their complaint alleged in their complaint that they had performed all that was required of them by the agreement and that defendants refused to perform their part of it; that the consideration of \$25,000 was just and reasonable; that plaintiffs stood ready to abide by and perform the agreements on their part. They prayed that defendants be required to specifically perform their part of the contract.

Defendants answered, admitted signing the agreement and escrow instructions but alleged (1) that their signatures thereto were obtained by fraud and mistake and alleged that J. H. Harrington, the broker, and also plaintiffs' attorney, had been acting, for several months prior to November 22, 1944, as plaintiffs' agent and attorney; that he prepared and presented to defendants for their signature, the agreement; that they refused to sign because it provided that defendants would accept an assignment of contract of the Long Beach property as payment of \$2750 on the purchase price of their ranch; that they verbally informed Harrington that they would not sign such an agreement but would only accept \$4,000 in cash; that he assured them that if they would sign the agreement as written, that he would sell the Long Beach property, obtain \$4,000 cash, and place that amount in escrow in place of the assignment, and stated that defendants could take his word for it; that no deal would be

consummated unless the \$4,000 was so deposited, and that the agent so agreed; that they then signed it because he stated it was all right and that it would save him the trouble of going to his office and rewriting the agreement; that when they noticed the escrow instructions they contained the same clauses in this respect as set forth in the first signed agreement; that they called the agent's attention thereto and he again assured them that no deal would be consummated until he had sold the Long Beach property and placed \$4,000 in cash in the escrow; (2) that defendants informed the agent that they would be compelled to pay \$1000 on the existing trust deed before January 1, 1945, and that the agent represented to them that plaintiffs were well to do people and they could easily take care of that; that Harrington failed to sell the Long Beach property and failed to deposit \$4,000 in cash in escrow, and on December 23, 1944, defendants informed the agent of the \$1,000 payment due on the trust deed and that he then said: "My clients cannot raise the money"; that on January 17, 1945, they then ordered the escrow canceled because of this fact and for the added reason that they failed to deposit \$1150 in cash in escrow, and further that the agent kept the \$100 paid him by plaintiffs and thereafter failed to pay defendants the \$100 outside of escrow as provided in the instructions; that plaintiffs did not deliver to the escrow holder the assignment of contract of sale of the Long Beach property and did not indicate the unpaid balance thereon; that defendants never extended the closing date of the escrow beyond December 24, 1944, and did not give Harrington or any other person authority to do so.

Defendants admitted that they subsequently leased the 40 acres and did not deposit the \$700 in escrow as demanded by plaintiffs but applied that amount in payment of delinquent taxes. They denied that plaintiffs performed all things required of them to be done and admitted that defendants refused to perform under the agreement as signed; denied that \$25,000 is a just and reasonable price for the property and claimed that the agreements as signed are unfair and that advantage was sought to be taken of them; denied that

plaintiffs are able or ready to abide by and perform the agreements on their part. They seek cancellation of the agreement on the ground of fraud and mistake and ask that plaintiffs take nothing.

In a supplemental complaint plaintiffs allege that the \$700 obtained on the subsequent lease belonged to plaintiffs and defendants should have deposited that amount in escrow, as demanded, as part of the cash down payment. They then specifically alleged that the value of the premises involved (467 acres), at the time of entering into the contracts, was \$30,000, and that by reason of defendants' failure to perform their contract plaintiffs have been damaged in the sum of \$5,000. Other items of claimed damage are set forth. By order of the court defendants were permitted to bring in R. S. Harrington and to file a cross-complaint against him seeking damages for \$2250, on some transaction in connection with a lease upon defendants' property. It was claimed that at all times Harrington was the agent of plaintiffs and aided and assisted them in deceiving and misleading the defendants.

In a second count of the cross-complaint damages are sought from the agent and plaintiffs for the agent's misrepresentations of Evarts' financial responsibility and for plaintiffs' defaulting in their obligations under the agreements, and it is alleged that as a result of the filing of this action and the recording of a lis pendens a cloud was cast upon their title interfering with defendants' refinancing of the property. \$2,000 is claimed for damages for slander of title and a decree quieting their title is sought.

In the answer to the supplemental or amended complaint defendants admit that the 467 acres were, at the time of entering into the contracts, of the value of \$30,000, and allege that they had a value greatly in excess of that amount, but denied that plaintiffs were damaged. They then allege that at the time of entering into the agreement plaintiffs were not familiar with the value of the property and relied entirely upon their agent, who assured them that the land was worth not in excess of \$25,000.

On January 21, 1947, plaintiffs, by leave of court, amended the allegations of their supplemental complaint to conform to the proof in reference to the value of the property, and therein alleged that \$25,000 was the fair and reasonable value thereof at the time of the execution of the agreements. Plaintiffs denied that Harrington was their agent at any of the times herein mentioned and claimed that at all times he was the agent of the defendants. They denied that Harrington made any misrepresentations and denied generally the defendants' allegations in their cross-complaint.

After trial the court found that the parties entered into the agreements in writing as set forth in the complaint but then found: (1) "That there was not a meeting of the minds of the parties to said agreement, who are the parties to this action, with respect to how or in what manner the initial or 'down' payment was to have been made under said contract"; (2) that the terms of the agreements are not sufficiently certain to make clearly ascertainable the amount of the trust deed to be given by plaintiffs as a part of the consideration for the transfer of the premises or to make ascertainable the terms of the obligation to be assumed by the defendants upon the "equity" or "contract for the sale" of the house in Long Beach, and that it cannot be ascertained therefrom whether the contract of sale is assignable or whether the owner of the house and lot in Long Beach will assent to the assignment of the contract of purchase; (3) that defendants received the \$700 from the lease but paid delinquent taxes with it; (4) that plaintiffs did not deposit in escrow the sum of \$1250 in cash but only \$450; (5) that plaintiffs, at all times, were not able financially to perform according to the terms of the agreement; (6) that the value of the premises is and was at all times \$30,000; and that the consideration of \$25,000 called for in the agreement was not, at the time of the execution thereof, a fair or reasonable value of the property, and the consideration was not adequate and the agreement was not just and reasonable; and (7) that Harrington, at the time of making the agreement between the parties, was ac-

ting as a real estate broker or agent for the defendants and at the same time was acting on behalf of plaintiffs as an attorney at law in the negotiation and preparation of the contracts between them.

The court denied plaintiffs relief under their complaint, held that Harrington was not entitled to any commission, quieted defendants' title to the acreage, held that they were not entitled to recover under their cross-complaint, and that all parties be restored to their former status as it existed prior to the making of the agreements in question. Judgment was entered accordingly. Plaintiffs appealed. Cross-defendant Harrington did not appeal.

Plaintiffs were represented at the trial by counsel. However, they have elected to perfect their own appeal in propria persona. It is difficult to ascertain the real legal question involved. As we construe the sum total of the argument it is this: that the evidence does not support the findings.

[1] Amicus curiae, appearing on behalf of the California Real Estate Association, was permitted to argue in respect to certain phases of the written contract of sale and the sufficiency and validity of the court's findings thereon. He points out that the trial court found that the parties signed the written agreements; that therefore, since these provisions are definite in their terms as to the method of disposition of the Long Beach property, and since there was an absence of a finding of fraud, misrepresentation or mistake, the trial court was not authorized, under the evidence, to set aside the agreement merely by a finding that there was not a meeting of the minds of the parties on that subject. With this contention we are in accord. (See Sec. 1856, Code Civ.Proc.; Secs. 1638, 1639, 1640 and 3391, Civ.Code.)

In *Nourse v. Kovacevich*, 42 Cal.App.2d 769, 109 P.2d 999, it is said (quoting from the syllabus):

"When the terms of an agreement have been reduced to writing by the parties, it is to be construed as containing all the terms thereof, and there can be, between the parties and their representatives or successors in interest, no other evidence of the

terms of the agreement than the contents of the writing, except (1) where a mistake or imperfection in the writing is put in issue by the pleadings, (2) where the validity of the agreement is in fact in dispute, or (3) where it is necessary to explain an ambiguity in the agreement."

See, also, *Payne v. Commercial Nat. Bank*, 177 Cal. 68, 169 P. 1007, L.R.A.1918 C, 328; *Thoroman v. David*, 199 Cal. 386, 249 P. 513; and *Bank of America etc. v. Pendergrass*, 4 Cal.2d 258, 48 P.2d 659, in which latter case it is held (syllabus No. 6):

"Parol evidence of fraud to establish the invalidity of an instrument must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing."

Defendants do not claim that plaintiffs evarts themselves made any misrepresentations. The only showing is that if there were any such misrepresentations they were made by Harrington. As to that, defendants' evidence shows that Harrington made some contemporaneous oral agreement to sell the property for them and place the money in escrow instead of the assignment provided for in the agreement.

[2] The trial court failed to find on the issue of fraud and misrepresentation or mistake as raised by the pleadings. A finding that there was no meeting of the minds of the parties to the contract respecting the Long Beach property was not the issue or even if it were the issue, it lacked legal evidentiary support to justify a rescission of the contract. Plaintiffs' undisputed evidence, as well as the testimony of defendants, show that several weeks after the signing of the escrow agreement defendants authorized Harrington to dispose of the equity in the Long Beach property at a discount of \$500 from the agreed price.

[3] Finding on point number 2 is not supported by the evidence. The amount of the trust deed was ascertainable under the terms of the written agreement and the provisions for the sale of the Long Beach property were clearly stated in the receipt and escrow instructions. It there provides

that the equity of \$2750 in the house, which is subject to the trust deed of \$4000, with a balance of \$3750 due thereon, shall be applied on the purchase price of the acreage. A written assignment of that contract was deposited by plaintiffs in escrow and they quitclaimed any interest they had therein to defendants. This was in accordance with the written agreement. Defendants failed to furnish any evidence that such contract was not in fact assignable or that plaintiffs could not perform their part of the agreement in this respect.

[4] Finding on point number 3 is admitted. As to finding on point number 4 the evidence conclusively shows that \$450 cash was paid into escrow by plaintiffs, the \$100 was admittedly paid to the defendants' agent out of escrow and was considered part of the \$1250 cash payment. Defendants, without the consent of plaintiffs, leased a portion of the acreage and received \$700 cash on account. The agent, plaintiffs, and the title company repeatedly demanded that this sum be paid into escrow as part of the cash payment. It would not now seem equitable for defendants to claim a breach of duty on the part of plaintiffs for failure to pay into escrow an additional sum of \$700.

[5] Finding on point number 5 that plaintiffs were at all times financially unable to perform the contract likewise lacks evidentiary support. In fact, the undisputed evidence seems most conclusive to the contrary.

Defendant Mrs. Johnston testified that Harrington told her that Evarts was "a man of means"; that he had properties outside of the county and equities in other property; that he owned farm machinery and was able to go ahead and farm. On this subject Evarts testified that he had between \$5,000 and \$6,000 worth of farm machinery and trucks in November, 1944. The evidence shows that he moved some of it onto defendants' ranch, by agreement, soon after the escrow was signed; that he had approximately \$4,000 consisting of cash in bank and travelers' checks; that he owned about 320 acres of land in Imperial Valley with an equity of about \$14,000 in that acreage, in addition to a trust

deed payable to him for \$2250 on another acreage in the valley; six quarter sections of land in Antelope Valley, valued at \$27.50 per acre with \$1,000 taxes due on it; also an equity in the Long Beach property and a deposit of \$750 on a duplex in Long Beach. He likewise testified that he was in the process of securing a loan on the acreage here involved to finance the transaction but that defendants refused to place their deed in escrow and the bank would not approve the loan until defendants did this. There is also a letter in evidence from plaintiffs to defendants' attorney offering to pay defendants \$28,000 cash for the property in settlement of the litigation. There is no evidence disputing the above testimony. We perceive no substantial evidence upon which the trial court could reasonably find that plaintiffs were financially unable to perform their part of the contract. The execution of the contract of sale is proof that the seller is satisfied with the qualifications of the purchaser and of his ability to perform the contract. *Ralston v. Demirjian*, 86 Cal.App.2d 124, 194 P.2d 41.

[6] Finding on point number 6 that the value of the property was \$30,000 at the time of entering into the contract and that \$25,000 was not a fair and reasonable price also lacks evidentiary support. Defendants had this property listed with Harrington for several months. He was unable to find a purchaser. He advertised the property for sale and in response thereto plaintiffs proceeded to the agent's office and were informed later by Johnston, when they visited the property, that he wanted to sell for \$25,000, with a payment of \$4,000 down. Defendants signed an agreement as to the price. Harrington testified that he discussed the sale price and the terms of the agreement with defendants. He admitted that he told them that he would wait until the Long Beach property was sold before he would claim his commission as broker. He testified that about January 11, 1945, Johnston came to his office and said: "Evarts is no good"; that he didn't see Johnston again until January 17th, at which time Johnston told him that a man from the bank said that Johnston could get \$30,000 for the ranch and he was not going to

sell to Evarts; that he told Johnston he should have some better reason than that to tell Evarts why he wanted to back out of the deal. Johnston said he did not remember such a conversation but admitted that subsequently on June 18, 1946, he leased the property to another with an option to purchase for \$30,000 "subject to this trial".

[7, 8] Plaintiffs' amended pleadings allege the value of the property at the time of making the contract to be \$30,000. Defendants admitted this allegation. With this admission there might be some support for this finding, but a later amendment, alleging its value as \$25,000 "in order to conform to the proofs", was ordered by the court. This amendment destroyed the effect of the former pleading and answer thereto. We have examined the entire evidence and find no substantial support for the finding that the actual, fair and reasonable value of the property at the time of the execution of the agreements, was in fact \$30,000, or anything different from that alleged. The only other evidence was that several real estate men told Johnston in December, 1944, that they "would like" to list the property at \$30,000. There is therefore no substantial evidence supporting this finding. The option to purchase at \$30,000, given on June 18, 1946, during a period of rising prices, is not evidence of the value of the property on the date of the execution of the agreements.

[9] Finding on point number 7 that Harrington was acting as agent for defendants and at the same time acting for plaintiffs as attorney at law in the negotiations and preparation of the contracts is likewise without evidentiary support. It was during the spring of 1944 that defendants listed the property with the agent who advertised it for sale. Plaintiffs answered the ad. The only evidence on that subject is that Harrington was associated with another attorney in bringing and prosecuting this action from January 30, 1945, until he withdrew from the case, and some statement made by counsel for defendants that he offered to prove that Harrington had been attorney for plaintiffs in some other case, except a statement by Evarts that Harrington represented him in a legal mat-

ter prior to the time "we entered into the contract with Johnston".

Since the findings lack evidentiary support the judgment must be and is reversed.

BARNARD, P. J., and MUSSELL, J., concur.



87 Cal.App.2d 308

THEIN v. SILVER INVESTMENT CO.
et al.

SILVER INVESTMENT CO. v. THEIN.
Civ. 13743.

District Court of Appeal, First District,
Division 1, California.
Aug. 30, 1948.

Hearing Denied Oct. 28, 1948.

1. Appeal and error ⇨931(1)

Appellate court must disregard all conflicts in evidence and accept as true the evidence and reasonable inferences therefrom most favorable to respondent.

2. Specific performance ⇨121(3)

In action by purchaser's assignee for specific performance of agreement to convey realty containing provision that no assignment should be valid without written consent of vendor, evidence supported finding that vendor was without knowledge and gave no consent to contract of sale between assignee and original purchaser prior to default by original purchaser and reentry by vendor under forfeiture clause.

3. Specific performance ⇨121(11)

In action by purchaser's assignee for specific performance of agreement to convey realty, evidence supported finding that assignee failed to pay or to tender balance of purchase price under terms of contract with original purchaser prior to time original vendor treated original purchaser as in default under original agreement.

4. Specific performance ⇨121(3)

In action by purchaser's assignee for specific performance of agreement to con-

vey realty, evidence supported finding that no act, omission, promise, agreement or representation of vendor induced assignee to pay substantial sum to original purchaser under contract of purchase with him.

5. Vendor and purchaser ⇨214(2)

Where original purchaser was in default under contract to convey realty, which forbade assignment without vendor's consent and vendor was without knowledge of contract of sale to assignee and refused consent to assignment, and did not know that assignee intended to do any more than supply purchaser with balance of purchase price when vendor consented to deposit deed with title company, or that assignee intended to or did pay purchaser substantial sums prior to taking up the deed, vendor was not estopped to deny validity of assignment by purchaser.

6. Equity ⇨54

Equity does not aid one who is sole cause of his own misfortune.

7. Specific performance ⇨99

Vendor and purchaser ⇨214(1)

Where purchaser's assignee sought specific performance of agreement to convey realty, but knew that original purchaser was delinquent in payments, to original vendor, that agreement forbade assignment without consent of vendor and that under contract with original purchaser assignee was to produce balance of purchase price by certain date but he made no attempt to do so until after interest of original purchaser and whatever interest assignee might have had, had been forfeited, equity would not grant relief from forfeiture and grant specific performance upon tender of purchase price.

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by LeRoy J. Thein against Silver Investment Co., a corporation, Mary S. Artz, Cecil B. Artz, and others, for specific performance of an agreement to convey realty, wherein Cecil B. and Mary Artz filed a disclaimer of interest, and Silver Investment Co., cross-complained to quiet title and recover rental value during alleged unlawful detention by plaintiff. From the

judgment, plaintiff and cross-defendant Thein appeals.

Judgment affirmed.

Jos. A. Brown, of San Francisco, for appellant.

Geo. A. Connolly and Jerome Politzer, both of San Francisco, for respondents

PETERS, Presiding Justice.

Plaintiff, LeRoy J. Thein, brought this action against defendants, Silver Investment Co. and Cecil and Mary Artz for specific performance of an agreement to convey realty. The Artzes filed a disclaimer of any interest in the property. The Silver Investment Co. opposed the request for specific performance and cross-complained to quiet its title to the property and to recover its rental value during its alleged unlawful detention by plaintiff. The trial court denied to plaintiff the remedy of specific performance, quieted cross-complainant's title to the property, and granted the cross-complainant \$700 damages because of plaintiff's unlawful detention of the property for a period of fourteen months. From this judgment plaintiff and cross-defendant Thein appeals.

[1] Appellant advances several arguments, but basically it is his contention that several of the findings are not supported by substantial evidence. On this appeal this court, of course, must disregard all conflicts in the evidence and accept, as true, the evidence and the reasonable inferences therefrom most favorable to respondent.

It is admitted that on October 28, 1944, Mr. and Mrs. Artz entered into a contract with the Silver Investment Company whereby the company agreed to sell, and the Artzes agreed to buy, a certain improved parcel of land in San Francisco for \$5,500, \$350 down, and the balance of \$5,150 at the rate of \$50 a month, payable on the first day of each month, unpaid installments to bear 6% interest. The buyers agreed to pay all taxes and all insurance premiums. It was also provided that if the buyers should fail for a period of thirty days to pay any installment "then the sellers shall be released from all obligations in law or equity to convey said property, and the buyers shall forfeit all rights, or interest

thereto, and any and all payments theretofore made by the buyers under this agreement shall be forfeited to the sellers, as rent and liquidated damages for the nonfulfillment of the terms of this agreement." Upon default, the sellers were given the right of re-entry and the right to repossess the property. It was further provided that "no assignment of this contract shall be valid without the written consent of the sellers," and that "Time is the essence of this agreement." It is admitted that the Artzes made all payments required under this contract up to and including the payment due on March 1, 1946, which was paid on March 15, 1946. It is further admitted that no further payments were made by the Artzes, and in particular that they did not make the payments falling due April 1st and May 1, 1946.

It further appears that on March 13, 1946, the Artzes entered into a contract to sell the property in question to appellant for \$6,125, \$200 down and the balance within 60 days to be paid to a designated title company. It was provided that time was the essence of this agreement. Admittedly, Thein paid the Artzes the \$200 called for by the agreement upon its execution, and on April 22nd paid them an additional \$900, and later an additional \$100. In spite of appellant's contention to the contrary, the evidence shows that respondent, during all times here pertinent, had no knowledge of the preliminary negotiations for this contract or of its execution, and that it had no knowledge of the payments made by appellant to the Artzes when they were made or prior thereto.

On April 10, 1946, Mr. Artz informed Jacob Krier, secretary of respondent, that he was trying to sell the property and had a prospective purchaser, but that he was not yet ready to call for the deed to the property. On April 17, 1946, Mr. Artz brought appellant to respondent's office and talked with Krier. Just what happened at that meeting is in dispute. Krier testified that Artz introduced appellant as the party who was to purchase the property from the Artzes; that Artz asked if respondent company would consent to an assignment of the contract to appellant; that he told Artz that respondent would not

consent to an assignment; that respondent was dealing with Artz and Artz alone; that if Artz wanted a deed to the property from respondent he would have to pay cash for it; that respondent would deliver a deed any time that Artz produced the cash; that Artz and Thein then held a consultation and then Artz told him to mail the deed to the title company and the money would be there; that no mention was made of Thein's prior payment, or of his intention to make future payments to the Artzes; that the witness was simply told that the money would be "at the title company as soon as the deed is there"; that neither Thein nor Artz knew the escrow number of their particular transaction and it was agreed that Thein would procure such escrow number and inform Krier so that the latter could deposit the deed with the title company; that Thein did not leave his telephone number with respondent, nor did he leave his residence address. When Thein was introduced to Krier the latter understood Artz to say that appellant was "Mr. Time" of the "Time Realty Company," a firm known to Krier. All of the pertinent portions of Krier's testimony were corroborated by the accountant for respondent and by Artz.

Krier further testified that several days after this meeting of April 17th Thein telephoned to Krier and gave him the escrow number. Under date of April 22nd Krier mailed to the title company a deed from respondent to the Artzes with instructions to deliver the deed to the Artzes upon receipt for the account of respondent of \$4,918.25, the balance then due respondent. Artz testified that during the evening of April 23, 1946, he finally reached Thein by telephone, having been unsuccessful in reaching him during the day, and informed him that the deed had been deposited with the title company. Thein denied having been so informed, claiming that he first learned of the deposit of the deed on May 16th, but this denial did no more than create a conflict in the evidence, which conflict has been determined by the trial court.

Krier testified that on May 8th he telephoned the title company and asked why his company had not received the money

for the deed. He was told that no money had been deposited to take up the deed. Krier then attempted to reach Artz by telephone and was unsuccessful, and then went out to the house in an attempt to reach him, but no one was there. He then telephoned the "Time Realty Company" in an attempt to reach Thein, whom Krier then erroneously believed was "Mr. Time." That company, of course, informed Krier it had no knowledge of the transaction. Krier had no other means of locating Thein. On May 9th he wrote to the title company requesting a return of the deed. On May 13th the title company mailed the deed back to respondent, and it was received by respondent on May 15th. On May 15th Krier visited the property and found it vacant.

By this time respondent was apparently suspicious of the deal. The Artzes were then delinquent on the April 1st and May 1st payments. Krier had been unable to locate either Artz or Thein. He now found that the Artzes had moved out of the property. On May 16th Krier, together with Johnsson, another officer of respondent, again visited the property, and, finding it vacant, with all the furniture removed, decided to take possession on behalf of their company, and began to change the locks. While so engaged, Thein and his son arrived. An argument ensued in which Thein claimed to be the owner of the premises. The evidence shows that Thein was belligerent, threatening and abusive. Johnsson finally suggested that they all return to respondent's office to talk the problem over. They did so, and Thein discussed the problem with Johnsson. Johnsson testified, and his testimony was corroborated by the accountant of respondent, that he talked with Thein and that Thein's son was not present during the major part of the conversation; that he told Thein that respondent recognized the Artzes, and the Artzes alone, as the parties with whom the respondent was dealing; that the deed had been deposited but that no money had been forthcoming; that the Artzes were two months delinquent in their payments and had violated their contract. He further testified that Thein then tendered \$100 in cash in payment of the two delinquent payments, which money he secured

from his son whom he called into the office; that Johnsson refused the tender telling Thein "I am looking to Mr. Artz, I have nothing to do with you."

Appellant contradicted this testimony. He testified that after returning to respondent's office he had a conversation with Johnsson, and that his son was present; that during the conversation he made a cash tender for the remainder of the purchase price due from the Artzes; that the balance was then in the neighborhood of \$4,918, and that he tendered that amount or more to Johnsson; that he had that amount in his wallet and threw the money on the desk; that Johnsson refused the tender, stating that before he could accept it he would have to talk it over with others in the company, but that he would recommend that the deed be placed back in escrow. Thein also testified that it was on this day—May 16th—that he first learned the deed had been placed in escrow on April 22nd, although Artz testified he had personally notified Thein of this fact on April 23rd. The testimony of Thein was corroborated by his son.

Johnsson unequivocally denied that Thein ever tendered more than \$100, and denied that Thein offered to pay the balance due on the Artz contract. In this he was corroborated by the accountant of respondent who overheard the entire conversation.

After this conversation the Theins left. On May 17th Krier again visited the premises and discovered that all the locks had been changed and that he could not get into the house. Appellant admits that he caused the locks to be changed. On May 18th Krier posted a "no trespassing" sign on the door of the premises, and shortly thereafter Thein arrived and tore it off. On May 20, 1946, appellant filed this complaint for specific performance.

Appellant testified that on May 22, 1946, two days after the complaint was filed, he drew a check for \$5,050 naming the title company as payee and sent the check to the title company. Admittedly, no instructions accompanied the check, and no escrow number was given to the title company. The check is dated May 22nd but the representative of the title company had no rec-

ord or recollection of when his company received it. Thein testified that the check was sent to make a good tender and that he was "still ready to pay that money, and have been at all times." Pending trial cash was substituted for the check. It is admitted that at no time during May, 1946, did appellant have on deposit with the bank upon which the check was drawn an amount sufficient to meet the \$5,050 check, his maximum balance for that month being \$2,578.76, and his average balance being \$1,300. The manager of the bank testified, however, that on May 23, 1946, Thein had made arrangements with the bank to have the bank honor the overdraft, and that if the check had been presented it would have been paid.

Appellant remained in possession of the property from May 18, 1946, to the date of judgment, July 25, 1947, a period of a little over fourteen months. Admittedly, the reasonable rental value of the premises was \$50 per month. Under date of September 30, 1946, the Artzes purported to assign to Thein all their interest in their contract of October 28, 1944, with respondent. The Artzes, however, as already pointed out, have filed a formal disclaimer in this action.

On these facts, the court, after finding the execution of the October 28, 1944, contract of sale between the Artzes and the respondent, with the 30 day forfeiture clause for default of the buyers, plus the time is of the essence clause, and the provisions against assignment without written consent of the seller, found that the Artzes had been in default thereunder since April 1, 1946; found the execution of the March 13, 1946, agreement of sale between Thein and the Artzes; found that such contract was entered into by the parties "without the knowledge or consent, written or oral, express or implied," of respondent, and that Thein failed to pay or tender the balance of the purchase price, as provided in that contract, within 60 days from the execution thereof; that Thein acquired no interest in the property by reason of his contract with the Artzes, and acquired no rights under the October 28, 1944, agreement between the respondent and the Artzes by reason of any alleged

assignment of rights thereunder; that the Artzes had no right to make any such assignment without written consent of the respondent, which was not procured; that Thein does not have any right, title or interest in such property; that it was not true that Thein paid any part of the \$1,200 to the Artzes in reliance on the promise of respondent to convey the property in accordance with the terms of the October 28, 1944, agreement between respondent and the Artzes; that respondent made no promise or agreement to convey the property to Thein; that respondent refused to consent to any assignment of rights to Thein, and refused to have any dealings with Thein; that on May 16, 1946, and after the default of the Artzes on April 1st, and their vacating of the house, respondent lawfully reentered and took possession; that thereupon all rights of the Artzes terminated; that on May 18, 1946, Thein unlawfully took possession of the property, and continues in such unlawful possession; that the reasonable value of Thein's unlawful occupancy was \$50 per month, and that respondent was entitled to such sum for each month during which Thein unlawfully withheld possession from it, up to the time of judgment.

The judgment thereafter entered decreed that neither Thein nor the Artzes had any interest in the property; that respondent was the owner thereof and entitled to possession; that the contract of October 28, 1944, be cancelled; and that Thein pay to respondent the sum of \$700 for the reasonable rental value during the period of unlawful withholding of possession; that the title of respondent to the property should be quieted.

As already pointed out, appellant attacks several of these findings as being unsupported, but, strangely enough, does not attack the finding that, upon the default and abandonment of the premises by the Artzes, and the reentry by respondent, all interest of the Artzes ceased, and respondent became the legal and equitable owner of the premises. That is the focal finding in the case. If respondent became the legal and equitable owner of the premises on May 16, 1946, and if on that date all interest of the Artzes was terminated, it is quite

obvious that any later tender of payment by appellant, even assuming such tender was otherwise proper and valid, would be of no legal significance. On the date of the only tender ever made, apparently May 22, 1946, if respondent was under no obligation to give a deed to the Artzes had they then made a proper tender on that date, it is too clear to require further discussion that a tender by the appellant on behalf of himself or the Artzes would avail appellant nothing. If appellant ever had any legal rights enforceable against respondent, those rights were derivative rights gained from the Artzes. Whatever rights appellant may have had against respondent were subject to all equities and defenses that respondent could have urged against the Artzes. Upon the termination of the Artzes' rights, appellant's rights against respondent likewise terminated.

[2] Appellant does contend that the finding that the contract between the Artzes and Thein was made without the knowledge or consent of respondent is unsupported, and contends the evidence compels a contrary finding. That contract was executed on March 13, 1946. There is not one word of testimony that respondent knew of the execution of the contract on that date. Respondent did not know the Artzes were contemplating selling the property until April 10th, and had no knowledge of the existence of Thein until April 17th. On that date all respondent knew was that the Artzes were contemplating selling to appellant. On that date Krier refused any assignment arrangement, but agreed to deed the property to the Artzes upon payment of the balance then due. Krier lived up to that agreement and deposited the deed to the property made out to the Artzes on April 22nd and Thein was so informed on April 23rd. Thein made no attempt to live up to his bargain with the Artzes until May 22nd. It is obvious that the challenged finding is amply supported.

[3] Appellant also attacks the finding that he failed to pay or to tender the balance of the purchase price. Under the terms of his contract with the Artzes, executed on March 13, 1946, appellant was

required to pay the balance of the purchase price within 60 days thereafter—i. e., May 12, 1946—and time was made of the essence. The only tender ever made was made on May 22, 1946. That tender was not made as required by the Artz-Thein agreement. When that tender was made the Artzes were two months delinquent on their payments to respondent, under a contract containing a 30 day forfeiture clause. Obviously, the tender, even if otherwise a valid tender, was made too late. Even if respondent was required to tender a deed to appellant to place him in default, such tender was made on April 22nd and appellant knew it on April 23rd.

Appellant also urges that the trial court erred in its finding that he acquired no interest in the property by virtue of his deed from the Artzes. The exact finding challenged is No. 6 (C.T. 44), and is to the effect that appellant acquired no interest by virtue of the conveyance by the Artzes of their interest "as alleged in paragraph IX of [the] * * * first amended and supplemental complaint." That paragraph merely alleges that, since the filing of the complaint, the Artzes have assigned their interests to appellant. The conveyance thus referred to is dated September 30, 1946, a date long after the Artzes had ceased to have any interest in the property. Appellant, however, treats the finding as if it referred to his agreement with the Artzes of March 13, 1946, and cites several cases relating to the force which must be given to non-assignability clauses in contracts. This is an improper interpretation of the finding, and all arguments based on this improper interpretation, are unsound.

[4, 5] The next contention of appellant is that respondent "is estopped by the declarations and conduct of its officers and agents to question the validity of the assignment and deed [of September 30, 1946?], and finding number 7 to the effect that no act, omission, promise, agreement or representation induced plaintiff to pay \$1200 to Mary and Cecil Artz is against the evidence and against law." (App.Op. Br. p. 71.) After arguing that he has thus made an outlay of \$1,200 and has thus suf-

ferred prejudice, appellant argues "It was clearly the duty of the officers of the defendant corporation, when they were informed that plaintiff was purchasing the property, to object then and there to the assignment. Having stood idly by, they cannot now raise the question, because 'where one is silent when he should speak, the law will compel him to be silent when he would speak.'" (App.Op.Br. p. 73.) Appellant then cites a number of authorities on the subject of estoppel. Code Civ. Proc., § 1962(3); *Vierra v. Pereira*, 12 Cal.2d 629, 86 P.2d 816; *Notten v. Mensing*, 3 Cal.2d 469, 45 P.2d 198.

There is not one word of evidence that Krier, or any other officer of respondent, prior to May 16th, was ever informed or knew that Thein had paid, or was intending to pay, the Artzes any portion of the purchase price. Thein paid the original \$200 and the subsequent payments totalling \$1,000 without informing respondent of his intention. The entire \$1,200 was paid to the Artzes weeks before the respondent knew of such payments. The evidence conclusively establishes that Krier and the other officers of respondent, from the very first meeting with Thein on April 17, 1946, until the meeting of May 16, 1946, told him, in no uncertain language, that respondent would not consent to an assignment, and that the company was willing to recognize the Artzes and the Artzes alone as their contracting party.

The evidence demonstrates that Krier had no intent, and that appellant had no reason to believe that Krier had the intent, to create any independent rights in appellant when he consented to deposit the deed with the title company for delivery to the Artzes upon the payment of the balance of the purchase price. There is nothing in the record to indicate that Krier knew or should have suspected that appellant intended to do any more than supply the Artzes with the balance of the purchase price, or that appellant intended

to pay the Artzes one cent prior to taking up the deed from respondent. The requisite elements of an estoppel just do not exist. (See cases collected and commented upon 10 Cal.Jur. p. 625, § 13; 5 Cal.Jur. (10 Yr.Supp.) p. 586, §§ 13 and 14.)

[6,7] The contentions that equity abhors forfeitures and will grant relief, where possible, from a forfeiture, need not be considered at length. Equity does not aid one who is the sole cause of his own misfortune. Any forfeiture that here resulted was caused by appellant's own acts. Respondent lived up to its agreement to deposit the deed. Appellant knew that the deed had been deposited. He could not expect respondent to wait for its money. He had promised to deposit the money immediately. He knew that the Artzes were delinquent in their payments to respondent. He knew the terms of that agreement. In addition, he knew that under his contract with the Artzes he was to produce the balance of the purchase price by May 12th. He made no attempt to live up to these obligations until May 22, 1946, after the interest of the Artzes and whatever interest he had, had been forfeited. Under such circumstances, no principle of equity suggests, far less compels, the granting of relief to appellant. He has brought his misfortunes upon his own head.

We conclude that the finding (not attacked by appellant) that all interest of the Artzes in the property terminated May 16, 1946, is supported and sound in law. We further conclude that every finding challenged by appellant is supported by substantial evidence. We further conclude that the trial court correctly found that there was no sound basis upon which to apply an estoppel or other form of equitable relief.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

87 Cal.App.2d 319

WEINBERG et al. v. WHITEBONE et al.
Civ. 13780.

District Court of Appeal, First District,
Division 1, California.

Aug. 31, 1948.

Hearing Denied Oct. 28, 1948.

1. Automobiles $\S$ 192(1)

Whether used automobile dealer was liable in damages for negligent operation of automobile by buyer depended on statutes in effect at time of accident. Vehicle Code, $\S$ 402.

2. Automobiles $\S$ 56

Where dealer, having made unconditional bona fide sale of used automobile for cash and delivered possession thereof to buyer, and taking power of attorney to secure registration or effectuate transfer of ownership, did not make proper endorsement and delivery of certificate of registration to buyer or immediately give written notice of transfer to Motor Vehicle Department, and did not deliver to Department necessary papers for registration of automobile in name of buyer until three days after sale, dealer was not relieved from civil liability under statute for injuries and property damage resulting from negligent operation of automobile by buyer on day of sale. Vehicle Code, $\S\S$ 177, 178, 186, 402.

3. Automobiles $\S$ 56

The word "delivery" as used in connection with transfer of title or interest in an automobile is subject to the requisites provided in Vehicle Code and may not be defined as the word is used in transfer of real or personal property generally.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

4. Automobiles $\S$ 56

Owner, having made bona fide delivery of possession of motor vehicle to buyer, is not relieved from civil liability for operation of vehicle by buyer or buyer's agent until owner has made proper endorsement and delivery of certificate of ownership in accordance with provisions of vehicle code, or has delivered or mailed to Motor Vehi-

cle Department immediate written notice of transfer or appropriate documents for registration of vehicle pursuant to transfer. Vehicle Code, $\S\S$ 177-179, 402.

5. Automobiles $\S$ 56

Owner, having delivered possession of automobile to buyer, may be relieved from civil liability for negligent operation of automobile by buyer by performing, in accordance with applicable statutes, delegated power to sign all papers necessary to secure registration of automobile or effectuate transfer of ownership, but mere delivery by buyer of such power of attorney to seller cannot relieve either buyer or seller from liability. Vehicle Code, $\S\S$ 178, 402.

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Clare Weinberg and Philip Weinberg, husband and wife, against C. A. Whitebone and another, individually and as copartners doing business as Midtown Motor Sales Company, and others, for personal injuries and property damage sustained in automobile collision. Verdicts and judgment for plaintiffs and named defendant and others appeal.

Judgment affirmed.

Geo. M. Naus and Donald Seibert, both of San Francisco, for appellants.

Ingemar E. Hoberg, of San Francisco, for respondents.

WARD, Justice.

This appeal involves the statutory provision (Vehicle Code, sec. 402) necessary to relieve a person from civil liability as "owner" of a vehicle at the time of an accident, and Vehicle Code, secs. 186, 177 and 178, which relate to or modify sec. 402.

The judgment is based upon two verdicts one for the sum of \$6,000 in favor of plaintiff Philip Weinberg, and the other in the sum of \$1,250 in favor of plaintiff Clare Weinberg. The defendants are Cecil A. Whitebone and Selma S. Whitebone, individually, and as copartners doing business as Midtown Motor Sales Company, and Midtown Motor Sales Company, a copart-

nership. The complaint joins as a codefendant Carl S. Feuerhelm, driver of the automobile which collided with a "pickup truck" operated by Philip Weinberg. The record shows that Feuerhelm was served but defaulted. So far as the questions raised on this appeal are concerned the appellants may be referred to as "Midtown."

Appellants contend that the trial court erred (1) in directing a verdict in favor of plaintiffs, (2) in denying the motion for a directed verdict in favor of the appealing defendants, and (3) in denying the motion made by the appealing defendants for judgment notwithstanding the verdict.

The testimony of a salesman employed by Midtown shows that the latter had a main office at Van Ness Avenue and O'Farrell Street in San Francisco, where its records, papers and money are kept, and a block away at Van Ness Avenue and Ellis Street has a used car lot, with a sub-office for negotiating sales. Both offices are open between 8:30 a. m. and 6:00 p. m. On the afternoon of November 26, 1945, defendant Feuerhelm, a U. S. Navy enlisted man, who desired to purchase a car, and two other sailors, entered Midtown's used car lot. The general manager of Midtown Motor Sales Company stated in his deposition: "The purpose of buying the car was for the purpose of traveling to his home in Harper's Ferry, Iowa, from San Francisco, being discharged from the Navy and taking his mileage, rather than being shipped home." The salesman testified that he showed the sailors a Ford, which was purchased, and that he accompanied Feuerhelm to the main office where "the papers" were filled out. The bill of sale shows payment in full of \$303.38 cash, made up as follows: Price, \$295; License transfer, \$1; sales tax, \$7.38. It is dated November 26, 1945, and at the bottom states, "Received copy Cert. of transfer, invoice," signed, "Carl S. Feuerhelm." A power of attorney was signed by Feuerhelm and witnessed by the salesman. The form of the power of attorney, dated November 26, 1945, reads in part: "Not Valid Unless Properly Witnessed By A Disinterested Person." The body of the document appoints and creates the "Midtown Motor Sales Co., to act as

my attorney in fact, to sign all papers and documents that may be necessary in order to secure California registration, or that may be necessary to effectuate a transfer of ownership on the following vehicle * * *" On the reverse side is the filing stamp of the Motor Vehicle Department, dated November 29, 1945, three days after the accident. The power of attorney was signed and witnessed in blank, which was the customary practice of the company. No conversation occurred between the salesman and Feuerhelm relative to the power of attorney or the pink slip. The salesman had never turned over a pink certificate to a purchaser.

In his deposition the general sales manager of Midtown stated that Feuerhelm asked him "what would be the best procedure in effecting transfer of title to him, due to the fact that he was going from California to Iowa. I told him that I thought it would be proper to have the title transferred in California, which would be forwarded to him, and he would have a clear California title on the car which would allow him to dispose of it very readily. And if he would sign a power of attorney for us to transfer the title, we would make the necessary arrangements to have it done, which we did." Feuerhelm drove the car away sometime before the closing hour of 6:00 p. m. The collision with plaintiffs occurred at about 7:30.—all on November 26, 1945. A stipulation and documentary evidence establish that Midtown on November 29, 1945—three days after the sale and collision—made hand delivery of the necessary papers "Which would include an application for reregistration in the name of the buyer Feuerhelm, and it might be weeks or months after that before the Department [of Motor Vehicles] acts upon it." Feuerhelm did not receive the pink certificate at any time though by letter he requested it from Midtown.

A motion for nonsuit was denied and the court advised counsel that it would instruct the jury to return a verdict against all defendants who made appearance in the case, and that the questions to be presented to the jury would be confined to damages.

The three questions heretofore noted as appellants' points on appeal may be considered together. Appellants frankly limit the question as follows: "The appellate issue, shortly stated, is liability or non-liability of Midtown under Vehicle Code, sec. 402. Conversely, the appeal presents no issues about negligence of Mr. Feuerhelm (the driver), contributory negligence, causation, nature or extent of injuries, or damages. At the trial Midtown conceded, and now again concedes, that Philip Weinberg's damages exceeded the \$6,000.00 ceiling (\$5,000.00 for personal injury and \$1,000.00 for damage to property) under sec. 402. And it is conceded that the evidence adequately supports, as to amount, the \$1,250 awarded by her verdict to Clare Weinberg."

[1] Section 402 has reference to the liability of an owner for the negligence of another person resulting from the operation of the vehicle "in the business of such owner or otherwise." It limits the amount of liability of the owner for imputed negligence and subrogates the rights of the person injured to the owner against the operator. Under the terms of the contract of conditional sale the section sets forth the respective rights of the owner, the vendee or his assignee. This is not a case wherein the title was to vest in the buyer upon the performance of a condition by him. (Civil Code, sec. 2981.) The facts of this case do not show that the sale was to be consummated upon the performance of any duty or condition to be effected or executed by the buyer as in a conditional sale contract, and hence cases cited by appellants or respondents touching this specific subject need not be mentioned except in so far as the reasoning in some particular case may bear upon the present problem. Some of the citations reflect the changes which have been made in statutory provisions and cases construing them. The statutes as they stood at the time of the accident control the issue here. A fair example of the cases cited is *Dennis v. Bank of America*, 34 Cal.App.2d 618, 94 P.2d 51. There Annie Dennis purchased from Paul Schwab, a used car dealer, an automobile, giving as part payment her used car. Al-

though she obtained possession of the car she did not get the pink slip, but relied on Schwab's promise that he would send it to the Motor Vehicle Department. Schwab, however, negotiated the pink slip on a conditional sale with one Magruder, turning over the contract and pink slip to the Bank of America. The pink slip was registered with Magruder as registered owner and the bank as legal owner. When Dennis brought a quiet title action she prevailed, the court ruling that the provisions of section 186 could not be availed of by a transferor who may be estopped to deny the transfer, and that the bank stood in Schwab's shoes as his assignee. The court also pointed out that there was no valid sale from Schwab to Magruder, and that (34 Cal.App.2d at page 625, 94 P.2d at page 55) Dennis followed—in entrusting the dealer with the pink slip to be forwarded to the Motor Vehicle Department—"a custom testified by a supervising investigator of the division of registration, department of motor vehicles of this state, to be the procedure followed in 'about ninety-five per cent of the sales made by dealers.'" In the *Dennis* case the subject of fraud was involved, a question entirely lacking in the present case. To rely on the rule of estoppel in any case involving a transfer of a motor vehicle, a good factual basis must be presented for its application. *Wargin v. Wargin*, 29 Cal.2d 843, 180 P.2d 349.

If Midtown held a clear title to the motor vehicle in question then there was an unconditional bona fide sale, with the price paid in full and possession of the vehicle delivered to the vendee. Section 177 provides: "Whenever the owner of a vehicle registered hereunder sells or transfers his title or interest in, and delivers the possession of, said vehicle to another, said owner shall immediately notify the department of such sale or transfer giving the date thereof, the name and address of such owner and of the transferee and such description of the vehicle as may be required in the appropriate form provided for such purpose by the department. * * * Every dealer upon transferring by sale, lease or otherwise any vehicle, whether new or used, of a type subject to registra-

tion hereunder, shall immediately give written notice of such transfer to the department upon the appropriate form provided by it." Section 178 provides: "An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner in addition to the foregoing has fulfilled either of the following requirements: * * * When such owner has made proper indorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code. * * * When such owner has delivered to the department or has placed in the United States mail, addressed to the department, either a notice as provided in Section 177 or appropriate documents for registration of such vehicle pursuant to such sale or transfer." Section 186 provides: "No transfer of the title or any interest in or to a vehicle registered hereunder shall pass and any attempted transfer shall not be effective unless and until the parties thereto have fulfilled either of the following requirements: * * * The transferor shall have made proper endorsement and delivery of the certificate of ownership and delivery of the registration card to the transferee as provided in this code and the transferee has delivered to the department or has placed in the United States mail, addressed to the department, such certificate and card when and as required under this code with the proper transfer fee and thereby makes application for a transfer of registration * * * The transferor shall have delivered to the department or shall have placed in the United States mail addressed to the department the appropriate documents for the registration or transfer of registration of such vehicle pursuant to such sale or transfer except as provided in Section 178."

[2] Midtown, the owner and dealer, neglected to make proper endorsement and delivery of the certificate of registration or in lieu thereof did not immediately give

written notice of the transfer and the date to the department.

In *Smith v. Western Casualty & Surety Co.*, 60 Cal.App.2d 508, 141 P.2d 10, and automobile liability insurance policy was involved. The court said in (60 Cal.App.2d at page 512, 141 P.2d at page 12): "The language 'Except as provided in section(s) 178' so modifies the proceeding language of sec. 186 that its effect is that upon delivery of the automobile and the endorsed certificate the title does pass to the transferee so as to make the transferee the owner, and to divest the transferor of his ownership (to quote the language of sec. 178), 'so as to be subject to civil liability for the operation of such vehicle thereafter by another.'"

"Upon such delivery the transferee becomes the owner for the purpose of fixing liability for the operation of the car by another under sec. 402, Vehicle Code, St.1935, p. 153 (*Ferroni v. Pacific Finance Corporation*, 21 Cal.2d 773 [778], 135 P.2d 569), and the transferor ceases to be owner for that purpose *Piacum v. Hexem*, 18 Cal.App. 2d 145, 63 P.2d 315." It must be noted that it is not only the delivery of the automobile but likewise the certificate. The transferee in this case, though he paid cash for the possession of the motor vehicle, was not "subject to civil liability for the operation of such vehicle" until the endorsed certificate passed from the dealer to the purchaser of the vehicle.

Appellants stress the question of ownership and permission to operate the vehicle. In *Krum v. Malloy*, 22 Cal.2d 132, 137 P.2d 18, a motor vehicle case, it was held that under a statute providing that an owner is responsible for the injury or death resulting from the negligent operation of the automobile, proof of permission and ownership is essential to impute negligence to the owner and, if either fact is absent the statute is inoperative. In the present case if *Feuerhelm*, the driver of the automobile, was the "owner," as that word is used in the quoted vehicle code sections, then the question of permission to operate the car may be inferred from ownership. If he was not the owner within the purview of the sections noted it may be in-

ferred that permission to operate the car was bestowed upon him by "Midtown." The question of permission may be eliminated from further consideration.

[3-5] The word "delivery," applying to delivery of a certificate of ownership in this case, may not be defined as the word is used in the transfer of real or personal property generally. The word "delivery" as used in connection with the transfer of title and interest in such vehicle is subject to the requisites provided in the Vehicle Code. An owner who has made a bona fide delivery of possession of a motor vehicle to a purchaser is not relieved of civil liability for the operation of such vehicle by the purchaser or the purchaser's agent until the vendor owner has made proper endorsement and delivery of the certificate of ownership in accordance with the provisions of the code (sec. 178). The delivery of a delegation of power by the vendee to the vendor to sign all papers and documents that may be necessary in order to secure registration in this state or "to effectuate a transfer of ownership" on such vehicle cannot relieve either the vendee or the vendor of liability for an accident resulting in an injury to a third person. The vendor of such vehicle may be relieved only by performance of the delegated power in accordance with the provisions of the applicable statutes. When a motor vehicle is subject to registration as

in this case, it is necessary to give immediate notice of the sale to the department. Midtown, the "dealer," failed to give immediate notice of such transfer to the department (sec. 177).

There is a period of time in some instances following the transfer of title and possession of a motor vehicle when legally and factually it appears difficult to determine responsibility for injuries resulting from accidents. The Legislature has given an opportunity to the vendor to avoid liability by compliance with the statutory provision to endorse and deliver the registration slip to the vendee or by delivering to the department the data set forth in section 177 or by forwarding appropriate documents for the new registration. The duty of registration is primarily imposed upon the buyer (sec. 179), but the failure to deliver the registration card to Feuerhelm prevented him from attempting to comply with the law. The dealer's acceptance of a power of attorney to effectuate the change of ownership could not relieve the dealer of his duty to comply with the statute. Dealers may not, under the guise of a power of attorney, escape liability unless there is a compliance with the terms of the power of attorney and the law.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.







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